CHAMBERS

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ORANGE
HON. PAUL I. MARX, J.S.C.

----------x

ALICE VALVERDE and ADOLPH VALVERDE,

Plaintiffs,

-against-

MARY ALVA and JMA 6, LLC, d/b/a "NEW WINDSOR SPORTS",

Defendants.

----------x

MARY ALVA and JMA 6, LLC,

Third-Party Plaintiffs,

-against-

GREG SHAW, P.E., SHAW ENGINEERING CONSULTING ENGINEERS, RD'S PAVING INC., ROBERT DEGROODT, RON DEGROODT PAVING, INC., DEGROODT PAVING, CORP., WASHINGTONVILLE SOCCER CLUB, INC., WASHINGTONVILLE WARRIORS and EDWARD MOLONEY.

Third-Party Defendants.

----------x

DECISION AND ORDER

Index No.: 2795/2009

Motion Date: November 21, 2012
Motion Sequence ## 3, 4, 5, 6

The following papers numbered 1 to 17 were read on the separate motions for summary judgment, pursuant to CPLR §3212, brought by: (1) Defendant/Third-Party Plaintiff Mary Alva;[1] (2) Third-Party Defendants Washingtonville Soccer Club, Inc., Washingtonville Warriors and Edward

---

[1] The action was discontinued against JMA 6, LLC by stipulation filed on May 9, 2012. The third-party action against Ron DeGroodt Paving and DeGroodt Paving was discontinued by stipulation filed on May 16, 2012.

Moloney; (3) Third-Party Defendants Greg Shaw, P.E. and Shaw Engineering Consulting Engineers; and (4) Third-Party Defendants RD's Paving, Inc. and Robert Degroodt:

Notice of Motion by Mary Alva/Affirmation of Joel A. Hirshfield, Esq. and Exhibits A to Z; Exhibits AA to EE. 1-2
Affirmation of Michael D'Angelo, Esq. in Opposition to Alva Motion and Exhibits FF to MM 3
Affirmation in Reply and Partial Opposition to All Third-Party Defendant Motions 4

Notice of Motion by Washingtonville Third-Party Defendants/Affirmation of James A. Randazzo, Esq. and Exhibits A to J 5-6

Notice of Motion by Shaw Third-Party Defendants 7
Memorandum of Law in Support of Motion 8
Affidavit of Greg Shaw, P.E. and Exhibits 1 to 3 9
Affirmation of Jana A. Slavina, Esq. and Exhibits A to N 10
Reply Affirmation of Jana A. Slavina, Esq. 11

Notice of Motion by RD'S and Robert Degroodt Third-Party Defendants/Affirmation of Nathan Losman, Esq./Affidavit of Robert Degroodt/Affidavit of Vincent Pici, P.E. and Exhibits A to M 12-15
Reply Affirmation of Nathan Losman, Esq./Affidavit of Vincent Pici, P.E. and Exhibit A 16-17

Upon the foregoing papers, it is ORDERED that the motion for summary judgment of (1) Defendant Mary Alva is denied; (2) Third-Party Defendant Washingtonville Soccer Club, Inc., Washingtonville Warriors and Edward Moloney is granted; (3) Third-Party Defendant Greg Shaw, P.E. and Shaw Engineering Consulting Engineers is granted; and (4) Third-Party Defendant RD's Paving, Inc. and Robert Degroodt is denied.

This personal injury action arises from a fall on a handicap access ramp in the parking lot of an indoor sports facility located in New Windsor, New York. The accident occurred at approximately 8:20 p.m. on January 13, 2007 as Plaintiff left the building and stepped off the sidewalk between two parked cars to cut across the parking lot. Plaintiff testified that as she stepped from the sidewalk, she did not notice that she was stepping onto a handicap ramp and she tripped and fell forward onto her arms, fracturing her left wrist and four fingers. Plaintiff also testified that she thought she was stepping down from the curb onto the pavement and she did not see the ramp

or the blue stripes on the ramp because it was dark. She also claimed that her fall was caused by the steepness of the handicap access ramp.

Defendant Mary Alva is the owner of the property where the sports facility is located. She leased the premises to Mondome, Inc., a company owned by her husband, John Alva.[2] Third-Party Defendants Greg Shaw, P.E. and Shaw Engineering Consulting Engineers were retained to design the facility. The facility was constructed on the property in January 2006. Following its construction, Third-Party Defendants RD's Paving and Robert DeGroodt paved the parking area and installed the subject ramp.

