At an IAS Term, Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3RD day of April, 2008.

P R E S E N T:

HON. DAVID B. VAUGHAN,
Justice.

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GREGORY HILL AND HELEN LEIGH, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS THAT WERE OF EARL S. LEIGH,

Index No.: 15179/05

Plaintiffs,

- against -

ABDO ALSAEDE, ALI ABDO ALSAEDE AND PRIME LOCATIONS, INC.,

Defendants.

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The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	5-6, 7
Reply Affidavits (Affirmations)	8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, the motion of defendant Prime Locations, Inc. (Prime or the managing agent) for an order, pursuant to CPLR 3212 and 3211, granting it summary judgment dismissing the complaint and all cross claims asserted against Prime is granted to the extent of dismissing the claims and cross-claims based on common-law negligence, and the cross-motion of

Gregory Hill and Helen Leigh, as administratrix of the estate of Earl S. Leigh (collectively, plaintiffs[1]), for summary judgment against Prime is denied.

Facts

On May 4, 2005, plaintiffs were struck by bricks, concrete, and other debris as they walked on a public sidewalk abutting 797-815 Stanley Avenue in Brooklyn, New York (the building), a block-long, single-story building with eight commercial store fronts and a basement. The building's roof was flat and had a parapet[2] which extended above the height of the rooftop and which was made of brick and mortar with a stone coping [3] running along its top. The accident occurred when the parapet and the stone coping collapsed and fell upon plaintiffs, thereby causing them severe injuries.

On the date of the accident, defendant Abdo Alsaede (the owner) held title to the building, and his nephew, Kamal Alsaede, was the managing agent of the building.

Management Agreement Between Prime and Owner

Prior to the accident, defendant Prime had been the "exclusive managing agent" and the "exclusive rental agent" of the building from March 1994 until mid-February 2005 pursuant to a

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[1] Subsequent to the commencement of this action, Earl S. Leigh died from causes unrelated to the accident. Future references to plaintiffs are to Gregory Hill and Earl S. Leigh.

[2] A "parapet" is "the continuation of an exterior wall, fire wall, or party wall above the roof line" (*see* NYC Admin. Code § 27-232).

[3] "Coping" is "the highest or covering course of a wall often of tile and usually with a sloping top to carry off water and commonly cut with a drip" (*see* Websters Third New International Dictionary [unabridged], at 502).

- Approval of any service contract where the aggregate payments thereunder exceeded $2,000 (§ 2.4).

- Approval of the selection of the superintendent and the assistant superintendent (if any) for the building (§ 2.1).

- Payment of wages of all building personnel, all of whom were considered to be the employees of the owner and not of Prime (§ 2.1).

- Prior notice of eviction of any tenant in the building (§ 2.8).

Prime's Day-to-Day Management of the Building

Mr. Steven Pyun, a Prime employee, was responsible for the management of the building on a day-to-day basis. Pyun had been a commercial real estate broker who entered commercial property management as an allied profession. He visited and inspected the building on a weekly basis, either alone or with the owner present. He kept in touch with the owner on a weekly and sometimes daily basis. He knew the building's history, having arranged the sale of the building twice prior to its sale to the current owner. His principal concerns with the building were (1) rent collections; (2) roof repair; and (3) keeping the building facade look uniform. His parting memorandum to the owner and the new managing agent summarized all of these areas and, with respect to the condition of the building, recommended the following:

> "Roof: Martin's Roofing did a good repair job where nobody is complaining of leaky roof to date. But eventually the roof needs a NEW roof done by a professional roofer.
>
> "Facade: If you can change the front of the entire block so that it looks more cohesive and tidy, it will make the whole block look so much better."

When Pyun informed the owner in January 2005 that he would not be able to stay on as the building manager due to his medical illness, the owner did not want to continue the building

management with anyone else from Prime (*see* Pre-Trial Deposition of Steven Pyun taken on September 8, 2006 [Pyun Deposition], at 74-75).[6]

The owner then selected his nephew Kamal as Prime's successor in managing the building. In February 2005, Pyun and the owner together visited a Yonkers, New York branch of HSBC Bank USA, National Association, to close the building account,[7] and, sometime thereafter, Kamal picked up all of the building's business records from Pyun as part of the former's assumption of the management duties for the building, and Pyun erased all electronic data pertaining to the building from his office computer.

Approximately three months after Kamal took over the management of the building, the underlying accident occurred. By summons and complaint, each dated May 13, 2005 and April 7, 2006, plaintiffs commenced separate personal injury actions against the owner and Prime, respectively, alleging negligence in their respective ownership and maintenance of the building. [8] Thereafter, the owner answered and asserted cross claims against Prime seeking contractual and common-law indemnification. By order dated October 24, 2007, the court granted plaintiffs' motion for summary judgment against the owner and denied the owner's cross-motion against Prime. Now before the court are Prime's motion, and plaintiffs' cross motion, for summary judgment.

