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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Justice

Index Number : 105201/2006

RICHARDSON, LOGAN

VS.

VILLACON REALTY

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 105201-06

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED
APR 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: April 15, 2008

HON. JOAN A. MADDEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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LOGAN RICHARDSON,

Plaintiff,

Index No. 105201/06

-against-

VILLACON REALTY CORP.,

Defendant.

----------X

Joan A. Madden, J.:

The present action is one to recover damages for personal injuries sustained by plaintiff Logan Richardson on property belonging to defendant Villacon Realty Corp. (Villacon), and leased to a Sam Ash Music Store (Sam Ash). This motion involves the questions of whether Villacon, as landlord, was in possession of the part of the premises on which the accident occurred at the time of the accident, so as to cast it in liability for negligence, and whether the present Administrative Code of the City of New York (Administrative Code) applies to it. Villacon moves for summary judgment dismissing the complaint, on the ground that it was an out-of-possession landlord when the accident occurred.

The premises, 163 West 48th Street, is a five-story building which is occupied on the street-level floor by Sam Ash. Plaintiff worked for Sam Ash at the time of his accident. Sam Ash rented the premises from Villacon pursuant to a lease

dated March 31, 1993 (Lease). Article One, § 1.1. of the Lease describes the leasehold as "the street floor of the Building known as 163 and 165 West 48th Street."

The accident happened on a flight of worn concrete steps leading from the rear of Sam Ash's premises down into the basement. Plaintiff, who used the stairs on a regular basis, alleges that he slid on the third step from the bottom of the stairway, causing him to fall backwards, and fracture his ankle.

Villacon argues that, despite the limited description of the demised premises in the Lease, the basement was also part of Sam Ash's leasehold, which by inference, included the rear stairs. Villacon insists that Sam Ash, as tenant, was entirely responsible for the maintenance of the rear stairs. However, while Sam Ash allegedly used almost the entire basement area for storage, the boiler and other building services, such as electricity, were also located in the basement, and had to be accessed by Villacon employees. Regardless, Villacon claims that Sam Ash's leasehold right to the basement (and by extension, the rear stairs), is shown by, among other things, the fact that Villacon's employees did not generally use that stairway, choosing instead to use a front stairway to reach the building's boiler and other services, which stairway did not go through Sam Ash's premises. As such, Villacon argues that it is entitled to the benefit of established New York law which largely exempts

out-of-possession landlords from liability for injuries to persons which take place on the leasehold premises, where, as here, the lease only reserves to the landlord a limited right to reentry.

"'[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.'" *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993), quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986); *see also Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 (1st Dept 2006). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. *See Alvarez v Prospect Hospital*, 68 NY2d 320, *supra*; *Kesselman, supra*. In the present case, the court's first call is to decide whether Villacon's status as an out-of-possession landlord has been established.

Under New York law, an out-of-possession landlord "'is not liable for injuries occurring on the premises unless it has retained control of the premises or is contractually obligated to perform maintenance and repairs [interior citation omitted].'" *Tragale v 485 Kings Corp.*, 39 AD3d 626, 627 (2d Dept 2007). A landlord's reservation of right to make inspections or repairs

"may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision and there is a significant structural or design defect." *Id.* Plaintiff, in his bill of particulars, claims that Villacon was in violation of several Administrative Code provisions with regard to the worn condition of the staircase and the lack of an adequate handrail.

Villacon claims that it is an out-of-possession landlord because it only reserved to itself the right to reenter Sam Ash's leased premises, including the basement, to make necessary inspections, maintenance, and repairs. As such, it argues that it cannot held liable, because, purportedly, due to the age of the building, the stairs are grandfathered under the Administrative Code, so that Administrative Code sections applicable to the maintenance of interior stairs are inapplicable.

The Lease describes the demised premises as being the "street level" of the building. The Lease goes on to say that Sam Ash also is leasing "all fixtures, equipment, improvements, installations and appurtenances which at the commencement of or during the term of this Lease are thereto attached (*except items not deemed to be included therein and removable by the Tenant as provided in Article Four ...* ." Lease, Article One, § 1.1

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[emphasis supplied].

Article Four, § 4.1 states that "[a]ll fixtures, equipment, improvements and installations ("Fixtures") attached to, or built into, the Premises at the commencement of or during this Lease, whether or not installed at the expense of the Tenant or by the Tenant, shall be and remain part of the Premises and be deemed the property of the Landlord except as otherwise expressly provided in this Lease." "Fixtures" is defined in section 4.1 to include, among a long list of items, "stairs."

