Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Karen Westerberg and Anthonly Galante,

Plaintiffs,

-against-

AMF Bowling Centers Inc.
d/b/a AMF Babylon Lanes
and IStar Bowling Centers LLP,

Defendants.

Motion Sequence No.: 001; MOTD
Motion Date: 1/10/18
Submitted: 4/4/18

Index No.: 17293/2014

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Clerk of the Court

Upon the following papers numbered 1 to 458 read on this application by defendants AMF Bowling Centers Inc. d/b/a AMF Babylon Lanes and IStar Bowling Centers LLP for summary judgment dismissing the complaint against them pursuant to CPLR 3212: Notice of Motion and supporting papers, 1 to 319; Answering Affidavits and supporting papers, 320 to 443; Replying Affidavits and supporting papers, 444 to 458; it is

ORDERED that the motion by defendant AMF Bowling Centers Inc. d/b/a AMF Babylon Lanes for summary judgment dismissing the complaint against it pursuant to CPLR 3212 is denied; and it is further

ORDERED that the motion by defendant IStar Bowling Centers LLP for summary judgment dismissing the complaint against it pursuant to CPLR 3212 is granted.

RW

This is a personal injury action arising from an alleged trip and fall claimed to have occurred on June 10, 2014 at AMF Bowling Centers Inc. d/b/a AMF Babylon Lanes ("AMF"), located at 430 Sunrise Highway, West Babylon, New York 11704 (the "subject premises"). Plaintiff commenced this action by the filing of a summons and complaint on September 3, 2014. Issue was joined on behalf of defendants AMF and IStar Bowling Centers LLP ("IStar") on October 7, 2014. Plaintiff thereafter served a verified bill of particulars on December 9, 2014, a supplemental verified bill of particulars on June 13, 2016 and a second supplemental verified bill of particulars on September 1, 2017. Plaintiff alleges that she sustained injuries when she tripped and fell on an uneven, hazardous, and dangerous interior step while walking toward a birthday party at an assigned bowling lane at the subject premises. Plaintiff further alleges that defendants had actual and constructive notice of the alleged hazardous and dangerous condition. After the completion of discovery, the note of issue was filed on September 8, 2017. Defendants now move for an order granting them summary judgment dismissing the complaint pursuant to CPLR 3212. In support of their motion, defendants submit an affirmation of counsel, an affidavit of Thomas Johnson, Bowlmor AMF's Vice President of Risk Management & Safety setting forth the chain of custody of the video footage from June 10, 2014, the plaintiff's deposition transcript, the deposition transcript of Amanda Matwiow, on behalf of defendant AMF, an AMF incident report, the lease agreement between defendants AMF and IStar, the affidavit of Matthew Ballinger on behalf of defendant IStar, the pleadings, the verified bill of particulars, supplemental verified bill of particulars and second supplemental verified bill of particulars, photographs, and a surveillance video of the subject incident. The Court notes that the video was inaccessible due to a error on the disc and, as such, it was not reviewed. Based upon the evidence produced, defendants assert that plaintiff was not looking at where she was going and stepped over a step leading to the bowling lanes, that defendants did not cause or create any alleged defective condition at the subject premises, and did not have actual or constructive notice of any such alleged dangerous or defective condition. It is further alleged that plaintiff's claims against defendant IStar should be dismissed as it was an out-of-possession landlord, had no control or supervision over the subject premises, and was not contractually obligated to perform any maintenance or repairs at the subject premises. Plaintiff opposes the motion.

Plaintiff testified at her deposition that the subject incident occurred at the AMF Babylon Lanes bowling alley on June 10, 2014 at 5:29 p.m. She testified that she was at the subject premises with her eight-year old son Christopher to attend a birthday party for one of his classmates. Plaintiff further testified that she was on the main level which was carpeted and there were two steps down to the area where the actual bowling lanes were located, which were each approximately 3 inches high and 10 inches deep. Plaintiff further testified that she had been to this same bowling alley approximately 25 times before the date of incident. She went bowling with her family at the subject premises in April 2014, February 2014, and around Christmas of 2013. Plaintiff testified that the lights in the ceiling above the area where the incident occurred were on, but dimmed for "cosmic bowling," during which time a black light was also used to light certain areas. Plaintiff testified that the steps and physical configuration of the premises had not changed since her last visit. Plaintiff further testified that she had descended the same stairs without any issue approximately one to two times during each of her approximately 25 prior visits to the bowling alley. Plaintiff testified that just prior to the incident, she was walking towards the steps to where the designated bowling lanes were

