

**Doherty v Karten**

2008 NY Slip Op 30318(U)

January 29, 2008

Supreme Court, New York County

Docket Number: 0123231/2000

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**EILEEN A. RAKOWER**  
J.S.C.

PRESENT: \_\_\_\_\_

PART 5

Index Number : 123231/2000

DOHERTY, JAMES

INDEX NO. \_\_\_\_\_

123231/00

vs

KARTEN, ALEXANDER

MOTION DATE \_\_\_\_\_

Sequence Number : 002

MOTION SEQ. NO. \_\_\_\_\_

002

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits \_\_\_\_\_

2, 3

Replying Affidavits \_\_\_\_\_

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

**FILED**  
FEB 05 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

1/23/08

Dated: \_\_\_\_\_

**EILEEN A. RAKOWER**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
JAMES DOHERTY and ROSEMARY DOHERTY,

Plaintiffs,

Index No.  
123231/00

- against -

Mot. Seq. No.  
002 & 003

Decision and Order

ALEXANDER KARTEN, JOSEPH KARTEN, INNER CITY  
REDEVELOPMENT CORPORATION and 2350 FIFTH AVENUE  
CORPORATION,

Defendants.

-----X  
ALEXANDER KARTEN, JOSEPH KARTEN and 2350 FIFTH AVENUE  
CORPORATION,

Third-Party Plaintiffs,

Index No.  
590152/04

-against-

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, NEW  
YORK CITY BOARD OF EDUCATION and THE CITY OF NEW YORK,

Third-Party Defendants.

-----X  
HON. EILEEN A. RAKOWER

Plaintiffs commenced this personal injury action alleging that plaintiff James Doherty was exposed to toxic chemicals during his employment with the New York City Board of Education ("BOE") at the premises known as 2350 Fifth Avenue, in the County and State of New York. Mr. Doherty alleges injuries as a result of his exposure to Perchloroetylene, a.k.a Tetrachloroethylene ("PERC"), a chemical solvent commonly used by dry cleaners, from November 14, 1997 through June 18, 1998. Specifically, Mr. Doherty alleges that he was exposed to PERC that was carried through the ambient air by the HVAC system installed by the defendants, more particularly, by Inner City Redevelopment Corporation ("Inner City"). Mr. Doherty also alleges exposure via drums of PERC left on the premises. Rosemary Doherty brings a derivative action. Defendants Alexander Karten, Joseph Karten ("the

[\* 3]

Kartens”)and 2350 Fifth Avenue (“2350”)bring a third party action as against New York City School Construction Authority (“NYSCA”), BOE and the City of New York collectively, (“City”) for indemnification.

Alexander Karten is alleged, in the complaint, to have controlled the subject premises after November 14, 1997. Joseph Karten is alleged, in the complaint, to have permitted PERC to be used and stored at the premises prior to November 14, 1997. Both Alexander and Joseph Karten are alleged to have owned the premises in that they are officers in the corporate entity referred to above as 2350. Inner City, of which Joseph Karten is president, is alleged to have repaired, renovated, maintained the premises and installed the HVAC system prior to November 14, 1997.

The Kartens and 2350 move for summary judgment as against both plaintiff and the City pursuant to CPLR 3212. Plaintiff and City oppose the motion. City, by separate motion, moves for summary judgment dismissing the Kartens’ and 2350’s third- party complaint as against it. 2350 and the Kartens oppose City’s motion. Defendant Inner City does not submit papers.

2350, in support of its motion, submits the following: the pleadings; the deposition transcript of Mr. Doherty dated August 26, 2003; the deposition transcript of Mr. Doherty dated March 21, 2006; the deposition transcript of Joseph Karten; the deposition transcript of Michael Salerno, Regional Facilities Manager for the Department of Education; the deed of sale for 2350 Fifth avenue dated November 9, 1970; the lease agreement between 2350 and NYSCA dated October 3, 1995; an assignment of lease agreement between NYSCA and the BOE dated October 3, 1995; a notice to admit; a letter re: “IS-120 Lease Alterations,” written by Joseph Karten for Inner City and addressed to the BOE; a letter written by Weston Managers and Designers Re: “New York City School Construction Authority . . . Indoor Air Quality/ Summa Canister Air Sampling Report” addressed to Mr. Eric Bregman; a copy of the Order on Consent; the bill of particulars; a copy of a report written by Dr. Debra Milek, of the Mt. Sinai-Irving J. Selikoff Center for Occupational and Environmental Medicine; and a copy of a report written by Dr. Stephen Adler of the Westchester Medical Center, Division of Nephrology dated April 20, 2004.

