

.Short Form Order

NEW YORK STATE SUPREME COURT- QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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DINORA CASTILLO,

Plaintiff,

-against-

180 WATER STREET ASSOCIATES L.P.,

Defendant.

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180 WATER STREET ASSOCIATES L.P.,

Third Party Plaintiff,

- against -

NEW YORK CITY DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES,

Third Party Defendant.

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Index No.: 22286/05

Motion Date: 11/28/07

Motion Cal. No.: 7 & 8

Motion Seq. No.: 1 & 2

Third Party Index No.: 350092/06

The following papers numbered 1 to 18 read on this motion by Third Party Defendant The City of New York s/h/a New York City Department of Citywide Administrative Services, for an order: 1) pursuant to CPLR Section 3025(b), permitting Third Party Defendant to amend its third party answer to assert a Worker’s Compensation defense; 2) and upon permission to amend, granting partial summary judgment dismissing all common law claims as against The City of New York s/h/a New York City Department of Citywide Administrative Services; and 3) transferring this case to an IAS City part [Motion No. 1]; and on this motion by Defendant/Third Party Plaintiff for an order granting summary judgment, pursuant to CPLR 3212, and dismissing the Complaint and all cross claims [Motion No. 2].

PAPERS
NUMBERED

<u>Motion No. 1</u>	
Notice of Motion- Affidavits- Exhibits.....	1 - 4
Defendant/Third Party Plaintiff’s Affirmation in Opposition- Affidavits.....	5 - 7
Reply Affirmation.....	8 - 9

Motion No. 2

Defendant/Third Party Plaintiff's Notice

of Motion- Affidavits- Exhibits.....	10 - 13
Plaintiff's Affirmation in Opposition-Exhibits.....	14 - 16
Reply Affirmation.....	17 - 18

Upon the foregoing papers, it hereby is ordered that the motions are resolved as follows:

This is a personal injury action commenced by plaintiff Dinora Castillo (“plaintiff”) against Defendant/Third Party Plaintiff 180 Water Street Associates L.P. (“defendant”) for injuries sustained by plaintiff, an employee in the Department of Human Resources of the City of New York, when she slipped and fell while descending an interior staircase at her workplace located at 172 Water Street, New York, New York on November 12, 2003. Defendant, the lessor of the premises, commenced a third party action against The City of New York s/h/a New York City Department of Citywide Administrative Services (“City of New York”), the lessee of the premises pursuant to a lease agreement with defendant. The City of New York now moves for an order permitting it to amend its third party answer to assert a Worker’s Compensation defense and, upon permission to amend, for an order of partial summary judgment dismissing all common law claims as against the City of New York, and an order transferring this case to an IAS City part. Defendant moves for an order granting it summary judgment, dismissing the Complaint and all cross claims. As the determination of the summary judgment motion [Motion No. 2] may render moot the motion to amend [Motion No. 1], defendant’s motion for summary judgment will be addressed first.

Motion for Summary Judgment/Motion No. 2

It is well-established that summary judgment should be granted only when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra. It is also well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected (citations omitted).” Juarez by Juarez v. Wavecrest Management Team Ltd., 88 N.Y.2d 628, 646 (1996). To establish a prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against an out-of-possession owner, the owner must demonstrate that it relinquished control of the leased premises, and that it was not obligated under the terms of the lease to maintain or repair the

leased premises. Bouima v. Dacomi, Inc., 36 A.D.3d 739 (2nd Dept. 2007); Dunitz v. J.L.M. Consulting Corp., 22 A.D.3d 45 (2nd Dept. 2005).