and nothing was blocking her view of the steps in front of her. Plaintiff stated that she saw the mother of the birthday girl, turned to her right to give the mother a kiss on her cheek, and while looking to her right, she stepped forward and walked off of the steps down to the bowling lanes. Plaintiff testified that she did not look down at the ground in front of her from the time she initially turned to great the other mother up until the time that she stepped forward and fell. Plaintiff said that as she was greeting the other mother, she "literally walked off the step." Plaintiff did not observe anything wet or sticky in the area before her fall. During the deposition, plaintiff identified herself in the video footage of defendant AMF from June 10, 2014 at timestamp 5:30:33 p.m. and indicated she was either standing on the main level or the first step and turning to her right, preparing to give the other mother a kiss on the cheek, and that she fell forward with the momentum of kissing the other woman and stepping forward with her left foot.

The deposition testimony of Amanda Matwiow on behalf of defendant AMF confirms that Ms. Matwiow was at the bowling alley on the date of the incident. While Ms. Matwiow did not observe plaintiff fall, she did have plaintiff complete an incident report, which indicates that plaintiff "tripped on step on lanes 49 and 50." Plaintiff confirmed with Ms. Matwiow that the information contained within the incident report was accurate and complete. Ms. Matwiow described the bowling alley as having dark grey carpet with pale swirls on the main level, one to two steps covered in black carpet and then a multi-colored tile floor area that led to the lanes. Ms. Matwiow further testified that during "extreme bowling," which was in effect at the time of the incident, there were lights from the ceiling illuminating the path for people to walk including the carpeted area behind the lanes where the incident occurred. Ms. Matwiow further testified that she was not aware of any prior complaints to the center regarding the subject steps leading down to the bowling lanes. During the approximately seven (7) years Ms. Matwiow has worked for defendant AMF as the shift leader, she was not aware of nor did she witness any other patrons falling over the subject stairs during "extreme bowling."

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v. Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v. Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v. Prospect Hosp.***, *supra*). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion (***Alvarez,*** *supra*, 68 N.Y.2d at 324-325, 508 N.Y.S.2d 923,

501 N.E.2d 572). Further, a party may not, through an affidavit submitted on summary judgment, contradict his or her own deposition testimony in order to feign an issue of fact (***Freiser v. Stop & Shop Supermarket Co., LLC***, 84 AD3d 1307, 923 NYS2d 732 [2d Dept 2011]; ***Andrew T.B. v. Brewster Cent. School Dist.***, 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; ***Knox v. United Christian Church of God, Inc.***, 65 AD3d 1017. 884 NYS2d 866 [2d Dept 2009]; ***Abramov v. Miral Corp.***, 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]).

Owners and occupants of stores, office buildings, and other places onto which members of the general public are invited have a nondelegable duty to provide the public with reasonably safe premises (***Blatt v. L'Pogee, Inc.***, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; ***Podlaski v. Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]), and have a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see* ***Nallan v. Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v. Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). This nondelegable duty includes the duty to provide the public with a safe means of ingress and egress (*see* ***Podlaski v. Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Demshick v. Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2d Dept. 2007]; ***Pulka v. Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v. 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v. Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v. Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]).

However, a landowner is not an insurer of the safety of others using its property (*see* ***Maheshwari v. City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]) and to impose liability upon a defendant in a trip and fall action, there must be evidence that the defendant either created the condition or had actual or constructive notice of it (*see* ***Gordon v. American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Hayden v. Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Denker v. Century 21 Dept. Stores, LLC***, 55 AD3d 527, 866 NYS2d 681 [2d Dept 2008]; *see also* ***Barretta v. Glen Cove Prop., LLC***, 148 AD3d 1100, 50 NYS3d 520 [2d Dept 2017]; ***Scoppettone v. ADJ Holding Corp.***, 41 AD3d 693, 839 NYS2d 116 [2d Dept 2007]; ***Bradish v. Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v. City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident so that it could have been discovered and remedied (*see* ***Gordon v. American Museum of Natural History***, 67 NYS2d 836, 501 NYS2d 646 [1986]; ***Marchese v. St. Martha's R.C. Church, Inc.,*** 106 AD3d 881, 881-882, 965 NYS2d 557 [2d Dept 2013], *quoting* ***Arzola v. Boston Props. Ltd. Partnership,*** 63 AD3d 655, 656, 880 NYS2d 352 [2009]); ***Perez v. New York City Housing, Auth.***, 75 AD3d 629, 906 NYS2d 299 [2d Dept 2010]; ***Bolloli v. Waldbaum, Inc.***, 71 AD3d 618, 619, 896 NYS2d 400, 402 [2d Dept 2010] [internal quotation marks omitted]; ***Villano v. Strathmore***

