

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - February 17, 2011

JOSEPH COVELLO, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
JEFFREY A. COHEN, JJ.

2010-06571

DECISION & ORDER

He Shang Wang, et al., respondents, v 82-90
Broadway Realty Corporation, appellant (and a third-
party action).

(Index No. 22954/08)

Tromello, McDonnell & Kehoe, Melville, N.Y. (James S. Kehoe of counsel), for
appellant.

Rimland & Associates, New York, N.Y. (Anthony M. Grisanti of counsel), for
respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals, as
limited by its brief, from so much of an order of the Supreme Court, Queens County (Rosengarten,
J.), dated May 10, 2010, as denied those branches of its motion which were for summary judgment
dismissing the complaint, or to strike the plaintiffs' bill of particulars to the extent that it referred to
loss of earnings.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs,
that branch of the defendant's motion which was for summary judgment dismissing the complaint is
granted, and that branch of the defendant's motion which was to strike the plaintiffs' bill of particulars
to the extent that it referred to loss of earnings is denied as academic.

The plaintiff He Shang Wang (hereinafter the injured plaintiff), an employee of New
York Supermarket, Inc. (hereinafter the supermarket), alleged that he was injured when he fell down
a stairway at his place of employment. The supermarket leased the premises from the defendant, 82-

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90 Broadway Realty Corporation. Following discovery, the defendant moved, inter alia, for summary judgment dismissing the complaint. In the order appealed from, the Supreme Court, among other things, denied the motion, finding that the defendant failed to establish its prima facie entitlement to judgment as a matter of law. We reverse the order insofar as appealed from.

The defendant established its prima facie entitlement to judgment as a matter of law by submitting its lease with the supermarket and an affidavit of the defendant's vice president, both of which demonstrated that it was an out-of-possession landlord that did not retain control over the premises and was not obligated under the terms of the lease to perform repairs or maintenance (*see Kane v Port Auth. of N.Y. & N.J.*, 49 AD3d 503, 504; *see also Euvino v Loconti*, 67 AD3d 629, 631, *Felder v Wank*, 227 AD2d 442, 442; *cf. Melendez v American Airlines*, 290 AD2d 241, 242; *Mikolajczyk v Morgan Contrs.*, 273 AD2d 864, 864). Moreover, the defendant made a prima facie showing of entitlement to judgment as a matter of law by submitting the injured plaintiff's deposition testimony, which demonstrated that he was unable to identify any defect which caused him to fall (*see Reiff v Beechwood Browns Rd. Bldg. Corp.*, 54 AD3d 1015, 1015; *Curran v Esposito*, 308 AD2d 428, 429; *see also Rodriguez v Cafaro*, 17 AD3d 658, 658; *Tresgallo v Danica*, 286 AD2d 326, 326).

In opposition, the plaintiffs raised a triable issue of fact as to whether the landlord retained control over the premises and, thus, could be held liable for injuries caused by a defective condition that was created by the defendant or of which it had actual or constructive notice (*see Nelson v Cunningham Assoc., L.P.*, 77 AD3d 638, 639). The plaintiffs, however, failed to show what defect, if any, caused the accident. Accordingly, that branch of the defendant's motion which was for summary judgment dismissing the complaint should have been granted (*see Reiff v Beechwood Browns Rd. Bldg. Corp.*, 54 AD3d at 1015; *Pluhar v Town of Southampton*, 29 AD3d 975, 975; *Rodriguez v Cafaro*, 17 AD3d at 658).

The parties' remaining contentions have been rendered academic by our determination or are without merit.

COVELLO, J.P., BELEN, HALL and COHEN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court