SHORT FORM ORDER

INDEX No. 08-22254
CAL No. 11-01986OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 1-30-12
ADJ. DATE 4-3-13
Mot. Seq. # 007 - MG

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ANN DUGGAN,

Plaintiff,

- against -

CRONOS ENTERPRISES, INC., DE RAFFELE MFG., CO., INC., DAWN ESTATES TRUST, DAWN ESTATES SHOPPING CENTER, DAWN ESTATES, INC., BERNARD KAPLAN, THEODORE KAPLAN and JOHN GNERRE,

Defendants.

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Upon the following papers numbered 1 to 63 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 33 -57 ; Replying Affidavits and supporting papers 58 - 59; 60 - 61 ; Other Defendant's Bernard Kaplan, Theodore Kaplan, Dawn Estates Memorandum of Law 62 - 63 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Dawn Estates Trust, Dawn Estates Shopping Center, Dawn Estates, Inc., Bernard Kaplan, and Theodore Kaplan seeking summary judgment dismissing the complaint is granted.

Plaintiff Ann Duggan commenced this action against defendants Cronos Enterprises, Inc., DeRaffele Manufacturing Company, Inc., Dawn Estates Trust, Dawn Estates Shopping Center, Dawn Estates, Inc., Bernard Kaplan, Theodore Kaplan, and John Gnerre to recover damages for injuries she allegedly sustained as a result of a trip and fall on a cement handicap ramp at the Suffolk Diner, which is

located at 2101 Middle Country Road in Centereach, New York. It is alleged that on November 21, 2005, plaintiff tripped and fell on the side splay of the ramp of the diner as she was stepping up onto the curb. Defendant Cronos Enterprises, Inc., d/b/a Suffolk Diner (hereinafter "Cronos"), owns and operates the Suffolk Diner, and defendant DeRaffele Manufacturing Company, Inc. (hereinafter referred to as "DeRaffele") constructed the subject diner. Defendants Dawn Estates Trust, Dawn Estates Shopping Center, Dawn Estates, Inc., Bernard Kaplan, and Theodore Kaplan (hereinafter collectively referred to as "Dawn Estates") own the land where the diner was constructed and leased the property to Cronos. Defendants Bernard Kaplan and Theodore Kaplan were the trustees for defendant Dawn Estates Trust. Defendant John Gnerre was DeRaffele's architect for the subject diner. By order dated October 14, 2011, this Court granted summary judgment dismissing the complaint against DeRaffele on the grounds that it did not own the subject diner and, therefore, did not owe plaintiff a duty of care, and that the alleged defective condition was open and obvious and not inherently dangerous.

Prior to plaintiff's accident, in September 1992, Dawn Estates Shopping Center, a partnership, and Cronos entered into a lease agreement for a parcel of vacant land, on which Cronos intended to build a diner. On April 21, 1994, DeRaffele entered into a construction contract with Cronos for the construction of a diner to be located at 2101 Middle Country Road in Centereach, New York. DeRaffele prepared and provided Cronos with an elevation plan for the diner, which included a schematic for the exterior of the diner, including a handicap ramp, setting forth its length and elevations. After the diagrams were given to Cronos by DeRaffele, Cronos then sought and received approval from Dawn Estates Shopping Center to construct said diner on the subject premises. Thereafter, Cronos allegedly had all of the exterior work, including the handicap ramps for the subject premises, performed in accordance with the specifications provided to them by DeRaffele. On October 17, 1994, Dawn Estates Shopping Center transferred its interest in the subject property to Dawn Estates Trust. On December 1, 2003, the lease between Cronos and Dawn Estate Shopping Center was assigned to and assumed by an entity known as Parnasos, Inc. In December 2005, Dawn Estates Trust sold the subject property to 2101 Route 25 Realty.