Article 4.2 provides that:

> [a]ll the perimeter walls of the Premises, any balconies, terraces or roofs adjacent to the Premises ... and any space in and/or adjacent to the Premises used for ... *stairways* ..., and access thereto through the Premises (at and for such times as shall not unreasonably interfere with the Tenant's business) for the purposes of such use in the operation, replacement, addition, repair, maintenance or decoration thereof, *are expressly reserved to the Landlord*.

Article Four, § 4.2 [emphasis supplied]. Consequently, Villacon appears to have deliberately removed all of the stairways in the building, including the one located in Sam Ash's premises, from the definition of the leased premises, even if it could be found that Sam Ash did indeed lease the basement.[1] In its attorney's reply affirmation, Villacon, apparently now aware that the Lease

[1]Villacon does not explain where Sam Ash's leasehold interest in the basement begins or ends, as Sam Ash's interest apparently did not include Villacon's possession of a part of the basement for the maintenance of the building's services. The Lease certainly does not answer the question.

does not support its claim to be out of possession of the basement and stairs, argues that the parties had entered into an "implied landlord tenant contract" giving control of the basement to Sam Ash, as evidenced by Villacon's alleged lack of use of the rear stairs.

Villacon offers the affidavit of its vice president Gerald W. Blume alleging that the rear stairs are part of Sam Ash's leased premises, and Sam Ash's responsibility to maintain. Villacon property manager Steven Karz (Karz), in an affidavit attached to Villacon's reply, states that, while he usually used the front stairs on a regular basis to access the basement's boiler and other services, he "has on occasion traversed the rear staircase during walk throughs of the building which include walk through of tenant space. I do not use the rear staircase for any reason other than the walk through of the building."

Plaintiff, in contrast, offers his own testimony to the effect that he saw Karz use the rear stairs with some frequency, both to check up on the basement, and to escort contractors, such as the boiler repair man and the exterminator, down to the basement. He also cites to Karz's deposition testimony, in which Karz admits that he used the rear stairway at least 20 times prior to plaintiff's accident.

The question here presented is really not whether Sam Ash leased the basement from Villacon, but whether Villacon still

retained control of the rear stairs leading to the basement. This question is not answered by the conflicting testimony as to whether Villacon's employees ever set foot on the rear stairs, but it is answered by the undisputed language of the Lease. And the Lease clearly retains to Villacon control over all of the stairways in the building. Therefore, with regard to the rear stairs, the court finds that Villacon is not an out-of-possession landlord, and is not limited in its liability to law pertaining to such parties.

This finding expands Villacon's potential liability, but does not answer the question as to whether Villacon may be held to the strictures of the Administrative Code. The matter is still on the table, and depends, in the first instance, on whether the current Administrative Code, enacted in 1968, is applicable to Villacon's building at all.

The Building's Certificate of Occupancy, which was issued to the premises in 1944, designates the subject building as an "Old Law Tenement" building. The Department of Buildings, in a document entitled "Multiple Dwelling Classifications," describes "Old Law Tenement" as "[o]riginally erected as a multiple dwelling in accordance with the laws in effect prior to April 12, 1901, and recorded as OL (Old Law) in the Tenement House Department 9now Department of Housing and Development), before April 18, 1929." Thus, the building was identified by the

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Department of Buildings in 1944 as an "Old Law Tenement," having been built before 1901.

The regulations which Villacon is said to have violated are found in Title 27 of the Administrative Code, which was enacted in 1968. Specifically, plaintiff claims that Villacon is in violation of several subsections of section 27-375 of the current Administrative Code, which deal with the safety requirements for interior stairs. Plaintiff also refers to the general applicability of sections 27-127 and 27-128. Section 27-127 says:

> [a]ll buildings and all parts thereof shall be maintained in a safe condition. All service equipment, means of egress, devices, and safeguards that are required in a building by the provisions of this code or other applicable laws or regulations, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working order.

Section 27-128 concludes: "[t]he owner shall be responsible at all times for the safe maintenance of the building and its facilities."

According to Villacon, section 27-135, as well as any other section of the 1968 Administrative Code, is inapplicable to it, because section 27-120 definitively exempts multiple dwelling buildings built before 1968 from compliance with the 1968 Administrative Code, and because plaintiff has not offered any pre-1968 Administrative Code sections which might apply.