Defendant's lease with Mondome provides that the owner/landlord is responsible for maintaining the outside areas of the property, and includes a provision whereby tenant agrees to indemnify and hold harmless the owner for any liability. Mondome subsequently rented the facility from time-to-time to various sports group, including the Washingtonville Third-Party Defendants, for practices and tournaments. The Washingtonville Third-Party Defendants held a tournament at the facility on January 13, 2007, which Plaintiffs and their son attended. The accident occurred as Plaintiff was leaving the facility to meet her husband and son in the facility parking lot.

Motions for Summary Judgment

A. Defendant/Third-Party Plaintiff Mary Alva's Motion

Defendant moves for summary judgment on the ground that neither the handicap access ramp nor the lighting in the parking area were the proximate cause of Plaintiff's fall, and, as an out-of-possession landlord, she owed no duty to Plaintiff. Defendant asserts that the parking lot, including the area of the handicap ramp, was illuminated by two four hundred watt metal halide parking/roadway lamps. In addition, Defendant states that the parking lot was illuminated by the headlights of vehicles in the lot, and that the floodlights and headlights provided sufficient lighting. She contends that Plaintiff's fall occurred because she was looking for her husband in the parking lot and was not looking where she was stepping. On the issue of lighting, Defendant presents the deposition testimony of Third-Party Defendant Edward Moloney that the floodlights illuminated the parking area and the handicap ramps on the day of the accident. *See* Alva Motion, Exhibit R, pg.

---

[2] Neither Mondome, Inc. nor John Alva are parties to the action.

26:9-21. Defendant also submits the affidavit of Brian G. Brady, P.E., a licensed professional engineer, who opines, based on the lighting plan, that "the subject ramp and parking area were lighted in a reasonable and safe manner." *Id.*, Exhibit EE at ¶ 4.

Defendant demonstrates her entitlement to summary judgment as a matter of law with evidence that the area where Plaintiff allegedly was injured was adequately lighted and that Plaintiff was inattentive to where she was stepping. She relies upon a line of cases which hold that summary judgment in favor of the property owner is proper where the plaintiff's inattentiveness results in a trip and fall. *See Louman v Town of Greenburgh,* 60 AD3d 915, 916, 876 NYS2d 112 [2nd Dept 2009] (plaintiff failed to raise triable issue of fact that defendant's failure to provide adequate illumination caused her fall where she admitted "that it was not the darkness that prevented her from seeing the sidewalk defect, but rather that she 'wasn't looking'"); *Reyes v La Ronda Cocktail Lounge*, 27 AD3d 397, 397, 812 NYS2d 503 [1st Dept 2006] ("plaintiff fail[ed] to directly testify that she looked down but could not see the floor or any substances that were on it ..."); *Webb v Salvation Army*, 83 AD3d 1453, 1454, 920 NYS2d 562 [4th Dept 2011] (plaintiff, who fell in a parking lot after she exited her vehicle, failed to raise a triable issue of fact; she admitted "that she was not looking down as she was walking" and tripped on a doll's boot).

In opposition, Plaintiff establishes that Defendant owed a duty pursuant to the provision in the lease between Defendant and Mondome, whereby Defendant retained responsibility for the maintenance of the "exterior of the property, including ... parking areas ... ". *See* Defendant's Notice of Motion, Exhibit Z, Commercial Lease at ¶ 8. "An out-of-possession landlord is not liable for injuries sustained on the premises unless it retains control of the premises or is contractually obligated to repair unsafe conditions." *Seney v. Kee Assocs*, 15 AD3d 383, 384, 790 N.Y.S.2d 170 [2nd Dept 2005] (citations omitted).

Plaintiff contends that the circumstances here are distinguishable from the cases relied on by Defendant in that Plaintiff did not testify that she did not look down before taking a step off the sidewalk. Plaintiff testified that she thought that she was stepping down off a curb; "didn't see the stripes and plus there were cars on both sides" of the ramp. Notice of Defendant's Motion, Exhibit G at 13:24-25. She "did not see that there was a ramp. It matched the driveway. Cause of the lighting, it was dark." *Id.* at 79:15-16. She also testified that immediately before she fell she was

Looking to see where her husband was, because she was "thinking he may have moved the car out of where he was towards where I might be ... ." *Id.* at 45-47.