Plaintiffs, in opposition, submit: a portion of Mr. Doherty’s deposition transcript dated March 21, 2006; a portion of Joseph Karten’s deposition transcript; a portion of Michael Salerno’s transcript; and an affidavit by Dr. Jonathan S. Wolf. City submits many exhibits which are duplicative of either plaintiffs or 2350’s submissions.

[\* 4 ]  
However, not submitted elsewhere is a copy of a "Remedial Work Plan" prepared by AKRF Engineering, P.C. dated May 1997.

The subject premises is made up of three contiguous structures, a center three story structure, a two-story annex and a one-story annex. The building was purchased by 2350 in 1970 and was leased to several laundry and dry cleaning establishments, all of whom vacated prior to 1995. BOE, by a lease dated October 3, 1995, leased "50,000 square feet of space, comprising the first floor in the building located at 2350 Fifth Avenue" from 2350.

BOE contracted with Inner City to renovate the leased space for use as a school. In the fall and winter of 1996, out of concern about the air quality in the proposed school, the BOE hired environmental consultants to evaluate the PERC levels in the building. The consultants had the building "baked, by raising the temperature to 85°F for 48 hours. This temporarily lowered the PCE ( PERC) levels in the building atmosphere." In May 1997, a remedial work plan was developed by AKRF Engineering, P.C. ("AKRF"). The plan referred to prior studies and reported that "very high levels" of PERC were measured in a hole drilled through the floor at the "northern end of the school." Generally, the highest contamination was found to be in or near "floor drains and other penetrations of the floor slab," suggesting that the PERC was coming from the area beneath the floor, primarily through "penetrations in the floor slab."

An Order on Consent, effective July 3, 1997, was issued by the New York State Department of Environmental Conservation to 2350 which required it to develop and implement a Preliminary Site Assessment ("PSA"). The stated purpose of the PSA was to gather data which would enable the Department of Environmental Conservation ("DEC") to:

characterize hazardous wastes which are or may be present at the site and to enable the Department to determine whether such wastes constitute a significant threat to public health or the environment necessitating remediation.

The Order also states:

The department does not allege that Respondent engaged in the intentional disposal of contaminants at the Site. Respondent maintains that the PERC contamination that is the subject of this Order is the result

[\* 5]

of day-to-day dry cleaning activities, the release of small quantities of PERC from dry cleaning equipment over time, and/or a spill or spills of currently unknown origin.

Under Section 2(B)(1)(c) titled "Preliminary Site Assessment Contents and Submittals," the Order directed 2350 to develop and submit:

A health and safety plan to protect persons at and in the vicinity of the Site during the performance of the PSA which shall be prepared in accordance with 29 CFR 1910 and all other applicable standards by a certified health and safety professional. Supplemental items shall be added to this plan by Respondent as necessary to ensure the health and safety of all persons at or in the vicinity of the Site during the performance of any work pursuant to this Order.

The BOE opened its school in September of 1997. The presence of elevated levels of ambient PERC on school property generated local media interest and garnered the attention of then Public Advocate Mark Green. The school closed shortly thereafter in October 1997.

Mr. Doherty was assigned as custodian to the empty premises by his employer, the BOE. Mr. Doherty was a self-described "key man," meaning he had "all the keys." (Plaintiff Deposition, Page 28). His responsibilities at the premises were to perform basic maintenance duties, including maintaining the air conditioning and heating systems. (Id. at Page 16). Mr. Doherty concedes that he knew about the PERC contamination and refers to the school as a "toxic waste dump." (Id. at Page 24).