Administrative Code § 27-120 states as follows:

> [a]t the option of the owner, regardless of the cost of the alteration or conversion, an alteration can be made to a multiple dwelling or a building can be converted to a multiple dwelling in accordance with all requirements of this code or in accordance with all applicable laws in existence prior to December sixth, nineteen hundred sixty-eight, provided the general safety and public welfare are not thereby endangered.

Under this section, it appears that the any alteration to the rear stairs would need to have been made in accordance with "all applicable laws in existence prior to December sixth, nineteen hundred sixty-eight, provided the general safety and public welfare are not thereby endangered." *Id.* However, Villacon has not discussed the making of any alterations to the premises prior to 1968, and this section does little to further Villacon's case. Section 27-120 does not say, as Villacon claims, that the owner of a building built before 1901 is exempt from compliance with the present Administrative Code under all circumstances.

Villacon further asserts that section 27-111 supplies the grandfathering provision it needs to win summary judgment. Section 27-111 is concerned with the "Continuation of lawful existing use," and states:

> [t]he lawful occupancy and use of any building, including the use of any service equipment therein, existing on the effective date of this code or thereafter constructed or installed in accordance with prior code requirements, as provided in section 27-105 of article one of this subchapter, may be continued unless a retroactive change is specifically required by the provisions of this code.

Villacon asserts that, under section 27-111, the rear stairs are grandfathered under the present Administrative Code, and so, their maintenance is not controlled thereby.

It has recently been held that a building constructed before the 1968 Administrative Code is grandfathered under the Administrative Code "as it existed at that time" it was constructed, and need not comply with the current Administrative Code, unless alterations to the building called for a different result under the Administrative Code. *Atschuler v Gramatan Management, Inc.*, 27 AD3d 304, 304 (1st Dept 2006). The Court in *Atchuler* (citing to Administrative Code § 27-105), concludes that the plaintiff would have to "off[er] evidence to show a renovation of the type that might have avoided the grand fathering provision" in order to require the owner to comply with the present Administrative Code. *Id.* Section 27-105 is concerned with the effective date of work for which an application for a permit was made and submitted to the Department of Buildings. Under this section, the date of the application determines which Administrative Code will apply to the work.

In *Pappalardo v New York Health & Racket Club* (279 AD2d 134 [1st Dept 2000]), the Court reviewed the question of whether Administrative Code section 27-211 "grandfathered any lawful use and occupancy existing on the effective date of the Administrative Code provisions in question" (*id.* at 138), and

held that evidence of the age of a building plus "the date and cost of renovations performed by the defendants" could grandfather the building, so that its owner would not be required to comply with the present Administrative Code. *Id.* In *Pappalardo*, the Court was faced with an accident which allegedly occurred because windows in a health club did not conform to current Administrative Code in the matter of the thickness of the glass. The Court found that the burden fell on the defendant on summary judgment to show that the building had been built before 1968, and that no alterations had been made to it. Thus, the Pappalardo Court construed Administrative Code section 27-211 as a means to avoid application of the present Administrative Code in more than just the "use" of the building. *See also Pavon v 19th Street Associates LLC*, 17 Misc 3d 1125(A), 2007 NY Slip Op 52144(U) (Sup Ct, New York County)("[i]t is well settled that in New York City a building owner has a duty to maintain his building in compliance with the Building Administrative Code and other statutory mandates unless the building is 'grandfathered' under Building Code § 27-111 [interior citations omitted])." *Id. at* 8.

Likewise, in *Sarmiento v C & E Associates* (40 AD3d 524 [1st Dept 2007]), the Court accepted as true that Administrative Code section 27-111 would grandfather existing marble stairs, if it were shown that the building pre-dated 1968, and had not

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undergone significant renovations under section 27-218 (a). The Court in *Sarmiento*, however, noted that, on summary judgment, it was the defendant who bore the burden of demonstrating the inapplicability of the present Administrative Code.

As these cases demonstrate, section 27-211 may be read as a means of avoiding the requirements of the current Administrative Code if a building predates 1968, and has not seen any of the kind of alterations which would bring it within the Administrative Code.

The Administrative Code defines "alteration," as here applicable, as: "[a]ny addition, or change or modification of a building, or the service equipment thereof, that affects safety or health and that is not classified as a minor alteration or ordinary repair." Administrative Code § 27-232. "Service equipment" is defined as "[e]quipment, including all components thereof, which provides sanitation, power, light, heat, cooling, ventilation, airconditioning, refuse disposal, fire-fighting, transportation, or similar facility for a building which by design becomes a part of the building, and which is regulated by the provisions of this Administrative Code."