Dawn Estates now moves for summary judgment on the bases that plaintiff is unable to identify the alleged defective condition that caused her to fall and that the alleged defective condition was open and obvious, and, therefore, it did not have a duty to warn plaintiff against a condition that was not inherently dangerous. Dawn Estates also asserts that under the doctrines of res judicata and collateral estoppel, plaintiff is precluded from relitigating the cause of her fall and the nature of the alleged defective condition that resulted in her fall. In support of the motion, Dawn Estates submits copies of the pleadings, the parties' deposition transcripts, a copy of the lease agreement between itself and Cronos, and photographs of the site of the accident. Plaintiff opposes the motion on the ground that there is a material issue of fact as to whether the alleged defect was open and obvious. Plaintiff also contends that the construction of the cement handicap ramp violated New York State Building Code §1100 and the American National Standards Specifications for making Buildings and Facilities Accessible and Usable by Physically Handicapped, because the ramp extended into the handicap parking spot, and its color, which was the same as the curb, failed to provide a visual cue differentiating between the ramp and the curb. In opposition to the motion, plaintiff submits photographs of the accident site, a copy of the American National Standards Specifications for making Buildings and Facilities Accessible

and Usable by Physically Handicapped, and the affidavit of her expert, William Marletta, a safety professional.

It is axiomatic that on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*see* ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). The court's task on a motion for summary judgment is issue finding rather than issue determination (*see* ***Sillman v Twentieth Century Fox Film Corp.***, *supra*), and it must view the evidence in the light most favorable to the party opposing the motion (*see* ***Boyce v Vazquez***, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Thus, to obtain summary judgment, the moving party must establish his or her claim or defense by tendering sufficient evidentiary proof, in admissible form, to warrant the court to direct judgment in the movant's favor (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach of that duty was a proximate cause of the plaintiff's injury (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Kievman v Philip***, 84 AD3d 1031, 924 NYS2d 112 [2d Dept 2011]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2d Dept 2006]). A landowner has a duty to maintain his or her property in a reasonably safe condition in view of the existing circumstances (*see* ***Tagle v Jacob***, 97 NY2d 165, 737 NYS2d 331 [2001]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Demshick v Community Hous. Mgt. Corp.***, *supra*). The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property (***Galindo v Town of Clarkstown***, 2 NY3d 633, 636, 781 NYS2d 249 [2004] *quoting* ***Kush v City of Buffalo***, 59 NY2d 26, 29-30, 462 NYS2d 831 [1983]; *see* ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]).

However, liability may not be imposed upon an out-of-possession landlord for injuries that occur on the premises unless the out-of-possession owner or lessor retained control over the leased premises, reserved the right to repair or maintain the property, or retained control over the operation of the business conducted on the premises (*see* ***Putnam v Stout***, 38 NY2d 607, 381 NYS2d 848 [1976]; ***Seawright v Port Auth. of N.Y. & N.J.***, 90 AD3d 1017, 937 NYS2d 234 [2d Dept 2011]; ***Conte v Frelen Assoc.,*** LLC, 51 AD3d 620, 858 NYS2d 258 [2d Dept 2008]); ***Pastor v R.A.K. Tennis Corp.***, 278 AD2d 395, 718 NYS2d 633 [2d Dept 2000]). The reservation of the right to enter the premises for inspection and repair may constitute sufficient control to permit a finding that the owner or lessor had constructive notice of a defective condition provided a specific statutory violation exists and there is a

significant structural or design defect (*see* ***Lindquist v C &C Landscape Contractors, Inc.***, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; ***Stark v Port Auth. of N.Y & N.J.***, 224 AD2d 681, 639 NYS2d 57 [2d Dept 1996]). However, a landowner does not have a duty to warn or protect against a condition that is open and obvious, and that is not inherently dangerous (*see* ***Losciuto v City Univ. of N.Y.***, 80 AD3d 576, 914 NYS2d 296 [2d Dept 2011]; ***Weiss v Half Hollow Hills Cent. School Dist.***, 70 AD3d 932, 893 NYS2d 877 [2d Dept 2010]; ***Bretts v Lincoln Plaza Assoc., Inc.***, 67 AD3d 943, 890 NYS2d 87 [2d Dept 2009]; ***Murray v Dockside 500 Mar., Inc.***, 32 AD3d 832, 821 NYS2d 608 [2d Dept 2006]).

