Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

KHALIL HONARYAR, an Infant under the Age Of 14years by His Father and Natural Guardian HABIB HONARYAR and HABIB HONARYAR, Individually

Plaintiff

-against-

THE PIZZA PALACE and SKINSON REALTY CORP.

Defendant

Index No: 1067/05

Motion Date: 7/5/07

Motion Cal. No.: 6

Motion Seq. No.: 2

SKINSON REALTY CORP.

Third-party Plaintiff

-against-

PIZZA PALACE & ITALIAN FOOD, HECTOR VALDEZ and LOUIS MIGUEL TORRES

Third-party Defendant

SKINSON REALTY CORP.

Second Third-party Plaintiff

-against-

BETTY GARCIA and JORGE DOMINGUEZ

Second Third-party Defendant

The following papers numbered 1 to 15 read on this motion by

defendant/third-party plaintiff, Skinson Realty Corp. (Skinson) For summary judgment dismissing the complaint insofar as it is asserted against it or, in the alternative for summary judgment in its second third-party action for contractual and common law indemnification against third-party defendant, Garcia and Dominguez

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 6
Answering Affidavits-Exhibits.....	7 - 13
Replying Affidavits.....	14 - 15

Upon the foregoing papers it is ordered that this motion is in all respects denied.

On November 14, 2003, the infant plaintiff, KHALIL HONARYAR, while walking on the public sidewalk, fell through the open cellar door into the cellar of commercial premises located at 41-94 Bowne St. The plaintiffs commenced this action against the tenants, second third-party defendants, Garcia and Dominguez (hereinafter the tenant) and the owner/lessor defendant/third-party plaintiff, Skinson to recover for, inter alia, the injuries the infant sustained as a result of the fall.

Skinson now moves for summary judgment dismissing the complaint insofar as it is asserted against it on the ground that it is an out-of-possession landlord and cannot be held liable to the plaintiffs since it did not retain control over the premises and did not contract to maintain the premises.

Pedestrians on the sidewalk must use reasonable care and look where they are going, but they are not required to be constantly watching for openings or obstructions in the sidewalk, since they have the right to assume that the sidewalk is in a reasonably safe condition for travel and to act on that assumption (see, Delaney v. Philhern Realty Holding Corporation, 280 NY 461, 466). This includes the right to assume that vaults constructed thereunder are securely covered, or, if left open, are properly guarded. (see, Friedlander v. Eagle Dry Goods Corp., 267 AD 701 [1944].)

The abutting owners and occupants for whose own benefit a permanent covered opening in the sidewalk exists, such as the cellar doors in this case, must use reasonable care in the construction, maintenance, and operation of the opening to

prevent undue risk of harm to pedestrians using the sidewalk (see, Cassidy v. Donner,7 AD2d 645 [1958], app dismissed, 7 NY2d 716 [1959]; Dowling v. Cromer, 269 AD 777 [1945]; 65 NY Jur. 2d Highways, Streets, and Bridges § 546 Assumption of Safety of Way; see, also, Clifford v. Dam, 81 NY 52 [1880]). The special benefit of having such an opening carries with it the duty to exercise reasonable care to know that it is left in a reasonably safe condition when it has been used (see, McCabe v. Century Theatres, Inc., 25 AD2d 154 [1966], aff'd 18 NY2d 648 [1966]; Pensa v. Raleigh Hall, Inc., 243 AD 816 [1935]; O'Brien v. Christy, 142 Misc. 2d 1069 [1989]; Administrative Code of the City of New York § 19-119). In addition, where an abutting owner has not surrendered complete control of the premises, it has the non-delegable duty of exercising due care with respect to the operation and maintenance of the cellar doors (see De Clara v. Barber S. S. Lines, 309 NY 620, 628 [1956]; Kirby v. Newman, 239 NY 470,[1925]; Collins v. Smith, 54 AD 774 [1938]; McCabe v. Century Theatres, Inc., supra; Cassidy v. Donner, supra; Pensa v. Raleigh Hall, supra). Notice is not required for liability to attach with respect to an abutting owner who comes within the specific benefit rule. (see, Clemmons v. Cominskey, 1 AD2d 933 [1956], 934 aff'd 2 NY2d 958 [1957], O'Brien v. Christy, supra).

The subject commercial premises are part of a single building which has both residential and commercial space. In support of its motion, Skinson submitted, inter alia, the lease and portions of the deposition testimony of Alberto Dominguez, employed as the resident superintendent where he stated that he is responsible for the maintenance of the residential portion of the building only and that the owners of the stores are responsible for the non-structural maintenance of their leased premises. The lease reflects that the subject demised premises include the basement. However, in opposition to the Skinson's motion, plaintiff submitted the entire deposition testimony of Dominguez which included testimony that the cellar doors are not locked during working hours, and he has gone into the cellar of the commercial premises using these doors to inspect and determine if there are any leaks from the pipes that belonging to the residential portion of the building. He also testified that he would repair minor problems to those pipes and call a contractor for larger jobs. In addition, the lease reserves to the owner/landlord the right to re-enter and inspect and repair the premises.

Dominguez further testified that he observed one of the doors to the basement open every day whenever the pizzeria was open, and that two orange cones are placed in front of the doors together with a yellow danger sign. The infant plaintiff and his

father, however, testified that they did not observe any cones, warning signs or any other barricades at the cellar doors on the day of the accident.

Based upon all of the above, summary judgment must be denied as the evidence submitted in support and opposition to the motion raise triable issues of fact including whether Skinson had surrendered complete control of the cellar to the tenant, whether the cellar was being used at the time of the accident and whether Skinson breached its duty care in the operation and maintenance of the cellar doors.

The branch of Skinson's motion for common-law and contractual indemnification is denied. It is noted that although Skinson has not submitted a copy of the second third-party complaint to enable the court to determine what causes of action are asserted against the second third-party defendants, the court has assumed that the causes of action are essentially identical to the causes of action asserted against third-party defendants, Pizza Palace & Italian Food, Valdez and Torres.

Where, as here, the alleged liability of a defendant is not entirely vicarious, but based in part upon its alleged breach of a duty of care owing directly to the plaintiffs, common-law indemnification is not available (see, e.g., Rogers v. Dorchester Assoc., 32 NY2d 553 [1973]; Storms v. Dominican College of Blauvelt, 308 AD2d 575, 577 [2003]). Accordingly, the motion for summary judgment on its claim for common-law and contractual indemnification is denied as premature, since there has been no determination as to whether Skinson was at fault in the happening of the accident (see, Brown v. Two Exch. Plaza Partners, 76 NY2d 172, 178-179 [1990]; Daries v. Haym Solomon Home for the Aged, 4 AD3d 447, 449 [2004]; Kagan v. Jacobs, 260 AD2d 442 [1999]).

Dated: August 28, 2007
D# 31

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J.S.C.