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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable JOHN A. MILANO IA PART 3
Justice

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ALAN G. WEIL, et al.

Plaintiff(s),

- against -

Index
Number 5597 1998

Motion June 13, 2000
Date: June 20, 2000

AMERICAN AIRLINES, INC., et al.

Defendant(s).

Motion
Cal. No. 50, 58

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The following papers numbered 1 to 23 read on these separate motions by defendants/third-party plaintiffs American Airlines, Inc. (hereinafter "American") and The Port Authority of New York and New Jersey (hereinafter "Port Authority") for summary judgment in their favor dismissing plaintiffs' complaint as against them and by third-party defendant Natural Energy Unlimited, Inc. (hereinafter "Natural") for summary judgment in its favor dismissing the third-party complaint of defendants/third-party plaintiffs American, Port Authority, and Sky Chefs, Inc. (hereinafter "Sky") as against it and for costs and sanctions and on these separate cross motions by defendant/third-party plaintiff Sky for summary judgment in its favor dismissing plaintiffs' complaint and all cross claims against it and by defendants/third-party plaintiffs American and Port Authority for summary judgment in their favor and against third-party defendant Natural on their claim for contractual indemnification.

	<u>Papers</u> <u>Numbered</u>
Notices of Motion - Affidavits - Exhibits	1 - 9
Notice of Cross Motion - Affidavits - Exhibits ...	10 - 14
Answering Affidavits - Exhibits	15 - 20
Reply Affidavits	21 - 23

Upon the foregoing papers it is ordered that the motions and cross motions are consolidated and determined as follows:

In this action, plaintiffs seek damages for personal injuries allegedly sustained by plaintiff Alan G. Weil on September 8, 1997, when he fell on a step outside a door leading to the tarmac of an airline terminal at John F. Kennedy International Airport. The terminal was owned by defendant Port Authority and leased to defendant American. According to the terms of the lease, defendant American had exclusive possession and control of the subject premises and was responsible for maintenance and repairs.

Defendant Port Authority retained the right to enter the premises and make repairs it deemed necessary.

It is well settled that an out-of-possession landlord owes no duty to maintain and make repairs upon demised premises unless the landlord retains control over the premises or is contractually obligated to perform such maintenance and repairs. (See, Putnam v Stout, 38 NY2d 607; see also, D'Orlando v Port Authority of New York and New Jersey, 250 AD2d 805; Stark v Port Authority of New York and New Jersey, 224 AD2d 681.) Reservation of the right to enter the premises for inspection and repair may constitute sufficient retention of control to support a finding that defendant landlord had constructive notice of a defective condition, provided that a specific statutory violation exists and there is a significant structural or design defect. (See, Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559; see also, Stark v Port Authority of New York and New Jersey, supra.)

Here, defendants Port Authority and American have presented competent evidence demonstrating defendant Port Authority's entitlement to summary judgment. This evidence established that defendant Port Authority did not retain control over the premises and was not contractually obligated to perform maintenance or repairs. Plaintiffs, in opposition, contend that an issue of fact exists concerning whether defendant Port Authority is liable based on its reservation of the right to enter and make repairs and its violation of certain sections of the Administrative Code. This contention, however, is without merit. There is no statute imposing a duty on defendant Port Authority to maintain and repair the terminals it leases at John F. Kennedy International Airport since defendant Port Authority functions as a state agency and is exempt from municipal regulation. (See, D'Orlando v Port Authority of New York and New Jersey, supra; see also, Santiago v Port Authority of New York and New Jersey, 203 AD2d 217; Love v Port Authority of New York and New Jersey, 168 AD2d 222.)

Accordingly, the part of defendants Port Authority and American's motion for summary judgment dismissing plaintiffs' complaint and all cross claims against defendant Port Authority is granted.

The part of defendants Port Authority and American's motion for summary judgment dismissing plaintiffs' complaint and all cross claims against defendant American, however, is denied inasmuch as issues of fact exist concerning whether the subject step or grade beam was defective based on the affidavit of plaintiffs' expert witness and if so, whether defendant American created the defective condition or had actual or constructive notice thereof.

Third-party defendant Natural's motion for summary judgment is denied. While General Obligations Law §5-321 does render the indemnity provision in the operating agreement void and unenforceable, that provision is separate from the provision requiring third-party defendant Natural to procure insurance naming defendants/third-party plaintiffs American, Port Authority and Sky

as additional insureds. (See, Kinney v Lisk Co., 76 NY2d 215; see also, Keelan v Sivan, 234 AD2d 516; Matthew v Crow Constr. Co., 220 AD2d 490; Schumacher v Lutheran Community Servs., 177 Ad2d 568.)

Defendants/third-party plaintiffs American and Port Authority's cross motion for summary judgment on their claim for contractual indemnification is denied inasmuch as defendants/third-party plaintiffs American and Port Authority failed to meet their initial burden of demonstrating their entitlement to summary judgment as a matter of law. (See, Alvarez v Prospect Hosp., 68 NY2d 320.)

Defendant/third-party plaintiff Sky's cross motion for summary judgment is granted without opposition. Defendant/third-party plaintiff Sky presented competent evidence demonstrating its entitlement to summary judgment as a matter of law. This evidence established that defendant/third-party plaintiff Sky did not own, lease, operate, control, or maintain the subject area and that it did not create or have actual or constructive notice of the alleged defective condition. Accordingly, plaintiffs' complaint and all cross claims against defendant/third-party plaintiff Sky are dismissed.

Dated: August 17, 2000

Justice John A. Milano