Terrace Homeowners Assn., Inc., 76 AD3d 1061, 908 NYS2d 124 [2d Dept 2010]***; Valdez v. Aramark Serv.***, 23 AD3d 639, 804 NYS2d 811 [2d Dept 2005]***; Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Gordon v. American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [2d Dept 1986]; ***Bykofsky v. Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994])). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v. Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]). This burden, however, cannot be satisfied by merely pointing out gaps in the plaintiff's case (*see* ***Valdez v. Aramark Serv.***, 23 AD3d 639, *supra*).

Nevertheless, 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]). Moreover, a property owner will not be held liable for trivial defects, not constituting a trap or nuisance, over which one might merely stumble, stub his or her toes, or trip (*see* ***Ambriose v New York City Tr. Auth.***, 33 AD3d 573, 826 NYS2d 261 [2d Dept 2006]; ***Fairchild v J. Crew Group, Inc.***, 21 AD3d 523, 800 NYS2d 735 [2d Dept 2005]; ***Hagood v. City of New York***, 13 AD3d 413, 785 NYS2d 924 [2d Dept 2004]). The court, in determining if the defect is trivial, is required to examine all the facts presented, including the "width, depth, elevation and irregularity, and appearance of the defect along with the 'time, place and circumstance' of the injury" (***Trincere v. County of Suffolk***, 90 NY2d 976, 978, 665 NYS2d 615 [1997]; *see* ***Wasserman v. Genovese Drug Stores***, 282 AD2d 447, 723 NYS2d 191 [2d Dept 2001]; ***Sanna v. Wal-Mart Stores***, 271 AD2d 595, 706 NYS2d 156 [2d Dept 2000]). "Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable" (***Schenpanski v. Promise Deli, Inc.***, 88 AD3d 982, 984, 931 NYS2d 650 [2d Dept 2011]; *see also* ***Maiello v. Eastchester Union Free School Dist.***, 8 AD3d 536, 778 NYS2d 716 [2d Dept 2004]).

Here, the defendants have established a prima facie entitlement to summary judgment. The record before the Court demonstrates that plaintiff frequented the subject premises 25 times prior to the date of the incident, that plaintiff had negotiated the same steps at least twice during each of those 25 visits, the steps had not been altered or changed in any way prior to the date of the incident, that if there was any defective or dangerous condition, it was open and notorious, fully known to plaintiff, who did not report any issues regarding the steps to the management of defendant AMF on any of her prior 25 visits to the bowling alley. The evidence reveals and plaintiff admits that there was lighting over the subject area illuminating the path for patrons to walk on and lights were above the subject carpeted area. Plaintiff further admits that she was aware of the step prior to her fall but she had turned to her right to greet someone and was not looking down. Plaintiff admits that other patrons, including her son, traversed the subject steps that same day without incident. Based upon the foregoing, defendants have established that any alleged condition at the subject location of the incident was open and obvious and readily observable by plaintiff's own senses. Thus, the condition was not inherently dangerous and defendants owed no duty to plaintiff (*see* ***Smith v. South Bay***

Home Assn., Inc., 102 AD3d 668, 957 NYS2d 728 [2d Dept. 2013](carpeting on step identical to carpeting on floor creating optical confusion was open an obvious condition, and not inherently dangerous, where there was lighting over the subject area, entitling defendants to summary judgment on slip and fall case); ***Schwartz v. Hersh,*** 50 AD3d 1011, 856 NYS2d 640 [2d Dept. 2008](plaintiff who used steps at least 100 times prior to the date of the accident without incident, could not recover for injuries when he fell after he missed the last step, although the staircase was dim and the carpet on the stairs was identical to the carpet on the floor creating an optical illusion, as the condition of the staircase was open and obvious and not inherently dangerous); ***Murray v. Dockside 500 Marina, Inc.,*** 32 AD3d 832, 821 NYS2d 608 [2d Dept. 2006](step descending from doorway platform to catering hall was open and notorious and thus did not constitute an inherently dangerous condition); ***Meyer v. Tyner***, 273 AD2d 364, 709 NYS2d 618 [2d Dept. 2000](poor illumination and similarity of color between insulation and unfinished attic floor was not a dangerous condition as floor was readily observable in plain view and easily discoverable with the use of one's own senses); ***Johnson v. 301 Holdings, LLC,*** 89 AD3d 550, 932 NYS2d 692 [1st Dept. 2011](stairs not inherently dangerous and not a hidden trap where lobby and stairs were lit, there were no physical defects in the structure of the steps and plaintiff was aware of the steps having traveled over them hundreds of times, without incident or complaints).

