SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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INDEX NO. 154366/2012

MITCHELL, CHARLES

Plaintiff,

MOTION DATE 10/15/2018, 01/04/2019

- v -

MOTION SEQ. NO. 009; 010

423 WEST 55TH STREET, LLC; WEST 55TH STREET BUILDING LLC

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 248, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 263, 264, 265, 267, 270, 271, 272

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

The following e-filed documents, listed by NYSCEF document number (Motion 010) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 247, 249, 262, 268, 269

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

In this slip and fall matter, defendants 423 West 55th Street, LLC ("423 West") and West 55th Street Building, LLC ("West 55th") respectively move in motion sequence 009 and 010 for summary judgment pursuant to CPLR 3212 to dismiss plaintiff Charles Mitchell's complaint which consists of a single cause of action for common law negligence (NYSCEF ## 196 and 212 – Notices of Motion). Plaintiff opposes the motions. The Decision and Order is as follows:

FACTS

Plaintiff claims that on August 22, 2011, he slipped and fell on the twelfth-floor of the building located at 423 West 55th Street ("the building") in the city, county, and state of New York (NYSCEF #253 – Mitchell EBT at 35). Defendant 423 West is the out-of-possession owner of the building and ground lessor to co-defendant West 55th, which leased the entire building and subleases units out to tenants. At the time of the accident, RHI Entertainment ("RHI") was the subtenant of the twelfth-floor of the building (*id.*). Plaintiff was employed by RHI as an operations assistant and was responsible for the mail room, shipping and inventory, and ensuring that the copy machines and water coolers were working (*id.* at 41-42).

Per the terms of the triple net ground lease, West 55th was required to "take good care of the Demised Premises (including the roof) and shall put and keep the same in good order and condition, and make all necessary repairs thereto, interior and exterior, structural and non-structural" (NYSCEF #242 – Agreement of Lease at §7.01)[1]. The ground lease further stated that "Landlord [423 West] shall not be required to furnish any services of facilities or to make any repairs or alterations in or to or about the Demised Premises. Tenant [West 55th]... assumes the full and sole responsibility for the condition, operation, repair, replacement, maintenance and management of the Demised Premises" (*id.* at §7.04)[2]. However, §13.01 of the ground lease allows 423 West a limited right to re-enter to inspect the building and to make necessary repairs to the building not performed by West 55th (*id.* at §13.01).

For its part, West 55th sublet the twelfth-floor to plaintiff's employer, RHI. Per the terms of the sublease, West 55th retained responsibility for keeping the roof of the building and all building facilities in good condition, including "electrical, heating, ventilation, elevator, plumbing and other Building systems serving the demised premises" (NYSCEF #252 – West 55th-RHI Lease at §4.1). However, the sublease required that RHI "take good care of the demised premises" (*id.*).

Plaintiff's accident occurred in the mail room of RHI between 7:30 AM and 8:00 AM on August 22, 2011 (*id.* at 48-9). At the time of the accident, plaintiff was carrying a large water bottle (to be placed on a water cooler) over his left shoulder (*id.* at 83-84). Plaintiff was transiting a ramp that was in the mail room when he took two to three steps on the ramp, slipped and fell backwards (*id.* at 84). At plaintiff's deposition, when asked "[d]o you know what you actually slipped on?", plaintiff replied that he slipped on "an oily substance" (*id.* at 139). However, he also testified that he did not know what he slipped on (*id.* at 140). Plaintiff did not look at the ramp prior to traversing it, but his shirt got "messed up" in the fall and that "[i]t was wet and kind of greasy-looking" (*id.* at 111, 125).

Plaintiff testified that for the month and a-half preceding his accident he regularly needed to clean up the ramp due to an oily substance collecting on it (*id.* at 91). Plaintiff contends that there are pipes above the ramp that were dripping (*id.*). Plaintiff claims that he reported the condition to his RHI supervisor, Phil Prockter, and West 55th's building superintendent, Daniel Rygor (*id.* at 88-89).

Daniel Rygor testified that he did not receive any complaints from plaintiff or Phil Prockter regarding any leaks at any time (NYSCEF #237 – Rygor EBT at 49, 51). Rygor testified that he inspected the sprinkler pipes monthly and never saw them leaking and noticed no leaks after plaintiff's accident (*id.* at 53).

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[1] This submission contains multiple exhibits. The cited provision can be found in NYSCEF #242 on page 113 of the submitted PDF.

[2] The cited provision can be found in NYSCEF #242 on page 113 of the submitted PDF.

Douglas Layton, 423 West 55th's property manager at the time of plaintiff's accident, testified that the pipes that ran above the ramp were sprinkler pipes that only contained water, not oil (NYSCEF #255 – Layton EBT at 82-83).

Non-party witness Laura Cataldo, an accounts payable clerk at RHI, testified that she became involved in plaintiff's accident when she heard plaintiff screaming after his fall (NYSCEF #239 – Cataldo EBT at 12-13). Upon hearing plaintiff's screams, Cataldo ran over to him (*id.* at 13). Cataldo testified that she saw some water next to plaintiff, believing it to be from the water bottle that plaintiff was carrying (*id.* at 20). Cataldo testified that she never saw any foreign substances on the ramp prior to the date of the accident and that she traversed the same ramp at least ten times daily (*id.* at 17, 21). Cataldo testified that she encountered a water condition at the base of the ramp a variety of times, but she believed it was caused by the mopping done by the cleaning people at night (*id.* at 28). Cataldo testified that she never saw any pipe leaks in the building (*id.* at 30).

Non-party witness Richard Rodriguez, an RHI mailroom employee and plaintiff's colleague, testified that he was unaware of anyone making complaints regarding any dripping or the condition of the ramp (NYSCEF #238 – Rodriguez EBT at 18). Rodriguez further testified that there was no leak of any kind, whether oil, water, or any substance coming from any location above the ramp (*id.* at 20-21).

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]).

With certain exceptions, an "out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or right to re-enter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific statutory safety provision'" (*Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 420 [1st Dept 2011] [internal citations omitted]; *see Henry v Hamilton Equities, Inc.*, 2019 WL 5429631 *3 [Ct App, Oct. 24, 2019]). Here, both

defendants are out-of-possession landlords with no obligation to keep the ramp located in RHI's demised premises free and clear of debris.

The ground lease between defendants states that West 55th is responsible for building repairs and grants 423 West a limited right to re-enter. Likewise, West 55th's sublease agreement with RHI required RHI to maintain its demised premises in good condition but clarified that West 55th was responsible for maintaining building services, such as sprinklers and elevators. As such, the lease provisions cited by defendants show that they did not have a contractual obligation to maintain the RHI mailroom ramp.

As for West 55th's contractual obligation to maintain building services, the evidence here indicates that the pipes that overhung the mailroom ramp were for fire sprinklers and contained only water. As such, plaintiff's contention that he slipped on an oily substance that allegedly dripped from the overhead water-sprinkler pipe does not comport with the evidence. Plaintiff does not address this factual incongruity.

Further, while both defendants had a limited right to re-enter, plaintiff does not point to a structural or design defect contrary to a specific statutory safety provision (*see Guilbe v Port Authority of New York and New Jersey*, 154 AD3d 522 [1st Dept 2017]). Indeed, plaintiff cites no statutory safety provisions. As such, there is no basis to hold either out-of-possession defendants liable for plaintiff's injury.

Plaintiff attempts to salvage this matter by arguing for the first time in his opposition to the defendants' respective motions that the cause of the oily condition was a leak from an elevator mechanical room that is allegedly located directly over the RHI mailroom ramp (NYSCEF #250 – Pl's Opp, ¶¶20-26). Plaintiff bases his contention exclusively on his engineering expert, Robert Fuchs, P.E., who claims that he reviewed plaintiff and Layton's deposition testimonies, photographs, and floor plans of the building to come to this conclusion (NYSCEF #258 – Fuchs Affidavit at ¶¶ 6 and 9).

Defendants vigorously oppose plaintiff's contention, claiming that plaintiff's elevator theory is brand new and was never disclosed to defendants in the many years this 2012 case has been litigated (NYSCEF #270 – 423 West Reply at ¶4). Defendants add that this elevator theory is nowhere to be found in plaintiff's complaint, bill of particulars, or supplemental bill of particulars (*id.* at ¶6). Defendants also argue that plaintiff's expert did not perform a site inspection and that the mechanical room is not located above the RHI mailroom ramp.

The court will not consider plaintiff's new theory of recovery. Simply put, "[a] court should not consider the merits of a new theory of recovery, raised for the first

time in opposition to a motion for summary judgment, that was not pleaded in the complaint" (*Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]).

As there is no basis to hold either defendant liable for plaintiff's injuries in this matter, their respective motions for summary judgment are granted, and plaintiff's complaint is dismissed.

Accordingly, it is ORDERED that defendants' 423 West 55th Street LLC and West 55th Street Building LLC's respective motions for summary judgment are granted, and plaintiff's complaint is dismissed; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

12/5/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE