2723 South State Street, Suite 150
Ann Arbor, MI 48104
(866) 534-6177
LawCompany.com

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

[redacted] Plaintiff	
v.	CASE NO. [redacted]
[redacted] et al. Defendants	
	[redacted] 2021

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Plaintiff, [redacted] ("Plaintiff") hereby responds and objects to the Motion for Summary Judgment, filed by Defendant [redacted] ("[redacted] and Defendant [redacted] ("[redacted] Plaintiff requests that this Court deny Defendants' motion since a question of material fact exists in this case, which should be decided by a jury.

STATEMENT OF FACTS

On or about [redacted], Plaintiff was located on the sidewalk of the premises located at [redacted] in [redacted], Maryland (the "Premises"). The Premises is owned by Defendant [redacted] and managed by Defendant [redacted], Inc. [redacted] and [redacted] a supermarket chain, rents the Premises to conduct their business. Plaintiff was located on the Premises on such day to shop at the supermarket, as an invitee of [redacted] and [redacted]

As Plaintiff walked through the parking lot on the Premises, she walked up onto the sidewalk, adjacent to the shopping cart pick-up area, which is located approximately [redacted]

from the entrance to the [redacted], in order to enter the store. At that time, she tripped and fell on a section of curb and [redacted] that was in a state of disrepair. Plaintiff tripped over the broken curbing, which propelled her forward, forcing her face into a nearby cement column. After striking the column, Plaintiff fell onto the [redacted] This section of curb and [redacted] which was in a state of disrepair, is located directly below the outdoor [redacted] sign, which is attached to the building on the Premises. The only people using this area of the [redacted] are [redacted] coming or going into the store.

Plaintiff brought suit against all Defendants, claiming that they had either actual or constructive notice of the unsafe and defective condition of the [redacted] and [redacted] Plaintiff argues that Defendants owed a duty to Plaintiff, as an invitee, to keep the property safe from any conditions that may harm her. Defendants breached that duty by failing to repair the [redacted] and [redacted], which they knew or should have known was in an unsafe condition. Because Defendants breached their duty and failed to maintain the Premises in a safe condition, this caused Plaintiff to be injured, which caused Plaintiff damages. Thus, Plaintiff maintains this action for Premises Liability.

[redacted] and [redacted] brought this Motion for Summary Judgment, arguing that, as the tenant of the Premises, they were not liable to maintain the Premises in a safe condition, which duty lies with the landlord of the Premises. [redacted] and [redacted] argued that the [redacted] of the building are in the "common areas", which is specifically designated for the landlord to maintain. Thus, because these Defendants argue there was no duty to maintain the site of the defect, Plaintiff cannot recover against these Defendants and, thus, the Court should enter judgment in their favor at this time.

Plaintiff now argues that Defendants are mistaken. The lease between the Defendants, in this case, does define the "common areas" to be maintained by the landlord, but such section of the lease does not include the [redacted], which is the location of the Plaintiff's injury. Indeed, the [redacted] are never mentioned in the lease at all, which leaves a question of material fact as to the identity of the entity responsible for maintaining such [redacted]. Thus, [redacted] and [redacted] did a owe a duty to maintain the Premises, did owe a duty to Plaintiff, as their invitee, and a question of material fact exists in this case. Thus, summary judgment would be inappropriate, and this matter should be a question for a jury to decide.

ARGUMENT

A. STANDARD OF REVIEW

Pursuant to Md. Rule 2-501, "any party may file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact that the party is entitled to judgment as a matter of law." Thus, before deciding on a motion for summary judgment, a court "must first determine whether there is any genuine dispute of materials facts." *Dashiell v. Meeks*, 396 Md. 149, 163 (2006). A court can only grant a motion for summary judgment if "there is no genuine dispute of material fact…" *Choice Hotels Int'l v. Manor Care of Am., Inc.*, 143 Md. App. 393, 397 (2002). The court will "consider the facts reflected in the pleadings, depositions, answer to interrogatories, and affidavits in the light most favorable to the non-moving party…." *Id.* at 398. Thus, if there is a fact in dispute, it will be resolved in favor of the non-moving party, or, in this case, the Plaintiff. *See Dashiell, supra,* at 163.

In this case, Plaintiff argues that there is a genuine dispute as to material facts. Thus, this court cannot grant summary judgment, as any dispute must be resolved in favor of the Plaintiff and against [redacted] and [redacted]

B. <u>A QUESTION OF MATERIAL FACT EXISTS IN THIS CASE, WHICH SHOULD BE DETERMINED BY JURY</u>

Defendants owed a duty to maintain the Premises in a safe condition, and Defendants breached that duty, which caused Plaintiff's injuries and her subsequent damages. In their motion, however, [redacted] and [redacted] argue that Plaintiff was injured in the common area of the Premises, which is the responsibility of the landlord to maintain. Because [redacted] and [redacted] are the tenants, they argue they have no duty to maintain the [redacted] upon which Plaintiff fell and, therefore, without a duty owed they cannot be held liable for Plaintiff's injuries. Defendants, however, are mistaken. Defendants did owe a duty to Plaintiff, and all invitees, to maintain the Premises in a safe condition. A material fact is in dispute in this case and, therefore, it should be up to a jury to determine if [redacted] and [redacted] owed a duty to Plaintiff. Their Motion for Summary Judgment should be denied.

Duties are owed to invitees to keep premises safe from unreasonable risks. In the law of torts, an invitee is

> a person invited or permitted to enter or remain on another's property for purposes connected with or related to the owner's business; the owner must use reasonable and ordinary care to keep his premises safe for the invitee and protect him from injury caused by an unreasonable risk which the invitee, by exercising ordinary care for his own safety, will not discover.

Leatherwood Motor Coach Tours Corp. v. Nathan, 84 Md. App. 370, 381 (1989).

This court went on to state that the word "owner" is a restrictive term. "The duty to an invitee is imposed on owners, tenants, and occupiers of land, those having sufficient possession and control to be answerable to others for its condition." *Id.* at 381-382. Thus, in general,

tenants do owe a duty to invitees to maintain the property. "When land is leased to a tenant, the law of property regards the lease as equivalent to a sale of the premises for the term. The lessee acquires an estate in the land, and becomes, for the time being, both owner and occupier, subject to all of the responsibilities of one in possession, to those who enter upon the land and those outside of its boundaries." *Smith v. Dodge Plaza P'Shp*, 148 Md. App. 335, 347 (2001). Therefore, the tenant is responsible for that part of the Premises under its control and owes a duty to any invitees to keep them safe from harm that the invitee may not discover.

The court held similar in *Cohen v. Herbert*, 145 Md. 195 (1924). In that case, a carpenter was working to renovate a building when he walked into a dark elevator shaft that he believed was a hallway. He fell into the shaft and was injured. He sued the tenant of the building for failing to operate the elevator with reasonable care to avoid injury to the invitees in the building. The tenant moved to set aside the judgment against it, but the court ruled that there was sufficient evidence to justify the judgment. The court ruled that in the enjoyment of the right to use the property, including the common areas of the hallways and the elevator in the building, the tenant also had to use such areas with reasonable care to avoid injury, and the plaintiff had the right to assume that the tenant would exercise that care required. The court here did find that the tenant failed to perform that duty owed to the plaintiff, even though the injury occurred in the common area in the building rather than in the space rented by the tenant. The court said it would not interfere and take the question away from the jury unless the case was absolutely clear that a plaintiff could never recover against a defendant. *Id.* at 205. The court held that the tenant owed a duty to the plaintiff to maintain the elevator, a common area of the building, and that question was rightfully left to the jury to determine the proper fault of all parties involved.

In this case, a genuine issue of material fact does exist, despite the argument from [redacted] and [redacted] that, based upon the lease, they do not have a duty to maintain the common area of the Premises, which duty falls directly on the landlord. Defendants attached a copy of the lease to their motion and directed the court to [redacted] which covers the landlord's responsibilities. Paragraph [redacted] states that the landlord shall main the exterior structural portions of the building, and the landlord will also maintain the common areas of the Premises. Paragraph [redacted] specifically states that the landlord will maintain floodlights and other means of illumination, maintain the parking area in good condition, permit-free parking for the tenant and its customers, and carry liability insurance to indemnify the tenant for any expense connected with the common areas, except to the extent such expense was caused by the tenant's negligence. Unfortunately, nowhere in this lease does it mention who is responsible for the [redacted] attached to the building that is leased by the tenant. Nowhere in this lease does it state who is responsible for the [redacted] that is attached to the building, directly under the [redacted] sign, where Plaintiff was injured. Because this [redacted] is attached to the building leased by [redacted] and [redacted] it is entirely probable that these Defendants, the tenants, are responsible for maintaining these areas. According to Paragraph [redacted] of the lease, the tenants are leasing the store building and the land beneath it. Paragraph [redacted] states that all of the Premises, except for the building, are referred to as the common areas. That still does not define the [redacted], attached to the building, under the [redacted] sign and within the concrete columns of the building. The lease does not state who is responsible for these [redacted] The lease does not state that the landlord will remove ice, snow, and debris from these [redacted] but only from the parking areas. Pursuant to Paragraph [redacted] of the lease, the tenant is responsible to keep the interior of the Premises in good order and repair. Again, however, does the interior

of the Premises include the [redacted] within the concrete columns which is attached to the building? The lease cannot answer that question, and the moving party has provided no other evidence to show that the landlord is responsible for that area of the building. At the very least, because the [redacted] is appurtenant to the building, it should have been the responsibility of the tenant to examine the building, and anything connected to it, and inform the landlord if anything needed repair, as this is the area seen by the tenant daily. Thus, there is a genuine issue of material fact in this case as to who is responsible to maintain the [redacted] connected to the building.