Furthermore, the evidence presented by defendants confirms that they had neither actual nor constructive notice of any alleged defect. Plaintiff's own testimony is that she did not make any complaints about the lighting or about the steps leading from the main level to the bowling area on the 25 prior visits she made over those same steps. In addition, defendant's witness, Ms. Matwiow, testified that she was not aware of any prior complaints and never witnessed anyone fall on those steps. Thus, defendants have demonstrated that they did not have actual or constructive notice of any alleged defective condition regarding the steps or the lighting at the subject area.

Defendants further assert that plaintiff cannot establish that any alleged dangerous or defective condition was a substantial cause of her trip and fall, as plaintiff's own testimony and video footage confirm that she was inattentive to the subject step and was looking to her right rather than down as she stepped forward at the time of the incident. Plaintiff testified that she "literally walked off the step" while she was greeting her friend with a kiss on the cheek. Under the circumstances, defendants have established prima facie that plaintiff's inattentiveness to her surroundings while attempting to traverse the steps was the proximate cause of her accident (*see. e.g.,* ***Outlaw v. Citibank, N.A.,*** 35 A.D.3d 564, 826 NYS2d 642 [2d Dept. 2007](regardless of the lighting conditions, the proximate cause of plaintiff's fall was that she was looking straight ahead and did not see the alleged defect on the stairs); ***Pinkham v. West Elm,*** 142 AD3d 477, 36 NYS3d 657 [1st Dept. 2016](plaintiff had turned and stepped without looking down which caused her to fall regardless of the elevation in the platform and the steps leading thereto); ***Franchini v. American Legion Post,*** 107 AD3d 432, 967 NYS2d 48 [1st Dept. 2013](plaintiff did not see the single step separating an exit door from a patio because she was looking straight ahead at a friend when she fell).

Defendants having established a prima facie entitlement to summary judgment, the burden then shifted to plaintiff to submit evidence in admissible form to raise a triable issue of fact. (*see* ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Plaintiff asserts that the carpets were dark and the lights were dimmed because the bowling alley was conducting "extreme bowling" at the time of the incident. Plaintiff asserts that she "didn't know there was a step there...[and] had no clue there was a step there until [she] fell." Plaintiff further testified that although she had been to the subject premises in the past, she was never there during "extreme bowling" when there is substantially less lighting. Plaintiff also submitted the deposition transcript of non-party witness Ann Barone who testified that the bowling lanes are below the main level separated by a little step and unless you have been there before, it is hard to tell that it is there, "you don't really see it, and then all of a sudden it's there....like you almost trip over it, trip down that step; I've done that before, but I've never gotten hurt...I still can't tell if that was just one step off or one...or if it's one or two. I still don't know." Ms. Barone further testified that the lighting that day in the bowling alley was dark and the area in question was not fully lit. Moreover, according to the testimony of defendant's witness, Ms. Matwiow, during "extreme bowling" there is no light directly above the stairs leading down from the carpet to the tile floor, there are no handrails, and no warning signs of any kind to alert patrons of the stairs or change in elevation. Plaintiff further submits an affidavit of an engineering and safety expert, Stanley Fein, P.E., who performed an inspection of the property on June 13, 2016. Mr. Fein opines that the subject area where plaintiff's accident occurred was in violation of several codes and standards. He further opined that the two different levels on the main level and the bowling area produce an optical illusion that they are level and flush with the mosaic tiles yet there is a difference in the elevation and that the two-step riser stairway leading to the bowling lanes created a tripping hazard, being that it was out of the line of sight of anyone approaching the bowling alleys and the lack of any type of handrail or other visual cue also contributed to the hazardous step condition. In addition, he mentioned that the "extreme bowling" lighting is very dim and inadequate. He further opined that "there is an issue regarding whether, under the circumstances of the inadequate lighting, a person who was unfamiliar with the premises as it existed during extreme bowling or cosmic bowling, could reasonably perceive the existence of a change in elevation of the two step riser and/or whether the subject area created 'optical confusion.'" Plaintiff further asserts that defendants knew or should have known of the dangerous condition created by the unequal steps, as Ms. Matwiow, the shift leader at defendant AMF, testified that on the left side of the bowling alley there are normal two step risers of equal heights but that where plaintiff fell, there is a two-step riser measuring 6 inches and then 2 ½ inches. Further, plaintiff relies upon the actual testimony of Ms. Matwiow, wherein she states that during "extreme bowling" the lights are shut off and there are different lights and other effects and there is a small light illuminating the seating area.