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[6] The management agreement was non-assignable by Prime (§§ 11 and 13).

[7] The parties attempted to close the account in mid-February 2005, and there were no transactions in that account between February 16, 2005 and May 2, 2005. Because of an overdraft in the account, however, the bank closed the account on May 2, 2005 when the overdraft was paid. (See undated letter from HSBC Bank USA, National Association, to Prime Locations, Inc., annexed as Exhibit C to Prime's Affirmation in Reply to Alsaede's Opposition [the Prime Affirmation]).

[8] By order dated September 27, 2006, the court consolidated the two actions for all purposes.

Cause of the Accident

The parties have devoted much effort to the cause of the accident and to whether the dangerous condition of the building could have been discovered by Prime in time to prevent the accident. Plaintiffs' expert, John Flynn, P.E., opined that the collapse of the facade was due to exposure to the elements with inadequate moisture-proofing at the copings and defectively installed roof flashing, which enabled the retention of water within the wall and the gradual disintegration of the parapet support and its ultimate collapse.[9] On the other hand, Prime's expert, Matthias Szayna, P.E., opined that the building's original design was at fault because the brick parapet had inadequate bracing and support which caused the ultimate collapse of the parapet and that ordinary maintenance and care would not have prevented the accident.

Discussion

The standards for summary judgment are well settled:

> "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action."

(*See Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986] [internal citations omitted]).

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[9] Plaintiffs have also offered an affidavit and a pre-trial deposition of Matthew Dinatale, plaintiffs' former co-worker, to the effect that the building parapet appeared "wavy" or uneven when he looked up at it as he passed by the building on his way to and from work. Mr. Dinatale had no engineering qualifications and had never examined or visited the roof of the building. He did not observe the accident itself, nor had he ever seen bricks or other debris falling from the building. Accordingly, his testimony carries little, if any, weight.

management agreement (the agreement), dated March 18, 1994.[4] As relevant herein, Prime was required, by the terms of the agreement (§ 2.2):

> "At the expense of Owner, to cause the Building to be maintained in good order and condition, including interior and exterior cleaning, and to cause all *routine* repairs and alterations to be made thereto, including (without limitation) electrical, plumbing, waterproofing, steam fitting, carpentry, masonry, elevator, decoration and such other *routine* repairs and *incidental* alterations as may be required in the course of the *ordinary* maintenance and care of the Building. Agent shall inspect the Building at reasonable interludes, but no less than once per week, and recommend to Owner programs of *preventative* maintenance and repair so as to keep the Building in good order."

(emphasis added).

Prime's other duties under the agreement included: hiring, supervision and dismissal, on behalf and at the expense of the owner, of all building employees; collection of rents; maintenance of insurance; verification and payment of bills; preparation of monthly statements of collections and disbursements; working with counsel on tenant evictions; and all other matters deemed reasonably necessary for the proper management of the building (§2.17).

In the management agreement, the owner expressly reserved to himself the following rights:

- Prior approval of expenditures of more than $500 for any type of repairs at any one time, except in an emergency (§2.2[b]). All emergency expenditures were permitted to be made only to the extent that funds were available therefor in the building account (§ 4.2),[5] or had been advanced by the owner to Prime (§ 4.1).

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[4] An identical copy of the management agreement is annexed as an exhibit to each of Prime's motion and plaintiffs' cross-motion. While Prime's motion references a "rider" to the management agreement (¶ 16), no such rider is annexed to its moving papers and, for purposes of this decision, the same is treated as nonexistent.

[5] Section 2.2(b) of the agreement, which permitted Prime to make emergency expenditures notwithstanding the $500 limit, was expressly made subject to Section 4.2 of the agreement, which provided that payments for any and all extraordinary expenses of the owner would be made by Prime out of the building account.

The court finds that Prime has met its burden of establishing a *prima facie* basis for entitlement to summary judgment by submitting admissible evidence demonstrating that Prime did not owe a duty of care to plaintiffs. The court also concludes that plaintiffs' papers are not legally or factually sufficient to justify denial of summary judgment to Prime with respect to plaintiffs' common-law negligence cause of action.[10]

"To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause" (*see Kenney v City of New York*, 30 AD3d 261, 262 [2006]). Because a finding of negligence must be based upon a breach of duty, a threshold and dispositive question in this case is whether Prime, as the managing agent, owed a duty of care to plaintiffs, non-contracting parties to the contractual arrangement between the owner and Prime (*see Church v Callanan Industries, Inc.*, 99 NY2d 104, 110 [2002]; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*see Espinal*, *supra*). In *Espinal*, the Court of Appeals identified three sets of circumstances as exceptions to this general rule, in which a duty of care to non-contracting third parties may arise out of a contractual obligation or the performance thereof (*see id.* at 140; *see also Church*, 99 NY2d at 111). Based upon the circumstances of this case, plaintiffs fail to qualify under any of the exceptions.