A "Vapor Recovery System" ("VRS") had been installed in the premises leased by the BOE by 2350 pursuant to the court ordered PSA. (No other "health and safety plan" was provided to the Court.) Mr. Doherty alleges that he was responsible for taking readings from the VRS and calling the results in to an office in the same building. Mr. Doherty claims he was told by the prior custodian to take the readings and call upstairs with them. Mr. Doherty stated that it was Mr. Karten's office. Mr. Doherty alleges that empty and half-empty barrels of PERC were located "all over the second and third floor, the stairways, all over them." He also states that in order to access the heating and air conditioning units on the roof, he had to pass through the second and third floors to get to them. (Plaintiff Deposition Page 36). 2350 does not confirm the existence of these barrels or that they contained PERC.

Mr. Doherty, in preparation for a fire department scheduled "standpipe test," cleaned the stairwells. According to Mr. Doherty:

When the fire department came in and did the standpipe test I had to clean off the staircases where the standpipes were and everything was thrown on the staircases.

He began cleaning on June 7, 1998, removing some of the drums that he alleges contained PERC. He wore usual street attire, cloth gloves, a dust mask and sneakers. Mr. Doherty denies spilling or coming into direct contact with any chemicals. Four days later, Mr. Doherty noticed a large amount of bright red blood in his urine. It went away but returned again in another four days. He went to the emergency room of Nyack Hospital and was hospitalized for 20 days, during which time he developed renal failure.

Initially, Joseph and Alexander Karten seek dismissal of all claims as against them as individuals. Corporations are legal entities distinct from their managers and shareholders and have an independent legal existence. The courts generally do not have the authority to 'pierce the corporate veil' except to prevent fraud or to achieve equity. (*Portchester Elec. Const. Co. v. Atlas*, 40 N.Y.2d 652[1976]). Plaintiffs make no such allegations, nor do they oppose the motion by the Kartens individually. Thus, the case as against the Kartens individually is dismissed.

2350 argues that, as an out of possession landlord, it is not liable to plaintiffs for their injuries. Plaintiffs, in opposition, argue that 2350 reserved the right to re-enter the premises pursuant to the lease. Plaintiffs argue that such a right subjects 2350 to liability. Article 29.1 of the lease agreement between 2350 and the BOE states, in relevant part:

LANDLORD or LANDLORD's agent shall have the right to enter and/or pass through the premises or any part thereof by appointment, upon not less than two (2) business days notice to the Division of School Facilities and to the principle of the school (a) for the purpose of making such repairs in or to the premises as may be provided for by this Lease or as it may be required to be made by law . . . LANDLORD shall also have the right to enter on and/or pass through the premises, or any part thereof; at such times as such entry shall be required by circumstances of emergency affecting the premises . . .

[\* 7]

2350 claims that because it was required to give notice to the BOE before entering the premises, the BOE had exclusive control. Further, pursuant to the lease agreement, it was the sole responsibility of the BOE to determine what constitutes an emergency or hazardous condition.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Generally, an out of possession landlord cannot be held liable for a third party's injuries on the premises unless it had notice of the defect and consented to be responsible for repairs or maintenance. (*Gomez v. 192 East 151<sup>st</sup> Street Associates, L.P.*, 26 A.D.3d 276 [1st Dept. 2006]). A reservation of the right to re-enter and make repairs will constitute sufficient retention of control to subject the owner to liability. (*Worth Distribs. v Latham*, 59 N.Y.2d 231 [1983]). An owner will escape liability only when it has completely parted with possession and control of the premises. (*Id.* at 238).

Pursuant to relevant case law, the two-day notice requirement stated in the lease does not negate 2350's right to re-enter the premises. Notwithstanding the fact that the BOE had the discretion to define what constitutes an emergency, the lease expressly grants 2350 *unlimited access* in emergency or hazardous situations. Neither can 2350 claim that it did not have notice that there was a hazardous condition on the premises. The Order on Consent issued to 2350 provided actual notice of a potentially serious hazard posed by the presence of ambient PERC. Indeed, the Order directed 2350 to implement a "health and safety plan to protect persons at and in the vicinity of the site during the performance of the PSA." Thus, 2350 cannot escape liability as an out of possession landlord.