Based upon the foregoing, plaintiff has established a triable question of fact as to whether there was a dangerous condition at the subject area of the incident (*see* ***Clark v. AMF Bowling Centers, Inc.,*** 83 AD3d 761, 921 NYS2d 273 [2d Dept. 2011]; ***Dalton v. North Ritz Club,*** 147 AD3d 1017, 46 NYS3d 900 [2d Dept. 2017]; ***Oldham-Powers v. Longwood Centr. School District,*** 123 AD3d 681, 997 NYS2d 687 [2d Dept. 2014]; ***Gordon v. Pitney Bowes Management Services, Inc.,*** 94 AD3d 813, 942 NYS2d 155 [2d Dept. 2012]; ***Guidone v Town of Hempstead***, 94 AD3d 1054, 942 NYS2d 632 [2d Dept 2012]; ***Rogers v 575 Broadway Assoc., L.P.***, 92 AD3d 857, 939

NYS2d 517 [2d Dept 2012]; ***Perez v 655 Montauk, LLC***, 81 AD3d 619, 916 NYS2d 137 [2d Dept 2011])). In addition, whether there was "optical confusion" creating a dangerous condition has been found to create a question of fact to be decided by a jury (*see* ***Roros v. Oliva,*** 54 AD3d 398, 863 NYS2d 465 [2d Dept. 2008](issue of fact regarding creation of 'optical confusion' and change in elevation between foyer and great room was a dangerous condition or was open and obvious); ***Matheis v. Hunt Country Furniture,*** 140 AD3d 713, 30 NYS3d [2d Dept. 2016]). There are also questions of fact as to whether defendants had constructive notice of the alleged dangerous condition based upon the testimony of Ms. Matwiow and the photographs submitted by plaintiff in opposition. Under the facts presented, there also are issues of fact regarding plaintiff's comparative negligence (***Clark v. AMF Bowling,*** *supra*).

Regarding the motion for summary judgment by defendant IStar, the initial question in a negligence action is whether the alleged tortfeasor owed a duty of care to the injured party (*see* ***Church ex rel. Smith v. Callanan Industries, Inc.***, 99 NY2d 104 [2002]; ***Espinal v. Melville Snow Contrs., Inc.***, 98 NY2d 136 [2002] and the existence and scope of that duty are legal questions for the courts to determine (*see* ***532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Ctr., Inc.***, 96 NY2d 280 [2002]; ***Solan v. Great Neck Union Free School District***, 43 AD3d 1035 [2d Dept. 2007]). It is well established that in premises liability cases, that "liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property." (***Nappi v. Incorporated Village of Lynbrook***, 19 AD3d 565 [2d Dept. 2005]; *see also* ***Comack v. VBK Realty Associates, Ltd.***, 48 AD3d 611 [2d Dept. 2008]).

It is well-established that an out-of-possession owner "is not liable for injuries that occur on the property unless the owner has retained control over the premises or is contractually obligated to perform maintenance and repairs" (***Nikolaidia v. La Terna Restaurant***, 40 AD3d 827, 835 NYS2d 726 [2d Dept. 2007]). Here, there is no dispute that defendant IStar is an out-of-possession owner. While there is a reservation of right clause in the lease agreement between defendants AMF and IStar allowing IStar to enter the premises "to make such repairs, alterations, improvements, additions, replacements or maintenance as [IStar] deems necessary," this clause by itself is not sufficient to impose liability, where, as here, there is no allegation of a specific statutory provision claimed to have been violated (***Nikolaidia v. La Terna Restaurant***, 40 AD3d 827, 835 NYS2d 726 [2d Dept. 2007]; ***Stark v. Port Auth. Of N.Y. and N.J.,*** 224 AD2d 681, 639 NYS2d 57 [2d Dept. 1996]). Plaintiff has not produced any evidence to create a question of fact in this regard.

Accordingly, defendant AMF's motion for summary judgment dismissing the complaint is denied and the motion by defendant IStar for summary judgment dismissing the complaint against it is granted (CPLR 3212).

Dated: 6/19/2018

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**