

Sumjdg-denied
Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **PETER J. O'DONOGHUE** IAS PART 13
Justice

MARIANA CRAC,
Plaintiff,

Index No.: 21681/05

-against-

Motion Date: 3/26/08

47-11 QUEENS BOULEVARD REALTY COMPANY
and PHILIP SCOURAS,
Defendants.

Motion Cal. No.: 4

Motion Seq. No.: 001

47-11 QUEENS BOULEVARD REALTY COMPANY,
Third-Party Plaintiff,

-against-

ABRANKIAN BACK & NECK CENTER, INC. and
METRO PEST CONTROL INC.,
Third-Party Defendants.

The following papers numbered 1 to 26 read on this motion by defendant/third-party plaintiff 47-11 Queens Boulevard Realty Company ("Realty") for an Order: (1) granting summary judgment in its favor and dismissing the complaint; and (2) granting defendant/third-party plaintiff Realty summary judgments over and against third-party defendants Abrankian Back & Neck Chiropractic, P.C. s/h/a Abrankian Back & Neck Center, Inc. ("Abrankian") and Metro Pest Control Inc. ("Metro"); and this cross-motion by third-party defendant Abrankian for an Order granting summary judgment in its favor and dismissing the complaint and cross-claims.

	PAPERS <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1-4
Answering Affidavits-Exhibits.....	5-9
Replying Affidavits.....	10-16
Notice of Cross-Motion-Affidavits-Exhibits.	17-20
Answering Affidavits-Exhibits.....	21-24
Replying Affidavits.....	25-26

Upon the foregoing papers it is ordered that the branch of this motion by defendant/third-party plaintiff Realty for an Order granting summary judgment in its favor and dismissing the

complaint is granted.

The branches of this motion by defendant/third-party plaintiff Realty for an Order granting summary judgment over and against third-party defendants Abrankian and Metro are denied as academic.

In the case at bar, plaintiff Mariana Crac ("Crac") alleged that at the time of the accident, she was employed by third-party defendant Abrankian. She claims that she was struck by a basement trap door as it was opened by Metro's exterminator, Mohamlal Roopnarien, coming up from the basement on May 5, 2003.

Defendant/third-party plaintiff Realty contended that it is entitled to summary judgment because it was an out of possession lessor who did not breach any applicable statutory provisions or exercise any control over the operation of the demised premises.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (See Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, supra, 49 NY2d 557.)

Generally, an out-of-possession landlord is not liable for injuries occurring on the premises unless it: (1) has notice of the defect and has consented to be responsible for maintenance or repair; or (2) has retained control of the premises. (See Knipfing v V & J, Inc., 8 AD3d 628 [2nd Dept 2004]; Velazquez v Tyler Graphics, Ltd., 214 AD2d 489 [1st Dept 1995].)

"However, constructive notice may be found where an out-of-possession landlord reserves a right under the terms of a lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists. In such case, only a significant structural or design defect that is contrary to a specific statutory safety provision will support imposition of liability against the landlord." (See Velazquez v Tyler Graphics, Ltd., 214 AD2d 489 [1st Dept 1995].) Thus, the "[r]eservation of a right of entry for inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision and there is a

significant structural or design defect" (See Knipfing v V & J, Inc., 8 AD3d 628 [2nd Dept 2004]; see generally Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559 [1987]; Putnam v Stout, 38 NY2d 607 [1976]; Stark v Port Auth. Of New York and New Jersey, 224 AD2d 681 [2nd Dept 1996]; Johnson v Urena Serv. Ctr., 227 AD2d 325 [1st Dept 1996].)

In the case at bar, defendant/third-party plaintiff Realty established its prima facie entitlement to judgment as a matter of law by demonstrating that it was an out-of-possession landlord which retained no control over the premises where the plaintiff's accident occurred, was not obligated to maintain or repair the premises where the accident occurred (see Exhibit I Article 4 annexed to moving papers), and did not violate any specific statutory provisions. In opposition, plaintiff submitted the expert affidavit of Daniel S. Burdett, P.E.. This affidavit failed to raise a triable issue of fact as to whether defendant/third party Realty violated any specific statutory provisions, since the statutory provisions the plaintiff's expert claims were violated, Administrative Code of City of NY §§ 27-127 and 27-128, are general safety provisions which do not constitute a sufficiently specific predicate for liability. (See O'Connell v L.B. Realty Co., 2008 NY Slip Op 3181 [2nd Dept 2008].) Plaintiff's reliance on OSHA regulations is similarly unavailing since these non-statutory provisions cannot be the basis of constructive notice imputed to the landlord. (See Conti v Kimmel, 255 AD2d 201 [1st Dept 1998].)

Accordingly, the complaint as asserted against defendant/third-party plaintiff Realty is dismissed.

In light of the dismissal of the main action, the third-party complaint and the cross claims for contribution and contractual and common-law indemnification, except for the claims by defendant/third-party plaintiff Realty to recover "any and all damages resulting from third-party defendant Abrankian's breach, including, but not limited to, any amounts paid or to be paid by defendant/third-party plaintiff Realty to plaintiff Crac, and all attorneys' fees, investigation fees, disbursements, and other litigation expenses incurred by defendant/third-party plaintiff Realty in connection with this litigation," are dismissed as academic. Defendant/third-party plaintiff Realty's claim for costs, disbursements, and attorneys' fees incurred by it "in connection with this litigation" is hereby severed. (See CPLR 1010.) Question(s) of fact exist, including but not limited to, whether tenant's action or omission to act was sufficient to trigger paragraph 61 of the lease allowing landlord to recover the items alleged, which may require resolution at trial.

Accordingly, the cross-motion by Abrankian for an Order granting summary judgment and dismissing the complaint and all cross-claims is denied as moot.

Dated: May 12, 2008

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J.S.C.