The first set of circumstances arises where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that

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[10] In their complaint, plaintiffs asserted both the common-law negligence and the public nuisance causes of action against Prime. Because neither Prime's motion nor plaintiffs' cross-motion addresses the public nuisance cause of action, the court considers herein only the common-law negligence cause of action.

risk (*see id* at 139). Judge Cardozo described this conduct as "launch[ing] a force or instrument of harm" (*see H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). Here, there is no evidence in the record that Prime's allegedly incomplete maintenance of the building created or increased the risk for plaintiffs' accident beyond the risk which existed before Prime had entered into any contractual undertaking (see *Church*, 99 NY2d at 112 [no evidence that defendant's incomplete performance of its contractual duty to install guide railing created or increased the risk of plaintiff's divergence from roadway beyond the risk which existed before the contractual duty arose]).

Plaintiffs argue that Prime's responsibility to provide ordinary maintenance included an obligation to ensure that the building facade would not collapse and that the accident occurred as a result of Prime's dereliction of that duty. Plaintiffs fail to appreciate the strict monetary restrictions imposed by the owner upon Prime's authority to act pursuant to the management agreement: all expenditures in excess of $500, regardless of whether they were for ordinary maintenance or for capital expenditures, were subject to the owner's prior approval. Although emergency expenditures were not subject to an express monetary limitation, they were nevertheless limited because they could only be paid out of the building account from which the owner routinely made substantial withdrawals (*see* Check Register, All Bank Accounts Abdo Alsaede, annexed as Exhibit D to the Prime Affirmation). Furthermore, according to the bank statements for the three-month period immediately preceding the accident (February, March, and April 2005), the building bank account had a negative balance (*see* Monthly HSBC Statements, annexed as Exhibit C to the Prime Affirmation) and, therefore, Prime had no money for repairs.[11]

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[11] By the terms of the management agreement, Prime was not "obligated to make any advance to or for the account of Owner or to pay any amount except out of funds held or provided as aforesaid [the building bank account], nor shall Agent be obligated to incur any

When it concerned the building repairs, the owner's frugality to the point of parsimony is well illustrated by the following excerpt from Pyun's deposition:

> "Q. Did he ever recommend any names of companies to do patch work instead of roofing work?
>
> "A. *Patch work, it was always a friend of his, or he wasn't even a patch worker. In the beginning, he used to ask me to just find somebody to just tar the area that we think was causing the leak.*
>
> "Q. Do what to the area?
>
> "A. Tarring it and just brushing the heavy duty tar on the roof and that more or less acts as an adhesive cement.
>
> "Q. Did you feel that that was insufficient?
>
> "A. No. That was – the building needed a new roof from the day I managed the building, and it was never – a new roof was never replaced...."

(*See* Pyun Deposition at 112 [emphasis added]).

The second set of circumstances giving rise to a promisor's tort liability arises where the plaintiff has suffered injury as a result of a reasonable reliance upon the defendant's continuing performance of a contractual obligation (*see Espinal*, 98 NY2d at 140). Here, it cannot be said that plaintiffs detrimentally relied on Prime's continued performance of its contractual obligations to maintain the building.

The third and final set of circumstances wherein tort liability will be imposed upon a promisor is "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (*see Church*, 99 NY2d at 112, *quoting Espinal*, 98 NY2d at 579). Here, Prime's contractual duty to manage the building was not of the type of "comprehensive and

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extraordinary liability or obligation unless Owner shall furnish Agent with the necessary funds for the discharge thereof" (§ 4.1).

exclusive" property maintenance obligation that would entirely displace the landowner's duty to maintain the premises safely (*see Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 [2004]; *Ingordo v Square Plus Operating Corp.*, 276 AD2d 528 [2000]; *Anderson v Cushman & Wakefield, Inc.*, 2008 NY Slip Op 50166 [2008]).

The appellate court in *Gardner* described, in detail, the terms of a management agreement which, the court held, did not grant the managing agent absolute and complete control over the premises and, therefore, did not subject it to liability:

> "The written agreement between the owner and appellant empowered the latter to rent and lease; to collect rents and deposit them in an agency account subject to the owner's right to demand at any time a statement of the accounts; to institute and prosecute actions; to make necessary repairs and alterations with the limitation that any alteration of a capital nature in excess of $2,500 would require the owner's approval; to supervise, hire and discharge employees, it being expressly provided, however, "that all such employees are in the employ of the Owner of the property and not of the Managing Agent." Other powers were given to the agent which need not be detailed. It should be noted, however, that while the agreement authorized appellant to make repairs there was no specific undertaking by appellant to do so and it assumed no responsibility in that respect.
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> "*It seems obvious that this agreement did not give such complete control to the appellant [the managing agent] so as to exclude the owner entirely. The fact that the owner reserved to itself control over the funds collected by the agent and also the right to pass upon all alterations in excess of $2,500 indicates that the agent was not put in the owner's place in the operation of the premises. The owner having reserved to itself a certain amount of control cannot be said that the managing agent's control was absolute and complete.*"

(*See Gardner v 1111 Corp.*, 286 AD 110, 113 [1955], *aff'd*, 1 NY2d 758 [1956] [emphasis added]).

Similar to *Gardner*, Prime took no action with respect to the condition of the building that caused the accident. As in *Gardner*, plaintiffs' claim is that Prime failed to inspect and repair or replace a defective piece of property. As such, plaintiffs' claim against Prime is not actionable (*see Tushaj v Elm Mgt. Assoc., Inc.*, 2000 WL 35610270 [Sup Ct, Bronx County, 2000]).

In *Lennon v Oakhurst Gardens Corp.*, 229 AD2d 897, 898-99 [1996], the court found that the managing agent "lacked the requisite exclusive control over the property necessary to be liable for nonfeasance" where, as here, the management contract provided, *inter alia*, that the managing agent was responsible for hiring employees to maintain the property and all such personnel were the employees of the owner, and that the managing agent was prohibited from making any unbudgeted expenditures exceeding $5,000 without the owner's prior consent, except under emergency conditions. Where the evidence demonstrated that the owner reserved a significant degree of control over the maintenance of the premises, the managing agent would not have a comprehensive agreement that displaced the responsibility of the owner such that it could be held liable to the plaintiffs (*see Hagen v Gilman Mgt.*, 4 AD3d 330, 331 [2004]).

In any event, Prime owed no duty of care to plaintiffs so as to be liable for their injuries under a theory of common-law negligence, as evidence in the record indicates that Prime had ceased to be the managing agent for the building approximately three months prior to the date of plaintiffs' accident when the owner designated his nephew Kamal as the successor managing agent.

"Generally, liability for a defective condition on premises does not attach to a prior owner or managing agent, except where a dangerous condition may have existed at the time of the conveyance *and* the new owner or manager has not had reasonable time to discover and remedy the defect" (*see Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317 [2001] [citation omitted; emphasis added]). Assuming the existence of the dangerous condition at the time of the transfer of the management of the building to Kamal, plaintiffs have produced no evidence that in the intervening three-month period prior to the accident Kamal lacked sufficient time to discover the building defect. (*Cf. Sarfowaa v Claflin Apts. LLC*, 284 AD2d 228 [2001] [there was an issue of fact

as to whether the new manager had enough time to discover gas leaks, notice of which was given to the former manager 11 days prior to the transfer of the management duties]). It cannot be said that, in this case, three months were insufficient time for the new manager to discover the dangers posed by the building facade assuming that the same existed at the time of the transfer.

As there is no evidence in the record that Prime was negligent while it was managing the building in the pre-accident period, Prime is entitled to summary judgment dismissing common-law negligence claims against it. Conversely, plaintiffs' cross-motion for summary judgment against Prime is denied.

Prime is also entitled to the dismissal of the owner's cross-claims against it for common-law indemnity.[12] "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident' or 'in the absence of any negligence' that the proposed indemnitor 'had the authority to direct, supervise, and control the work giving rise to the injury.'" (*see Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-85 [2005] [citations omitted]). Previously, the court found the owner to be negligent, thereby precluding indemnification under the first prong of the two-pronged test. As stated above, Prime lacked the requisite control over the building and thus the second prong of the test is not satisfied in this case. Accordingly, the owner's cross-claims against Prime for common-law indemnity in connection with plaintiffs' common-law negligence cause of action are dismissed.

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[12] The management agreement does not require Prime to indemnify the owner, but requires the owner to indemnify Prime in certain circumstances.

Conclusion

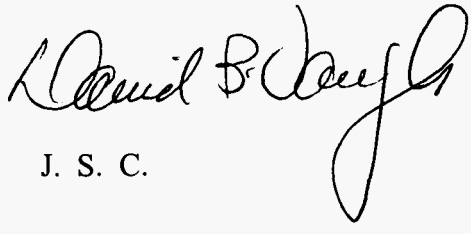
Based upon the foregoing:

(1) Prime's motion for summary judgment is granted to the extent that the common-law negligence claim and related cross claims against Prime are hereby dismissed; and

(2) Plaintiffs' motion for summary judgment is denied in its entirety.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.