The Court finds Plaintiff's deposition testimony on the issue of where she directed her attention immediately before the fall is sufficiently unclear that the Court can not say that Defendant is entitled to summary judgment as a matter of law.

Plaintiff also establishes material questions of fact regarding the adequacy of the lighting in the parking area near the ramp through her expert's report, her deposition testimony and the deposition testimony of Mr. Alva and Third-Party Defendant Moloney. Third-Party Defendant Edward Moloney testified that he received some complaints about the lighting before the accident, which he reported to Mr. Alva. *See* Notice of Defendant's Motion, Exhibit R at p. 19:20-25; 20:8-16; 12:12-15. Mr. Alva testified that he agreed with Mr. Moloney's assessment that night that it was dark near the ramp and the blue lines were hard to see. *See* Notice of Defendant's Motion, Exhibit K at p. 38:19-39:1. Mr. Alva also testified that it was difficult to see walking between the cars, as Plaintiff attempted to do. *Id.* at p. 40:2-6.

Plaintiff's expert, Vincent Ettari, P.E., P.C., opines that the lighting levels in the area of the ramp were below the required illumination levels set out in the New York State Property Maintenance Code, and as a result, Plaintiff could not see the ramp that caused her to trip and fall. *See* Notice of Motion of Robert DeGroodt, Exhibit L at p.37.[3] Mr. Ettari further opines that the excessively steep slope of the handicap ramp, which is not in compliance with the applicable code, in combination with the inadequate lighting, was the proximate cause of Plaintiff's fall. *Id.* at pp. 37-39.

Plaintiff challenges the opinion of Defendant's expert, Brian Brady, who opines that the lighting laid out in the lighting plan was safe and reasonable. Plaintiff contends that the actual lighting was not constructed according to the lighting plan. She further contends that the conflicting opinions of the two experts create a question of fact for the jury.

---

[3] Plaintiff cites to Defendant's Exhibit F, however, that exhibit only contains the expert disclosure and does not contain a copy of Ettari's report. The Court was able to locate a copy of the report attached to another party's motion. The Court finds that Ettari's affidavit, submitted with Plaintiff's opposition, cures any alleged defect and allows his opinion to be considered on the instant motion.

The Court finds that there are material questions of fact as to the proximate cause of Plaintiff's injuries. Accordingly, the Court denies Defendant's motion for summary judgment.

B. Washingtonville Third-Party Defendant's Motion

The Washingtonville Third-Party Defendants, who are sued herein because they rented the facility to host a tournament on January 13, 2007, move for summary judgment against Defendant. The Washingtonville Third-Party Defendants claim that they did not owe a duty of care to Plaintiff because they did not own, occupy, control or make special use of the property; they merely rented the indoor facility from time to time. Mr. Moloney, the Washingtonville coach who organized the practices and tournaments, testified that he did not maintain the facility or its premises and he reported complaints and problems to Mr. Alva, whose corporation, Mondome, Inc., leased the premises from Defendant. As stated previously, Defendant retained responsibility for the maintenance of the parking area in the written lease between herself and Mondome, Inc. The Court is not aware of a written lease between either the Washingtonville Third-Party Defendants and Defendant, or a written sub-lease between the Washingtonville Third-Party Defendants and Mondome, Inc.

In opposition, Defendant merely states that if issues of fact are found as to her, then issues of fact must also be found as to the Washingtonville Third-Party Defendants "for their responsibility for running the sports dome on the day of Plaintiff's fall." Affirmation (of Defendant) in Reply and Partial Opposition (to Plaintiff's Motion for Summary Judgment), at pg. 16. She relies upon Mr. Alva's statement during his deposition, when asked "who was responsible for operating the sports dome on January 13, 2007?", he responded "[o]n that day Washingtonville Soccer." Notice of Defendant's Motion, Exhibit N, at p. 8:20-22.

Defendant's opposition is not sufficient to raise a genuine issue of material fact with regard to the Washingtonville Third-Party Defendants' liability for Plaintiff's injuries. The Washingtonville Third-Party Defendants only rented the indoor area from time-to-time and did not have a duty to maintain the parking areas; that duty remained with Defendant. *See Warren v Wilmorite, Inc.*, 211 AD2d 904; 621 NYS2d 184 [3rd Dept 1995].

Accordingly, the motion of the Washingtonville Third-Party Defendants is granted.

