At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of December, 2020.

PRESENT:

HON. INGRID JOSEPH,
Justice.

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OWEN CHERRY,

Plaintiff,

Index No. 523577/2017

-against-

REMICA PROPERTY GROUP CORP., BOLLA MANAGEMENT CORP. and MOBIL,

Defendants.

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The following e-filed papers read herin:	NYSCEF #
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Upon the foregoing papers, defendants Remica Property Group Corp. ("Remica Property"), Bolla Operating Corp. s/h/a "Bolla Management Corp. ("Bolla")," and Exxon Mobil Corporation s/h/a "Mobil ("Exxon Mobil") move for an order pursuant to CPLR § 3212, granting them summary judgment on the issue of liability dismissing plaintiff's Complaint.

Plaintiff commenced this action by the filing of a Summons and Verified Complaint on December 7, 2017 to recover damages for injuries that he allegedly sustained on July 18, 2017, when he tripped and fell while walking over an area of the pavement located at 1143 Atlantic Avenue, Brooklyn, New York. The property where plaintiff fell is an Exxon Mobil brand gas station with a convenience store, which is operated by Bolla and owned by Remica.

Remica and Exxon Mobil contend that neither entity owed plaintiff a duty of care, because they did not operate, maintain or control the premises where plaintiff allegedly fell. Remica concedes that it owns the premises but argues that the property has been occupied, maintained and controlled by Bolla pursuant to the terms of a triple net lease executed on September 15, 1998 and the Assignment and Assumption of such lease that was executed on January 19, 2011. Remica argues that Bolla is the sole entity responsible for operation, repair and maintenance of the premises, as well as the payment of rent, property taxes, insurance premiums, and structural maintenance and repairs. The defendants submitted copies of the lease documents; transcripts from the deposition testimony of the plaintiff and Robert Sorrenti ("Mr. Sorrenti"), the Director of Investigations for Bolla; and affidavits from Kevin Ferraioli ("Mr. Ferraioli"), the Territory Manager for Exxon Mobil, and Remy Roizen Weinstein ("Mr. Weinstein"), the Chief Operating Officer of Remica.

The defendants contend that the plaintiff's fall was not caused by an actionable condition that they created, or for which they had actual or constructive notice. Mr. Sorrenti, Bolla's investigator, stated that there were no complaints, trip and fall incidents, or other hazardous issues reported prior to plaintiff's accident. Mr. Sorrenti also testified that he was not made aware of any defective condition in the area until one year after the plaintiff's trip and fall. The defendants also contend that the alleged defect was trivial in nature, open and obvious, and that there is no evidence that the condition created a trap, snare, nuisance, or other blatant tripping hazard. The defendants point out that the plaintiff did not describe a defective condition in the Bill of Particulars or during his deposition testimony and further, that the plaintiff failed to produce photographs that establish the existence of a trap or blatant tripping hazard.

Plaintiff argues that the defendants have failed to meet their prima facie burden, because

the issue of whether a defective condition existed is a question of fact for the jury. Plaintiff contends that Mr. Sorrenti's statements regarding the condition of the premises are not reliable, since Mr. Sorrenti stated he had never inspected the premises prior to plaintiff's fall. Plaintiff maintains that he was walking, while looking straight ahead, when he tripped on a groove in the ground that is depicted in the photographs. Plaintiff reiterates that his right foot got caught in the sunken, uneven pavement that also had a circular, metal lid with jagged edges.

The defendants contend that they submitted sufficient evidence to establish, as a matter of law, that they did not create or have actual or constructive notice of the groove in the pavement where plaintiff fell. The defendants maintain that any such groove was open and obvious and not actionable under New York law. The defendants claim that Remica and Exxon Mobil are not responsible for maintaining the premises pursuant to the underlying Lease and Assignment and Assumption of Lease.

After careful review, the court finds that Remica is not liable for plaintiff's trip and fall incident, because Remica is an out-of-possession landlord that did not retain control over the premises and is not contractually bound to repair unsafe conditions (*Taylor v Lastres*, 45 AD3d 835 [2d Dept 2007]; *Linquist v C & C Landscape Contractors, Inc.*, 38 AD3d 616 [2d Dept 2007]). Bolla's Director of Investigations, Mr. Sorrenti, acknowledged the existence of a triple net lease agreement, which was assigned from ExxonMobile and assumed by Bolla in 2011. He also testified that Bolla gas stations and convenience stores are addressed by Bolla Construction, which is another entity under the Bolla conglomerate of companies. Mr. Sorrenti's statements are corroborated by Remica's Chief Operating Officer, Mr. Weinstein, who averred that Remica does not occupy or control the premises and further, that Remica is not responsible for repairing unsafe conditions pursuant to provisions of the lease. Furthermore, the Territory Manager for Exxon

Mobil, Mr. Ferraioli, stated unequivocally that Exxon Mobil was not the lessee when plaintiff tripped and fell. Mr. Ferraioli explained that Bolla merely uses Exxon Mobil brand gasoline. Plaintiff has failed to produce a scintilla evidence that contradicts Mr. Sorrenti, Mr. Weinstein, or Mr. Ferraioli's statements.

The next issue is whether Bolla has demonstrated the absence of issues of fact regarding plaintiff's claims that it created, or had actual or constructive notice of the condition that existed on the premises the day that the plaintiff tripped and fell. As an initial matter, the court finds that Bolla has failed to meet its initial burden of establishing that it did not create the hazardous condition, or that it had actual or constructive notice of that condition for a sufficient length of time to discover and remedy it (*Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013]; *Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610, 611 [2d Dept 2011] *citing Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949 [2d Dept 2009]). The defect that the plaintiff alleges caused him to trip and fall are visible and apparent in the photographs, but is unclear whether such condition existed for a sufficient length of time prior to the accident, such that Bolla's employees would have had an opportunity to discover and remedy it (*See Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Negri v Stop and Shop, Inc.*, 65 NY2d 625 [1985]; *Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949 [2d Dept 2009]). Moreover, Bolla provided insufficient evidence of its inspection records relative to the time when the plaintiff fell and thus, there is no showing of a lack of constructive notice (*See Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d at 611 [2d Dept 2011 *citing Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949 [2d Dept 2009]; *Holub v Pathmark Stores, Inc.*, 66 AD3d 741 [2d Dept 2009]; *Britto v Great Atlantic & Pacific Tea Company, Inc.*, 21 AD3d 436 [2d Dept 2005]).

Lastly, the issue of whether the uneven pavement, as described by plaintiff, constituted a

dangerous or defective condition is a question of fact for the jury (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). Contrary to the defendants' arguments, there is insufficient evidence to establish that the defect was trivial and did not constitute a trap or nuisance (*Kehoe v City of New York*, 88 AD3d 655-, 656-657 [2d Dept 2011]). This court is cognizant that there is no minimal dimension test, or per se rule that the condition must be of a certain height or depth in order to be actionable (*Trincere*, at 977). However, the width of the alleged dangerous condition and the depth of depressions versus elevations in the pavement are not ascertainable by the photographs alone. The area, as photographed, is also cast in shadows and thus, the pictures do not fairly and accurately represent the condition of the premises when plaintiff tripped and fell. Consequently, the pictures are insufficient to establish that the defect was trivial and not actionable *(Schenpanski v Promis Deli, Inc.*, 88 AD3d 982, 984 [2d Dept 2011][photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial]).

Based upon the foregoing, the court grants the defendants' motion solely to the extent that summary judgment on the issue of liability is granted in favor of defendants Remica Property Group Corp. and Mobile.

This constitutes the decision and order of the court.

ENTER,

HON. INGRID JOSEPH, J.S.C.

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