Plaintiff would find Villacon's obligation to repair or replace the rear stairs in Administrative Code sections 27-115 through 27-118. Sections 27-115 through 27-117 deal with the consequence of altering buildings depending on the percentage of

the structure which is altered. In the present matter, there has been no discussion concerning the percentage of the building which might have been altered.

Plaintiff, apparently relying on the premiss that the building must have seen alterations within its lifetime, quotes section 27-118 as requiring Villacon to update the stairs. Section 27-118 (a) states that:

> [e]xept as otherwise provided for in this section, if the alteration of a building or space therein results in a change in the occupancy group classification of the building under the provisions of subchapter three, then the entire building shall be made to comply with the requirements of this code.

Section (b) provides that:

> [e]xcept as otherwise provided for in this section, if the alteration of a space in a building involves a change in the occupancy or use thereof, the alteration work involved in the change shall, except as provided for in this section, be made to comply with the requirements of this code and the remaining portion of the building shall be altered to such an extent as may be necessary to protect the safety and welfare of the occupants.

Section (c) concludes:

> [w]hen, however, the cost of alterations[2] involved in the change of occupancy of an existing building erected prior to December sixth, nineteen hundred sixty eight or space therein authorizes the alterations to be made in compliance with the applicable laws in existence on such sixth day of December nineteen hundred and sixty eight, such change in occupancy may similarly be made

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[2]The rules governing the costs of alterations are addressed in sections 27-114 through 27-117, but, as no evidence of the cost of any alterations has been discussed, these sections are unavailing.

> in compliance with such prior laws, provided the general safety and public welfare are not thereby endangered, and further provided that the alteration work shall effect compliance with all requirements of this code relating to interior finish work, finish flooring and floor coverings, sprinklers, elevators, smoke detectors, directional signs, emergency lighting and emergency power.

Again, this section is, as of this time, of no moment, as no discussion has been made, or proof adduced, indicating any alteration to the premises.

Plaintiff also apparently equates alterations with change in use. It is uncontested that the Sam Ash store was previously a restaurant. Plaintiff argues that the change in the use of the premises requires the application of the present Administrative Code. "Use" is defined in the Administrative Code as "[t]he purpose for which a building, structure, or space is occupied or utilized, unless otherwise indicated by the text. Use (used) shall be construed as if followed by the words 'or is intended, arranged, or designed to be used.'" Administrative Code 27 NYCCRR § 27-232.

Plaintiff's purported expert, Scott Silberman, argues that the "use" of the building, as defined in the Administrative Code, changed when the storefront changed from a place of "Assembly" (i.e., a restaurant) to that of "Mercantile." However, this evidence is without probity, as plaintiff has failed to qualify Silberman as an expert by providing a copy of his qualifications as an expert, even after being warned by defendant that the

expert's affidavit was inadequate in that regard. Further, a New York Building Department "Overview for Complaint," provided by defendant, generated as a result of a complaint by a third party that the conversion to a Sam Ash store violated the building's certificate of occupancy, shows that the Department of Buildings has concluded that the "use" of the storefront floor had not changed, but had remained "retail" in use.

As a result of the foregoing, it is impossible to tell whether the building has been altered to such an extent that Villacon would be obligated to repair or replace the rear stairs under 27-118. There is also no evidence of a change in use of the building, or application to do so, which might trigger the grandfathering clauses in sections 27-111 or 27-105 related to "use." However, on this motion for summary judgment, this is not plaintiff's problem.

On a defendant's motion for summary judgment in a case such as the present one, it is improper to "place[] the burden of establishing the applicability of the Administrative Code to the building upon plaintiff," because

> [i]t is well settled that in order to prevail on a motion for summary judgment, the moving party must demonstrate entitlement to judgment as a matter of law, and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers [internal citations omitted].

Pappalardo v New York Health & Racket Club, 279 AD2d at 140; *see also Pavon v 19th Street Associates LLC*, 17 Misc 3d 1125(A),

supra (defendant's burden to eliminate all issues of fact regarding the applicability of the Administrative Code).

In sum, Villacon's reliance on Administrative Code section 27-120 does not resolve the issue of whether its building, and the concrete stairs found leading to the basement in Sam Ash's store, are grandfathered under the Administrative Code. As such, its motion must be denied.

Accordingly, it is

ORDERED that the motion for summary judgment brought by defendant Villacon Realty Corp. is denied, and the parties are directed to appear for the pre-trial conference previously scheduled for April 24, 2008 at 2:30 pm, in Part 11, Room 351, 60 Centre Street.

Dated: April 15, 2008

ENTER:

J.S.C.

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