C. Third-Party Defendants Greg Shaw, P.E. and Shaw Engineering Consulting Engineers

Third-Party Defendants Greg Shaw, P.E. and Shaw Engineering Consulting Engineers, who are sued herein because they prepared the engineering plans for the facility and incorporated the lighting plans of non-party Ruud Lighting for the facility, move for summary judgment against Defendant. The Shaw Third-Party Defendants contend that there is no liability on their part because they had no role in the operation of the facility; they did not supervise the construction of the facility; and the ramp and lighting at the facility were not constructed in accordance with their plans.

In opposition, Defendant merely states that if issues of fact are found as to her, then issues of fact must also be found as to the Shaw Third-Party Defendants for their involvement with the lighting and engineering plans. Defendant's conclusory statement is clearly insufficient to raise a genuine issue of material fact.

Accordingly, the motion of the Shaw Third-Party Defendants is granted.

D. Third-Party Defendants RD's Paving Inc. and Robert Degroodt

Third-Party Defendants RD's Paving Inc. and Robert DeGroodt, who are sued herein because they constructed the subject handicap ramp, move for summary judgment against Defendant/Third-Party Plaintiff on the ground that the ramp was not excessively steep and meets code requirements. The DeGroodt Third-Party Defendants submit the affidavit of their expert, Vincent Pici, P.E., who opines that Plaintiffs' expert's conclusion that the ramp is excessively steep is mathematically incorrect given the length and height of the ramp.

In opposition, Defendant merely states that if issues of fact are found as to her, then issues of fact must also be found as to the DeGroodt Third-Party Defendants for their involvement in the construction of the subject ramp. Defendant's expert did not offer any opinion as to the steepness of the ramp, and her conclusory statement is clearly insufficient to raise a genuine issue of material fact.

Plaintiffs oppose the motion on the ground that "Mr. Pici's opinion is patently insufficient because his calculation of the ramp's slope is based on a clear misinterpretation of the data obtained by Mr. Ettari." Affirmation in Opposition at ¶ 55. Plaintiffs assert that Mr. Pici's opinion is speculative because he did not measure the ramp himself and therefore, he has no factual basis to challenge Mr. Ettari's data. Plaintiffs also challenge the DeGroodt Third-Party Defendants'

assertion that Plaintiff cannot establish that the slope of the ramp was the proximate cause of her injuries, asserting that the accident could have more than one proximate cause.

The Court finds that the conflicting affidavits of the experts on the issue of the slope of the ramp raise genuine issues of material fact regarding the proper physical measurements of the ramp, whether Plaintiffs' expert properly relied upon an electronic shop meter to determine the slope, and whether the various levels of the ramp affect the calculation of the slope.[4] The slope is critical to determining whether there was a defect in the ramp that caused or contributed to Plaintiff's fall. Therefore, summary judgment cannot be granted as a matter of law.

Accordingly, the motion of the DeGroodt Third-Party Defendants is denied.

The foregoing constitutes the decision and order of the Court.

Dated: February 1, 2013
Goshen, New York

ENTER

HON. PAUL I. MARX, J.S.C.

[4] Although Plaintiff has not asserted any claims against the DeGroodt Third-Party Defendants, CPLR §3213(b) provides that "the motion shall be denied if *any party* shall show facts sufficient to require a trial of any issue of fact." *See also Mendez v The Union Theological Seminary in the City of New York*, 26 AD3d 260, 261, 809 NYS2d 77 [1st Dept 2006] (although plaintiff could not sue third-party defendant, he was "nonetheless entitled to oppose dismissal of the third-party action"); *Way v Grantling*, 289 AD2d 790, 792, 736 NYS2d 424 [3rd Dept 2001].

To:

Nathan Losman, Esq. White Fleischner & Fino, LLP 303 Old Tarrytown Road White Plains, New York 10603	Michael D'Angelo, Esq. Dupee & Monroe, P.C. 211 Main Street, P.O. Box 470 Goshen, New York 10924
Joel A. Hirshfield, Esq. Hirshfield & Costanzo, P.C. 189 East Post Road, Suite 402 White Plains, New York 10601	Jana A. Slavina, Esq. Wilson Elser Moskowitz Edelman & Dicker 3 Gannet Drive White Plains, New York 10604
James A. Randazzo, Esq. Gaines Gruner Ponzini & Novick, LLP 11 Martine Avenue, 8th Floor White Plains, New York 10606	