SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL PART: 48**

TOMASA FLORES,

INDEX NO.:13684/05

Plaintiff,

MOTION DATE:10-14-07
SUBMIT DATE: 1-25-08
SEQ. NUMBER - 003

-against-

530 WJS LLC and SPIEGEL ASSOCIATES,

Defendants

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The following papers have been read on this motion:

Order to Show Cause, dated 11-27-07..... 1
Affirmation in Opposition, dated 1-7-08.....2
Reply Affirmation, dated 1-23-08.....3

Defendants' motion for summary judgment, CPLR §3212 is granted and the action is dismissed. That portion of the motion which seeks leave to file a jury demand is denied as moot.

Plaintiff, an employee of Nassau Candy Distributers, Inc., (NCD) was injured when, while inside the premises, leased by NCD from defendant, 530 WJS, LLC (WJS), pieces of ceiling tile and electrical wire or cable fell on her causing injury. Defendant, WJS, the

owner of the building, had previously leased the entire building to NCD pursuant to a lease which imposed upon the tenant NCD the obligation to perform all repairs and maintenance with respect to the building. Defendant Spiegel Associates is the managing agent for WJS. The obligations imposed upon NCD were all inclusive and applied to both structural and nonstructural conditions, including lavatories and bathrooms. Defendants retained a limited right to enter the leased premises to make inspections, to exhibit the premises to prospective buyers or tenants and for any purpose whatsoever relating to safety, protection or preservation of the premises. The lease also reserves a right to the landlord to enter the premises to make repairs for reasons of safety, without imposing an obligation to do so.

Plaintiff, while not disputing that defendants were an out of possession landlord (and agent), argues that defendants retained sufficient control so as to owe a duty to plaintiff and that the doctrine of *res ipsa loquitur* applies.

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*see Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986), *Rebecchi v. Whitmore*, 172 AD2d 600, (2nd Dept. 1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Frank Corp. v. Federal Ins. Co.*, *supra* at 967; *GTF Mktg. V. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore*, *supra* at 601.

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist (see *Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2nd Dept. 1989)].

The submissions by defendants establish entitlement to judgment thus shifting the burden to the plaintiff to rebut the movants' case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). Here, plaintiff has failed to establish the existence of triable issues of fact and hence, the motion for summary judgment is granted.

Historically, landlords could not be held liable for injuries caused by dangerous conditions on their premises when possession had been transferred. Courts believed that conveyance of possession by lease was similar in effect to conveyance of title. This rule was relaxed so as to impose a duty to remedy dangerous conditions on a landlord who had contractually assumed the responsibility to make repairs. Thus, a landlord may be found liable for failure to repair a dangerous condition on leased premises of which it has notice, if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs, *Chapman v. Silber*, 97 NY2d 9, 19 (2001).

Generally, the liability of an out of possession landlord hinges on whether the landlord has retained sufficient control over the premises to be held to have constructive notice of the condition, *Massucci v. Amoco Oil Co.*, 292 AD2d 351 (1st Dept. 2002) as where the landlord has either contractually or through a course of conduct became obligated to maintain or repair the defective condition. *Melendez v. American Airlines, Inc.*, 290 AD2d 241 (1st Dept. 2002). A landlord who has the right but not the obligation to enter the premises and make repairs at the tenant's expense may also be liable if the dangerous condition constitutes a significant structural or design defect. *Supra.*

Here, there was no obligation on the part of the defendants to make any repairs or perform any maintenance, structural or otherwise and although the lease gives the defendants the right but not the obligation to make repairs, there is no evidence here that it was either a structural or design defect that caused the incident.

Here the defendants exercised no control over the premises, were not contractually obligated, assumed no responsibility for maintenance and did not create the dangerous condition, hence there is no liability to plaintiff *Buckowski v. Smith*, 185 AD2d 556 (3d Dept. 1992).

Plaintiff's reliance on the doctrine of *res ipsa loquitur* is of no avail. The elements necessary for the application of this rule are that (i) the event ordinarily does not occur in the absence of negligence (ii) the cause was an agency or instrumentality in a defendant's exclusive control and (iii) plaintiff did not cause or contribute to the event. *Morejon v. Rais Construction Co.*, 7 NY3d 203, 209 (2006). Here, plaintiff has not demonstrated sufficient

facts to make a prima facie showing that the element of exclusive control has been or may be satisfied. *Cf Ever Win Inc., v. 1-10 Industry Associates, LLC.*, 33 AD3d 845 (2d Dept. 2006) applying to water main pipes.

Based upon the foregoing, plaintiff has failed to demonstrate the existence of a triable issue of fact, the motion for summary judgment is granted and the action is dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 11, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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