Mr. Doherty alleges a significant exposure to PERC stored in drums on the second and third floors of the building. 2350 cannot argue it escapes liability as an out

of possession landlord regarding the drums allegedly stored outside of the BOE's leasehold. However, Mr. Joseph Karten testified that all chemicals were removed from the premises prior to the BOE entering into the lease.

It is well settled that issues of witness credibility are not properly resolved in a motion for summary judgment (*Santos v. Tempco Services Industry, Inc.*, 295 A.D.2d 218[1st Dept. 2002]) and the assessment of the value of a witness's testimony constitutes an issue for resolution by the trier of fact (*Dollas v. W.R. Grace and Co.*, 225 A.D.2d 319[1st Dept. 1996]).

Clearly, there are issues of fact regarding whether Mr. Doherty's injuries were sustained on the leased premises or in other locations which were not controlled by the BOE. It is unclear who, if anyone, directed plaintiff to have contact with the alleged drums outside of the BOE leasehold. There are issues of fact as to which exposure, PERC in the ambient air and/or PERC alleged to be contained in drums on that staircase was the proximate cause of Mr. Dougherty's injuries.

Finally, 2350 submits two doctors' reports in which they opine that Mr. Doherty's injuries were pre-existing. In opposition, plaintiffs submit a treating doctor's affidavit that links Mr. Doherty's injuries to PERC exposure. Whether Mr. Doherty was exposed to PERC, and whether he was exposed at levels that created a health hazard are issues that are unresolved. The motion court's proper role is merely issue finding, not issue determination and the court must draw all reasonable inferences in the opposing party's favor. (*Rose v. Da Ecib USA*, 259 A.D.2d 258[1st Dept. 1999]). Thus, 2350's motion for summary judgment as against plaintiff must be denied.

Both 2350 and City move for summary judgment against each other. 2350 seeks a judgment against City for indemnification and City moves for summary judgment against 2350. City argues that it is not obligated to indemnify 2350 because Mr. Doherty has neither suffered a "Grave Injury" as it is defined by Workers' Compensation Law, nor did it expressly agree to indemnify 2350 in its contract. 2350, in opposition, argues that City owed the sole duty of care to Mr. Doherty and they are City's acts or omissions which caused his injuries. Notably, BOE assigned Mr. Doherty to the premises after it knew that the premises contained PERC in the ambient air.

The "Save Harmless" section of the lease between City and 2350 states, in relevant part:

TENANT shall defend, indemnify and save LANDLORD and its partners, officers, agents, representatives and employees harmless from and against any and all claims, liability, losses, damages, expenses, suits and judgments arising from injuries . . . resulting from TENANT'S acts, omissions, negligence or misconduct . . . in connection with its use and occupancy of the demised premises . . .

Generally, Workers' Compensation Law shields employers from liability as against a third party except when plaintiff suffers a "grave injury" or the third party is indemnified pursuant to contract. (*Rodrigues v. N & S Building Contractors, Inc.*, 5 N.Y.3d 427[2005] *citing* Workers' Compensation Law §11). As the contract between 2350 and City contains such an indemnification clause, an exception exists to the general rule barring third party suits against an employer. However, 2350 is only entitled to contractual indemnification here if Mr. Doherty's injuries were caused by an act, omission, negligence or misconduct of the City. It is premature at this juncture to grant summary judgment as to either party on the issue of contractual indemnification. (*Alexander v. New York City Transit*, 34 A.D.3d 312[1st Dept. 2006]).

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted to the extent that the complaint is hereby severed and dismissed as against defendants Alexander Karten and Joseph Karten, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that 2350 Fifth Avenue Corporation's motions for summary judgment are denied; and it is further

ORDERED that defendant the City of New York's motion is denied; and it is further

ORDERED that the remainder of the action shall continue.

DATED: January 29, 2008

**FILED**  
FEB 05 2008  
CLERK'S OFFICE  
NEW YORK  
EILEEN A. RAKOWER, J.S.C.