“[A]n out-of-possession landlord is not liable for negligence with respect to the condition of property unless the landlord is contractually obligated to make repairs, maintain the premises, or has a contractual right to reenter to inspect and make needed repairs.” Guzman v Haven Plaza Hous. Dev. Fund. Co., 69 N.Y.2d 559 (1987); Knipfing v V & J, Inc., 8 A.D.3d 628 (2nd Dept. 2004); Schiavone v 382 McDonald Corp., 251 A.D.2d 486 (2d Dept. 1998); Johnson v Urena Serv. Ctr., 227 A.D.2d 325, lv denied 88 N.Y.2d 814 (1996). See, also, Rocco v. Marder, 42 A.D.3d 516 (2nd Dept. 2007); Nikolaidis v. La Terna Restaurant, 40 A.D.3d 827 (2nd Dept. 2007); Flores v. Baroudos, 27 A.D.3d 517 (2nd Dept. 2006); Beda v. City of New York, 4 A.D.3d 317, 772 N.Y.S.2d 339). As a general proposition, an out-of-possession landlord may be held liable for a third-party's injury on the premises based on the theory of constructive notice where, the landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection, maintenance, and repair, there is a specific statutory violation, and a significant design or structural defect that proximately caused the injury. Spencer v. Schwarzman, LLC, 309 A.D.2d 852(2nd Dept. 2003); Briggs v. Country Wide Realty Equities, Ltd., 276 A.D.2d 456 (2nd Dept. 2000)[“Constructive notice may be found where an out-of-possession landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists”]. See, also, Dunitz v. J.L.M. Consulting Corp., *supra*; Rosas v. 397 Broadway Corp., 19 A.D.3d 574 (2nd Dept. 2005); Roveto v. VHT Enters., Inc., 17 A.D.3d 341 (2nd Dept. 2005); D'Orlando v. Port Auth. of New York & New Jersey, 250 A.D.2d 805 (2nd Dept. 1998); Stark v. Port Authority of N.Y. & N.J., 224 A.D.2d 681 (2nd Dept. 1996); Dalzell v. McDonald's Corp., 220 A.D.2d 638 (2nd Dept. 1995); Pirillo v. Long Island Railroad, 208 A.D.2d 818 (2nd Dept. 1994) Roveto v. VHT Enters., Inc., 17 A.D.3d 341 (2nd Dept. 2005). The right of reentry alone, however, is insufficient to establish liability, which must be based on a significant structural or design defect that is contrary to a specific statutory safety provision. Lane v Fisher Park Lane Co., 276 AD2d 136 (2nd 2000); Johnson v Urena Serv. Ctr., *supra*; Deebs v Rich-Mar Rlty. Assocs., 248 AD2d 185 (2nd Dept. 1998); Velazquez v. Tyler Graphics, 214 AD2d 489 (2nd Dept. 1995).

Here, defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that it was an out-of-possession landlord who retained no control over the premises where the plaintiff's accident occurred, and had no contractual obligation to maintain the premises or make repairs. See, Grippio v. City of New York, 45 A.D.3d 639 (2nd Dept. 2007). Defendant's building manager, Joseph Helmreich, testified at his deposition that the building located at 180 Water Street was used exclusively by the City of New York, which “built out the entire space,” that the premises were leased to the City of New York, and that the lease required the tenant, the City of New York, to maintain the interior of the premises, which “were built out by the City of New York, including the staircases. Having established its prima facie entitlement to summary judgment, the burden then shifted to plaintiff to present sufficient evidence raising a triable issue of fact.

In opposition, plaintiff asserts that she fell on a defective portion of one of the steps on defendant's premises, which she described as the "tread on the edge of the step [that] was loose and lifted off of the step." She argues that this condition was "structural in nature and the responsibility of the landlord, 180 Water Street Associates." In reply, defendant argues that the stairway at issue "was not a common area but a staircase utilized solely by the Third-Party Defendant New York City Department of Citywide Administrative Services," that no expert evidence was presented that the alleged defect was structural, and that, assuming it was structural, paragraph 13.4 of the lease required the lessee to "give written notice to landlord of the need for any such repair. . ." It further was alleged that, although plaintiff used the stairway on numerous occasions prior to her accident, neither she nor anyone else made any complaints to defendant landlord.

As was stated in Nikolaidis v. La Terna Restaurant, 40 A.D.3d 827 (2nd Dept. 2007), "[r]eservation of a right to enter the premises for purposes of 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." Here, plaintiff neither asserts any statutory violation nor shows "any significant structural or design defect." Id.; See, Eckers v. Suede, 294 A.D.2d 533 (2nd Dept. 2002)[the plaintiff failed to submit evidence that the floor condition over which she tripped constituted a significant structural defect which violated a statutory duty to repair (citations omitted)]; Tragale v. 485 Kings Corp., 39 A.D.3d 626 (2nd Dept. 2007). Nor did plaintiff "submit any evidentiary facts with respect to the nature or duration of the defect which allegedly caused the accident." Marchese v. Fresh Meadows Associates, 207 A.D.2d 87 (2nd Dept. 1994). See, also, Aprea v. Carol Management Corp., 190 A.D.2d 838 (2nd Dept. 1993); Portera v. Long Island Sports Complex, Inc., 270 A.D.2d 471 (2nd Dept. 2000).

Plaintiff thus failed to meet her burden of raising a triable issue of fact as to whether the defendant had actual or constructive notice of the defect, or whether the defendant retained sufficient control over the premises such that liability could be imposed upon it under the circumstances, or that the defect at issue was a significant structural or design defect. Accordingly, defendant's motion for summary judgment dismissing the complaint must be, and hereby is granted, and the complaint is dismissed. This disposition renders academic the City of New York's motion to amend its answer.

Dated: January 15, 2008

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J.S.C.