Defendants owed a duty to Plaintiff, and, thus, this motion should be denied. Knowing that this business operates because customers, or invitees, come onto and into the Premises for their [redacted] needs, [redacted] and [redacted] owed a duty to their customers to ensure they would not be harmed by anything on their leased area of the Premises. Defendants did not ensure that the Premises, and the [redacted] appurtenant to the building, were free of danger, and, because they breached their duty, Plaintiff was injured. Because an issue of fact must be resolved against the moving party, a genuine issue of material fact continues to exist in this case. It should be up to a jury to determine whether that is the landlord, property manager, or tenant.[1], or all three, were responsible to maintain the [redacted] attached to the building and within the concrete columns of the supermarket. Because there is an issue of material fact in dispute in this case that should be determined by a jury, this motion must be denied.

[1] It should be noted that Paragraph [redacted] of the lease, attached to the Motion for Summary Judgment as Exhibit [redacted] is not reproduced in its entirety as an exhibit. The top portion of page [redacted] is cut off. The visible lines, however, state [redacted]." Because this is part of paragraph [redacted], which covers the tenant's covenants, one can assume that tenant is supposed to hold liability insurance that holds the landlord harmless for any expense that occurs from the tenant's breach of a duty under the lease. Thus, it must be a question for the jury to determine who controlled this area of the Premises, whose duty it was to maintain the area safely, and who breached that duty by causing Plaintiff's damages.

C. DEFENDANTS HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE DEFECT

Defendants had actual or constructive notice of the defect on the [redacted] that caused Plaintiff's injuries. Defendants attempt to argue, in their motion for summary judgment, the Plaintiff can point to no facts showing that [redacted] and [redacted] knew about such defective conditions before Plaintiff's injuries. Plaintiff, however, does allege that these Defendants had a duty to inspect the property, and, thus, Defendants did have actual or constructive knowledge of the defect. Thus, the Defendants' Motion for Summary Judgment should be denied.

In order for a possessor of land to be liable for harm to an invitee, the possessor must have actual or constructive knowledge of the defect that caused the harm. The Restatement (Second) of Torts states that:

> [a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts §343 (1965).

"Whether a condition on the possessor's land is one which the possessor should know involves an unreasonable risk of harm to invitees is closely related to, if not indistinguishable from, the extent of the possessor's duty to inspect." *Macias v. Summit Mgmt.*, 243 Md. App. 294, 336 (2019). In order for a plaintiff to recover, there must be some evidence that the defendant knew or should have known of the dangerous condition. "To show constructive knowledge, an invitee must demonstrate that the defective condition existed long enough to permit one under a duty to inspect to discover the defect and remedy it prior to the injury." *Id.*

at 337. A true test of liability is the proprietor's superior knowledge when it is known to the owner or occupant but not known to the injured party. *See id.* Thus, in order for a plaintiff to recover, she must demonstrate that the possessor of the property knew or should have known of the defect or, at the very least, should have discovered the defect upon inspection and exercising reasonable care.

In this case, Plaintiff does allege that [redacted] and [redacted] had actual or constructive notice of the defect. This area of the [redacted] was entirely within their control. This [redacted] is not defined, by the lease, as being in the "common areas" over which the landlord had control. Conversely, this [redacted] was located just [redacted] from the front door to the [redacted]. This is an area of the Premises that would only be used by customers/invitees and employees of [redacted] and [redacted] These Defendants had possession of this area of the Premises and access to see this area daily. These Defendants should have been inspecting this area of the [redacted], just as they would inspect the interior of the building, to ensure their customers are safe from any defects that may be undiscoverable by the customers[2]These Defendants should have been exercising reasonable care in inspecting their property to maintain such areas for their invitees. Thus, these Defendants should have known of a defect on their property that would have placed their customers in harm's way. These Defendants are the only parties to have superior knowledge of this area of the [redacted], which is not a part of the common area of the parking lot but are instead just steps from the front door to the [redacted] appurtenant to the building, and within the purview of the business.

[2] Defendants attempt to argue that Plaintiff has not cited any evidence showing that Defendants knew of the condition or when they knew of such condition. It should be noted by this Court, however, that, although Plaintiff has sent to Defendants Interrogatories and Requests for the Production of Documents, Defendants have yet to respond to such discovery. Thus, Defendants should not be allowed to argue that Plaintiff has not submitted any evidence as to when such defect was known or should have been known to Defendants when Defendants have so far refused to answer such questions in discovery.

Therefore, [redacted] and [redacted] breached its duty to warn Plaintiffs, and other invitees, of a defective condition on the property, which defective condition caused Plaintiff's injury. The Motion for Summary Judgment must be denied.

CONCLUSION

WHEREFORE, for the reasons set forth above, a genuine issue of material fact exists in this case to determine the proper party responsible for maintaining the [redacted] appurtenant to the building on the Premises. Because a question of fact exists and because any dispute must be resolved against the moving party, Plaintiff respectfully requests that this Court deny Defendants' Motion for Summary Judgment and allow this case to proceed to trial.

Respectfully submitted,
[redacted]

By:_____
[redacted].
[redacted]
[redacted]
[redacted]
Attorney for Plaintiff

LC
LawCompany

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response was forwarded via First Class Mail this _____ day of [redacted] to:

[redacted]
Attorney for Defendants
[redacted]

_____
[redacted]