SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**

Justice

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SUSAN KILEY,

Plaintiff,

- v -

FAC 1333 NORTH AVE, LLC, FAC 1333 NORTH AVE, LLC d/b/a DUNKIN' DONUTS, VINCENT Q. GIFFUNI, VINCENT Q. GIFFUNI d/b/a G & G PLAZA, and MERIT OPERATING CORP.,

Defendants.

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INDEX NO. 159648/2017

MOTION SEQ. NO. 001; 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 79, 92, 95, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for **SUMMARY JUDGMENT**.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 96, 97, 98, 99, 107, 108, 109

were read on this motion to/for **SUMMARY JUDGMENT**.

Plaintiff commenced this action by summons and complaint against defendants FAC 1333 NORTH AVE, LLC, FAC 1333 NORTH AVE LLC d/b/a/ DUNKIN DONUTS (collectively, "FAC defendants"), and defendants VINCENT Q. GIFFUNI, VINCENT Q. GIFFUNI d/b/a G&G PLAZA and MERIT OPERATING CORP. (collectively "GIFFUNI defendants") arising from a slip and fall accident that occurred on July 16, 2017, as she was exiting the Dunkin Donuts located at 1333 North Avenue in New Rochelle, New York. (NYSCEF Doc. No. 1, *summons and complaint*). In this action, plaintiff seeks recovery for personal injuries she sustained, for an unspecified monetary judgment "that far exceeds the jurisdictional imitation of all lower Courts which would otherwise have jurisdiction" on account that defendants "were careless, reckless and negligent" in their ownership, operation, and management of the stairs on which she tripped and fell. (NYSCEF Doc. No. 1, *summons and complaint,* ¶¶ 34-37).

On July 16, 2017, plaintiff went to the Dunkin' Donuts located at 1333 North Avenue, New Rochelle, New York, to buy a sandwich and coffee. (NYSCEF Doc. No. 104, *defendants' statement of undisputed material facts*, ¶¶ 1, 16). The Dunkin' Donuts establishment was located in a shopping center called G & G Plaza. (*Id.*, at ¶ 2). The building located at this address is owned by Giffuni & Giffuni. (*Id.*, at ¶ 3). In 2013, Giffuni & Giffuni (incorrectly sued as VINCENT Q. GIFFUNI d/b/a/ G&G PLAZA) leased part of the building to the FAC defendants who would operate a Dunkin' Donuts franchise at the rented premises. (*Id.*, at ¶¶ 3, 4). On that

day, plaintiff parked her car in the rear parking lot of the shopping center and climbed the staircase to enter the Dunkin' Donuts. (*Id.*, at ¶¶ 7, 8). Plaintiff ascended the metal staircase, which led to a concrete landing, and pulled open the glass door to enter the Dunkin' Donuts, without issue. (*Id.*, at ¶¶ 9 - 14). After purchasing a sandwich and coffee, on her way out of the Dunkin' Donuts, plaintiff pushed out the same glass door, after which she fell down. (*Id.*, at ¶¶ 15, 16). In the complaint, plaintiff alleges that she was "caused to trip and fall… and was caused to fall down the stairs and be violently precipitated to the ground… causing her to sustain serious, severe and permanent personal injuries." (NYSCEF Doc. No. 1, *summons and complaint,* ¶ 34).

GIFFUNI defendants answered, denying the allegations in the complaint and setting forth various affirmative defenses. (NYSCEF Doc. No. 2, *verified answer*). GIFFUNI defendants also asserted a cross-claim against the FAC defendants, that the latter would be liable for any or part of the damages and incurred costs and fees, should plaintiff recover against the GIFFUNI defendants. (NYSCEF Doc. No. 2, *verified answer*).

FAC defendants also answered, similarly denying the allegations and setting forth various affirmative defenses. (NYSCEF Doc. No. 3, *verified answer*). FAC defendants also asserted cross-claims against GIFFUNI defendants, for contribution (first counterclaim), common law indemnification (second counterclaim), contractual indemnification (third counterclaim), and that GIFFUNI defendants, having failed to obtain liability insurance naming the FAC defendants as an additional insured party, would be liable to the FAC defendants for any judgment including costs and fees incurred in this action (fourth counterclaim). (NYSCEF Doc. No. 3, *verified answer*).

Both sets of defendants now move against plaintiff for summary judgment, and cross-move against each other.

Plaintiff has opposed each motion for summary judgment as against her.

In their motion, GIFFUNI defendants argue that the court should grant summary judgment in their favor as against plaintiff and all other claims including its cross-claims. (NYSCEF Doc. No. 23, *notice of motion*). With respect to summary judgment as against plaintiff, GIFFUNI defendants argue that plaintiff's testimony shows that she is not able to identify the cause of her injury and, thus, a jury would have to engage in speculation, warranting summary judgment. They cite to plaintiff's deposition testimony that as she had entered the Dunkin' Donuts without issue a few minutes before she exited the store through the same doorway, that as she exited, she was not looking down but was instead looking straight ahead, and that she had forgotten that there was a step out of the store. (NYSCEF Doc. No. 24, *affirmation in support*, ¶ 39; *citing* NYSCEF Doc. No. 31, *Exhibit G, plaintiff's deposition*, pages 61-63.) They offer expert evidence that there was no defective condition at all, in that the step out of the rear door of the property complies with code requirements of New Rochelle. (NYSCEF Doc. No. 24, *affirmation in support*, ¶ 40, and NYSCEF Doc. 37, *expert disclosure pursuant to CPLR 3101(d)*.) To the extent plaintiff blames the lack of differentiating colors between the doorway and the concrete landing area of the outside steps, defendants proffer photographs of the accident location showing that the floor in the interior of the store was darker

beige or red tile in contrast with the landing which was gray concrete, (NYSCEF Doc. No. 24, *affirmation in support*, ¶ 48, *citing* Exhibit "F"), and here again, point to plaintiff's testimony that she was not looking down as she exited the store. (*Id.*) Defendants argue that they created no dangerous condition, and that they had no actual or constructive notice of it in that no one had ever complained about the staircase landing prior to plaintiff's accident (NYSCEF Doc. No. 24, *affirmation in support*, ¶¶ 49-55).

Plaintiff's opposition to this motion admits that plaintiff had entered the store through the rear door without issue, and that she exited the store through the same door "a couple of minutes later." (NYSCEF Doc. No. 44, *affirmation in opposition*, ¶ 7). Plaintiff cites to her own testimony, that she "didn't recall a step at all," that she "thought it was flat from what [she] could see from looking out the door. It looked flat to [her]", and also that, "[she] was looking straight ahead where [she] was going to walk." (NYSCEF Doc. No. 44, *affirmation in opposition*, ¶ 21). She confirmed that she lost her balance because "there was a step . . . that [she] didn't know" was there. (NYSCEF Doc. No. 44, *affirmation in opposition*, ¶ 23). She reiterated that the only thing she remembered was exiting the store, taking one step out, and falling. (NYSCEF Doc. No. 44, *affirmation in opposition*, ¶ 24). Plaintiff submitted photographs from outside and inside the door in question, arguing that they show that defendants did not "provide any visual cues as to the existence of the single step down outside this exit." (NYSCEF Doc. No. 44, *affirmation in opposition*, ¶¶ 42, 58.) Plaintiff thus argues that summary judgment should be denied as a question of fact remains as to whether the single step down was dangerous under the circumstances in the case and whether defendants had a duty to warn of this step down." (NYSCEF Doc. No. 44, *affirmation in opposition*, ¶ 59.) Plaintiff offers her own expert, who informs the court that marbled beige tile floor with the dark grey colored rubber mat on top and the silver-colored metal threshold/door saddle did not provide any visual cue of the six-inch single step drop down to the cement-colored platform. Additionally, the black frame of the door obstructed the view of the single step from within the store; the silver-colored threshold/door saddle did not provide a contrasting visual cue that the abutting cement colored platform was six inches down and, instead, created a dangerous optical illusion to persons looking forward that the platform was level with the door. (NYSCEF Doc. No. 44, *affirmation in opposition*, ¶¶ 73-79, *citing* NYSCEF Doc. No. 53, *affidavit of Nicholas Bellizzi*.)

FAC defendants submit their own summary judgment motion as to plaintiff. These defendants argue that plaintiff could not identify any defect that caused her accident, it was she who was not paying sufficient attention when exiting the store, the step was not defective or inherently dangerous, and thus, FAC had no duty to warn of the step's presence. FAC defendants further argue that since they leased the space from GIFFUNI defendants, they cannot be held liable absent specific lease language assigning responsibility for such conditions.

FAC defendants also partially oppose GIFFUNI's motion, arguing that should summary judgment be denied, the court should not dismiss FAC's cross-claims against GIFFUNI defendants as under the lease and common law principals, FAC would be entitled to contractual and common law indemnification and contribution from GIFFUNI defendants. (NYSCEF Doc. No. 100, *affirmation in partial opposition*).

A movant seeking summary judgment in favor must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*See Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. (*See Alvarez v Prospect. Hosp.*, 68 NY2d 320 [1986]). The proof raised by the opponent to the motion "must be sufficient to permit a finding of proximate cause 'based not upon speculation, but upon a logical inference to be drawn from the evidence.'" (*Robinson v City of New York*, 18 AD3d 255 [1st Dep't 2005], *quoting Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743 [1986]).

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach. (*Akins v Glenx Falls City School Distr.*, 53 NY2d 325, 333 [1981]). "While property owners and business proprietors have a duty to maintain their premises in reasonably safe condition, which duty includes eliminating, protecting against, or warning of dangerous, defective, or otherwise hazardous conditions, there is no duty to protect or warn against conditions that are in plain view, open, obvious, and readily observable by those 'employing the reasonable use of their senses.'" (*Pinero v Rite Aid of New York, Inc.*, 294 AD2d 251 [1st Dep't 2002] [quotation marks and citations omitted]). In such cases, "the condition is a warning in itself." (*Id.*, *citing Tarricone v State*, 175 AD2d 308 [3rd Dep't 1991]).

The "issue of whether a condition is open and obvious is generally a jury question and should only be resolved as a matter of law when the facts compel such a conclusion." (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 59 [1st Dep't 2004]). "For a condition to be open and obvious as a matter of law requires that the condition "could not be overlooked by anyone making a reasonable use of his senses." (*Barber.*, 37 Misc 3d 1217[A], at *10, *citing Garrido v City of New York*, 9 AD3d 267, 268 [1st Dep't 2004]). However, the mere fact that a defect or hazard is capable of being discerned by a careful observer is not the end of the analysis. (*Westbrook,* 5 AD3d 72.) "The nature or location of some hazards, while they are technically visible, make them likely to be overlooked." (*Id.*) Moreover, the extent to which a defect is open and obvious addresses the issue of plaintiff's comparative negligence, not the defendant's overall duty to maintain its premises in a reasonably safe condition. (*Id.*, *citing Acevedo v Camac*, 293 AD2d 430, 431 [2d Dep't 2002]).

Where members of the public frequent a location, a landowner owes a nondelegable duty to provide member of the general public with a reasonably safe premises, including a safe means of ingress and egress. (See *LoGiudice v Silverstein Props., Inc.*, 48 AD3d 286, 287 [1st 2008]). "An out-of-possession landlord 'is generally not liable for negligence with respect to the condition of property . . . unless [she or he] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs . . . and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Vargas v Weishaus*, 199 AD3d 620, 623 [1st Dept 2021], citing *Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525, 527 [1st Dept 2017] [internal quotation marks omitted]).

Defendants here make their *prima facie* showing of entitlement to judgment as a matter of law. They offer testimony from plaintiff's deposition that she had entered the subject location via the same doorway before she exited and fell two minutes later, and that she was not looking down but was looking ahead as she opened the door to exit. (NYSCEF Doc. No. 24, *affirmation in support,* ¶¶ 25, 39). They further submit an expert affidavit from Paul Morris, P.E. stating that the step was in compliance with the applicable state building code, and that there were contrasting colors and patterns differentiating the tile inside the store from the concrete landing. (NYSCEF Doc. No. 42, *expert affidavit*). Defendants further cite to deposition testimony of Mr. Marrinan, FAC's president, who testified that no one had made any complaints regarding the step at issue. (NYSCEF Doc. No. 24, *affirmation in support,* ¶ 29.)

However, both sets of defendants' motions for summary judgment are denied because plaintiff has shown the existence of a triable issue of fact. Plaintiff has sufficiently disputed the issue of whether the step down when exiting the Dunkin' Donuts' rear door was "open and obvious," which the court agrees is a question for the jury. Plaintiff does not deny that she was not looking down, rather she confirms that she was looking ahead as she exited the store. However, the fact that she was unaware of a step down that was not apparent to her as she looked ahead while leaving the store cannot be said to be an unreasonable use of her senses. Plaintiff testified at her deposition that this was her first time inside the subject Dunkin' Donuts location and that she was not distracted when she exited the premises. She testified that she "thought it was flat from what [she] could see from looking out the door. It looked flat to [her]." She pushed the door open with her left hand while stepping forward and fell down the stairs after taking a step out of the door. Contrasting this with her entrance into the premises, which required her to pull the door open before stepping into the store over a two-brick height threshold on which the door frame sat, her exiting the same door, with a reasonable use of her senses, provided no warning as to a step down. Here, while "technically visible," the nature and/or location of this step, could have made it likely to be overlooked by one exiting the Dunkin' Donuts. In any event, that plaintiff was admittedly looking ahead, and not down, as she exited the door, goes to the issue of her comparative negligence, not defendants' overall duty to maintain its premises in a reasonably safe condition.

Plaintiff additionally raises the contrast, or lack thereof, of colors of the floor tiles inside the store (beige), the doorframe threshold (silver/aluminum) and cement landing (gray), as another reason she did not realize there was a step immediately beyond the glass exit door. Defendants' moving papers included photographs of this area, but the parties characterize the colors differently and, while the Dunkin' Donuts manager testified that the black mat was always placed on the inside of the rear exit door, plaintiff's testimony did not address whether this was the case on the date of the accident. The court has reviewed the parties' respective photographic exhibits and finds that whether any color differences were *sufficiently* adequately to provide "any visual cues as to the existence of the single step down outside this exit" is a question of fact for a jury.

As to FAC defendants' motion as against GIFFUNI defendants, it is similarly denied. FAC defendants argue only that the lease between them does not require FAC to make any structural changes to the premises, a point which GIFFUNI defendants do not seem to dispute. However, plaintiff's allegations pertain not only to the physical step but also to the lack of

warning as to its existence, which implicates FAC as the business operator. Accordingly, it is hereby

ORDERED that the motion of defendants FAC 1333 NORTH AVE, LLC d/b/a DUNKIN DONUTS s/h/a FAC 1333 NORTH AVE, LLC and FAC 1333 NORTH AVE, LLC d/b/a DUNKIN DONUTS is denied (Mot. Seq. 001); and it is further

ORDERED that the motion of defendants VINCENT Q. GIFFUNI, GIFFUNI AND GIFFUNI and MERIT OPERATING CORP, LLC's motion for summary judgment as against plaintiff is denied (Mot. Seq. 002); and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this order, with notice of entry, upon all parties.

This constitutes the decision and order of this court.

September 25, 2023

HON. VERNA L. SAUNDERS, JSC

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