Subsection 9 of the lease agreement between Dawn Estates Shopping Center and Cronos states, in pertinent part, that

> . . . the tenant shall, at all times during the term, and at its own cost and expense, put, keep, replace and maintain in thorough repair and in good, safe and substantial order and condition, all buildings and improvements on the demised premises at the commencement of the term and thereafter erected on the demised premises, of forming part thereof, and its full equipment and appurtenances, both inside and outside, structural and nonstructural. Tenant shall also, at its own cost and expense, put, keep, replace and maintain in thorough repair and in good, safe, and substantial order and condition, and free from dirt, snow, ice, rubbish, and other obstructions or encumbrances, the sidewalks, parking areas, gutters and curbs in front of and adjacent to the demised premises. Landlord shall in no event be required to make any alterations, rebuildings, replacements, changes, additions, improvements or repairs during the term [of the lease].

Here, under the unambiguous terms of the subject lease concerning repairs to sidewalks and appurtenances, Dawn Estates did not have a duty to maintain the sidewalk or appurtenances, inside or outside, of the subject premises (*see* ***Berkowitz v Dayton Constr., Inc.***, 2 AD3d 764, 769 NYS2d 730 [2d Dept 2003]), and, therefore, as an out-of-possession landowner, it did not have a duty to repair any alleged defective conditions (*see* ***Servo v Bank of N.Y.***, 96 AD3d732, 946 NYS2d 194 [2d Dept 2012]; ***Brewster v Five Towns Health Care Realty Corp.***, 59 AD3d 483, 873 NYS2d 199 [2d Dept 2009]; ***Conte v Frelen Assoc., LLC***, 51 AD3d 620, 858 NYS2d 258 [2d Dept 2008]; ***Wheaton v East End Commons Assoc., LLC***, 50 AD3d 675, 854 NYS2d 528 [2d Dept 2008]). In fact, Bernard Kaplan testified at an examination before trial that Dawn Estates was not responsible for the maintenance of the subject premises, and that Cronos was responsible for the daily maintenance of the diner and the surrounding areas. Moreover, Dawn Estates established that it did not create, nor have actual or constructive notice of the alleged defective condition in existence on the subject premises (*see* ***Singh v United Cerebral Palsy of N.Y. City, Inc.***,72 AD3d 272, 896 NYS2d 22 [1st Dept 2010]; ***Rhian v PABR Assoc., LLC***, 38 AD3d 637, 832 NYS2d 590 [2d Dept 2007]). Bernard Kaplan testified that, despite the lease giving Dawn Estates the right of prior approval before any buildings were built on the land, it did not approve or hire DeRafelle or any of the subcontractors hired by Cronos during the construction of the diner and surrounding area, nor did it direct the contractors during the construction of the diner or the handicap ramp at issue. Additionally, Bernard Kaplan testified that he never received any complaints

about the handicap or access ramp leading to the diner, and that if he had, he would have informed Cronos of such complaints so that it could correct the problem.

In addition, Dawn Estates established that, if in fact there was a defect in existence on the subject premises, such defect was trivial in nature. Dawn Estates's submission of the parties' deposition testimonies and the photographs of the accident scene, which according to plaintiff's and nonparty witness Denise Lombardi's testimonies, accurately depicted the defect that allegedly caused plaintiff's fall, demonstrate that the height differential between the parking lot and the side splay of the handicap ramp is less than an inch in height (*see* ***Das v Sun Wah Rest.***, 99 AD3d 752, 952 NYS2d 232 [2d Dept 2012]; ***Ramirez v City of New York***, 93 AD3d 833, 941 NYS2d 199 [2d Dept 2012]; ***Sokolovskaya v Zemnovitsch***, 89 AD3d 918, 933 NYS2d 90 [2d Dept 2011]; *see also* CPLR 4518 [a]). Photographs of a defect which fairly and accurately reflect how the alleged defective condition appeared on the date of the accident may be used to demonstrate whether a defect is trivial in nature (*see* ***Schenpanski v Promise Deli, Inc.***, 88 AD3d 982, 931 NYS2d 650 [2d Dept 2010]; ***Aguayo v New York City Hous. Auth.***, 71 AD3d 926, 897 NYS2d 239 [2d Dept 2010]; ***Copley v Town of Riverhead***, 70 AD3d 623,895 NYS2d 452 [2d Dept 2010]). Further, Denise Lombardi testified at an examination before trial that the difference in height elevation between the side splay of the handicap ramp and the parking lot is "maybe an inch," that prior to plaintiff's accident she had never observed the one-inch difference in height elevation, and that the subject ramp has been in existence for at least ten years. Based upon these submissions, Dawn Estates demonstrated, as a matter of law, that the defect did not have the characteristics of a trap or nuisance, was trivial, and, therefore, not actionable (*see* ***Maciaszek v Sloninski***, 105 AD3d 1012, 963 NYS2d 382 [2d Dept 2013]; ***Sawicki v Conklin Realty Co., LLC***, 94 AD3d 1083, 943 NYS2d 208 [2d Dept 2012]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]).

Furthermore, the side splay of the cement handicap ramp that connects to the parking lot was not an inherently dangerous condition, but was readily observable by anyone employing the reasonable use of his or her senses and, thus constituted an open and obvious condition (*see* ***Gallub v Popei's Clam Bar, Ltd., of Deer Park***, 98 AD3d 559, 949 NYS2d 467 [2d Dept 2012]; ***Gallo v Hempstead Turnpike, LLC***, 97 AD3d 723, 948 NYS2d 660 [2d Dept 2012]; ***Pipitone v 7-Eleven, Inc.***, 67 AD3d 879, 889 NYS2d 234 [2d Dept 2009]). Plaintiff testified that she had used the subject ramp, without incident, during her prior numerous visits to the diner, that she did not know what caused her to fall, and that she never observed any defects in the ramp prior to her accident.

In opposition to Dawn Estates's prima facie showing, plaintiff's expert's affidavit was insufficient to raise a triable issue of fact as to whether the handicap ramp deviated from good and accepted industry standards (*see* ***Giambruno v Wilbur F. Breslin Dev. Corp.***, 56 AD3d 520, 867 NYS2d 202 [2d Dept 2008]; ***Miller v Kings Park Cent. School Dist.***, 54 AD3d 314, 863 NYS2d 232 [2d Dept 2008]; ***Cardia v Willchester Holdings, LLC***, 35 AD3d 336, 825 NYS2d 269 [2d Dept 2006]). Moreover, plaintiff's evidence failed to raise a triable issue of fact as to whether the alleged defect was a proximate cause of her accident (*see* ***Albano v Pete Milano's Disc. Wines & Liqs.***, 43 AD3d 966, 842 NYS2d 524 [2d Dept 2007]; ***Kipybida v Good Samaritan Hosp.***, 43 AD3d 966, 827 NYS2d 201 [2d Dept 2006]). As previously stated, plaintiff testified that she did not know what caused her to fall, and that she was unaware of any complaints ever being made about the cement handicap ramp or the parking

lot before her incident. "Proximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident, however, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action" (***Costantino v Webel***, 57 AD3d 472, 472, 869 NYS2d 179 [2d Dept 2008]). "Since it is just as likely that the accident could have been caused by some other factor, such as misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation" (***Manning v 6638 18th Ave. Realty Corp.***, 28AD3d 434, 435, 814 NYS2d 178 [2d Dept 2006], *quoting* ***Teplitskaya v 3096 Owners Corp.***, 289 AD2d 477, 478, 735 NYS2d 585 [2d Dept 2001]). Accordingly, Dawn Estates' motion for summary judgment dismissing the complaint as against it is granted. The action is severed and continued as against the remaining defendant.

Dated: June 3, 2013

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION