[* 1]

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 26

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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BURGOS,MARIA S. Index Nº. **0015760/2006**

-against- Hon..**NELSON S. ROMAN** ,

205 E.D. FOOD CORPORATION Justice.

----------X

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGEMENT DEFENDANT**
Noticed on **December 11 2007** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers ~~this~~ The motion is resolved in accordance with the annexed decision/order dated 04/21/08

RECEIVED
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Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 4/21

Hon. _____ 04/21/08
NELSON S. ROMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------x

MARIA S. BURGOS,

Plaintiff(s),

- against -

205 E.D. FOOD CORPORATION D/B/A C-TOWN, C-TOWN SUPERMARKET AND TERRINAZ ENTERPRISES, LLC,

Defendant(s).

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DECISION AND ORDER

Index No: 15760/06

Defendants move seeking an Order granting them summary judgment over and against plaintiff. Defendants aver, *inter alai*, that insofar as they neither created the condition alleged nor had notice of the same, they are entitled to summary judgment as a matter of law. Plaintiff opposes the instant motion alleging that defendants not only created the condition herein, but had actual notice of the same.

For the reasons that follow hereinafter defendants motion is hereby denied.

The instant action is for alleged personal injuries stemming from the purported negligent maintenance of a premises. The verified complaint alleges that on April 25, 2006 plaintiff sustained injury while within premises located at 228 Brook Avenue, Bronx, NY (228). Its is alleged that plaintiff was injured, when she tripped and fell

due to a defective condition within 228. It is alleged that defendants were negligent with respect to the maintenance of the premises herein. It is alleged that said negligence caused the accident herein.

In support of the instant motion, defendants submit plaintiff's deposition transcript, wherein she testified, in pertinent part, as follows. On April 25, 2006, at about 2:55PM, plaintiff tripped and fell while shopping within the supermarket located within 228. Plaintiff entered the supermarket, picked up a basket, checked her bag, and headed to the aisle containing mayonnaise, fruits, vegetables and sodas. She picked up a jar of mayonnaise from the shelf, took a few steps to her left, felt something on her right calf, and fell to the floor. After she fell she realized that she had tripped over a box of tangerines, which was about the same size as her shopping basket. Prior to the accident, plaintiff had not seen the box of tangerines. She frequented the supermarket two to three per week and had been therein the day prior to her accident. When at the supermarket on the date prior to her fall, she did not see the box of tangerines herein. Prior to her fall she never made any complaints to any supermarket staff regarding boxes and other stuff on the floor. However, plaintiff had complained to her family about boxes and other items on the floor. Plaintiff had been in the supermarket five minutes prior to her fall.

Defendants submit Roberto Rodriguez' (Rodriguez) deposition transcript, wherein he testified, in pertinent part, as follows. On April 25, 2006, he was

employed as a manager within the C-Town supermarket located at 228. His duties and responsibilities entailed the directing of other employees. The supermarket herein consisted of one floor, contained six aisles, and had one public entrance. The first Isle contained produce, and items such as ketchup and mayonnaise. Some of the produce was displayed on tables secured to the floor and located in the center of the aisle. Boxes were not stored on the floor and would only occupy the floor if someone was working in the aisle. On the date herein, Rodriguez, was working in the aisle adjacent to Aisle one. He heard something fall in aisle one and reported thereto. He saw the plaintiff on the ground and heard her scream. He id not see any tangerine boxes on the floor thereat.

Defendants submit Narciza Diaz' (Diaz) deposition transcript, wherein she testified, in pertinent part, as follows. Diaz is member and principal of defendant TERRINAZ ENTERPRIZES, LLC (Terrinaz). On April 25,, 2006, Terrinaz owned and managed 228, a one story building, which it leased to defendant 228, E.D. FOOD CORPORATION (ED). ED operated a C-Town supermarket out of the premises herein. Terrinaz did not manage, operate, control, or maintain the 228, and would only enter the premises, for purposes of collecting rent. Diaz never received any complaints related to the structure of 228 nor with regard to the manner in which business was being conducted therein.

In opposition to the instant motion, plaintiff submits Mercedez Cruz'

deposition transcript. Said transcript is not pertinent to the Court's decision.

The Law and Standard on Summary Judgment

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. Muniz v. Bacchus, 282 A.D.2d 387 (1st Dept. 2001). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. Reuben Israelson v. Sidney Rubin, 20 A.D.2d 668 (2nd Dept. 1964); Erin Federico v. City of Mechanicville, 141 A.D.2d 1002 (3rd Dept. 1988); Harry L. Cohen v. Genesee Supply Co., 7 A.D.2d 886 (4th Dept. 1959). Consequently any such submissions are inadmissible and cannot be the basis for creating an issue of fact sufficient to preclude summary judgment. Johnson v. Phillips, 161 A.D.2d 269 (1st Dept. 1999); Rue v. Stokes, 191 A.D.2d 245 (1st Dept. 1993).

Once movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). The burden, however, always remains where it began, with the movant on

the issue. Hence, "if the evidence on the issue is evenly balanced, the party that bears the burden must loose." Director Office of Workers Compensation Programs v. Greenwich Collieris, 512 U.S. 267 (1994); 300 East 34th Street Co. V. Habeeb, 248 A.D.2d 50 (1st Dept. 1997).

It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. On this issue the Court of Appeals has stated

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case. (Internal citations omitted).

Friends of Animals v. Associated Fur Manufacturers, Inc., 46 N.Y.2d 1065, 1067-1068 (1979). Accordingly, generally, the opponent of a motion for summary judgment

seeking to have court consider inadmissible evidence must proffer an excuse for proffering the inadmissible evidence in inadmissible form. Johnson v. Phillips, 161 A.D.2d 269 (1st Dept. 1999). Additionally, while evidence inadmissible when the motion is made and inadmissible when the case is tried, is insufficient to raise an issue of a fact precluding summary judgment; inadmissible evidence, whose inadmissability has been excused and which may likely be admissible at trial, may be considered. Phillips v. Joseph Kantor & Company, 31 N.Y.2d 307 (1972). In Phllips, for example, the court discussed that in lieu of affidavits from actual witnesses, detailing the substance of their testimony, affidavits listing witnesses' names, the substance of their testimony, and how said witnesses acquired their knowledge, could be considered and could raise an issue of fact sufficient to defeat summary judgment. Id. Similarly, in Zuckerman v. City of New York, 49 N.Y.2d 557 (1980), the court discounted an attorney affirmation as speculative, in that said attorney lacked no personal knowledge of the facts he was proffering. Id. The court, however, in recognizing that inadmissible evidence could be used to preclude summary judgment, stated that if said attorney had personal knowledge of a witnesses testimony and that witnesses' testimony created an issue fact, said affirmation would suffice to defeat summary judgment. Id.; See, Indig v. Finkelstein, 23 N.Y.2d 728 (1968); Graso v. Angerami, 79 N.Y.2d 813 (1991).

When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into

or resolve issues of credibility. As the Court stated in Knepka v. Talman, 278 A.D.2d 811 (4th Dept. 2000):

> Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint (see, Mickelson v. Babcok, 190 A.D.2d 1037, 593 N.Y.S.2d 657; see generally, Black v. Chittenden, 69 N.Y.2d 665, 511 N.Y.S.2d 833, 503 N.E.2d 1370; Capelin Assocs. v. Globe Mfg. Corp., 34 N.Y.2d 338, 34,1 357 N.Y.S.2d 478, 313 N.E.2d 776). Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial(see, Schoen v. Rochester Gas & Elec., 242 A.D.2d 928, 665 N.Y.S.2d 372; Mickelson v. Babcock, *supra*).

See also, Yaziciyan v. Blancato, 267 A.D.2d 152 (1st Dept. 1999); Perez v. Bronx Park Associates, 285 A.D.2d 402 (1st Dept. 2001); Glick & Dullock v. Tri-Pac Export Corp., 22 N.Y.2d 439 (1968); Singh v. Kolcaj Realty Corp., 283 A.D.2d 350 (1st Dept. 2001).

Accordingly, the Court's function when determining a motion for summary judgment is issue finding and not issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). When the existence of an issue of fact is even debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 167 (1960). It is well established that inadmissable hearsay is insufficient to raise any triable issues of fact

sufficient to defeat summary judgment. Schwartz v. Nevatel Communications Corp., 778 N.Y.2d 308 (2nd Dept. 2004); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Self serving affidavits, meaning those which contradict previous deposition testimony, will not be considered by the Court in deciding summary judgment and cannot raise a triable issue of fact sufficient to defeat summary judgment. Lupinsky v. Windham Construction Corp., 293 A.D.2d 317 (1st Dept 2002); Joe v. Orbit Industries, Ltd., 269 A.D.2d 121 (1st Dept. 2000); Kistoo v. City of New York, 195 A.D.2d 403 (1st Dept. 1993).

A defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively, with evidence demonstrating the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof. Mondello v. DiStefano, 16 A.D.3d 637 (2nd Dept. 2005); Peskin v. New York City Transit Authority, 304 A.D.2d 634 (2nd Dept. 2003).

Premises Liability and Common Law Negligence

Absent a duty of care to the person injured, a party cannot be held liable in negligence. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928). In cases where there is a duty and that duty is breached, a party is held to have acted negligently. To impose common-law negligence, the tort, the duty breached, must be the proximate cause of the accident. Misirlakis v. East Coast Entertainment Props., 297

A.D.2d 312 (2nd Dept. 2002).

The common law dictates that a landowner is duty bound to maintain his or her property in a reasonably safe condition. Basso v. Miller, 40 N.Y.2d 253 (1976). Logically, the law dictates that reasonable care be utilized in the maintenance of the property, taking into account all circumstances such as the likelihood of injuries to others, the seriousness of the injury, and the burden involved in avoiding the risk. Id. This duty also obligates a landowner to warn against dangerous conditions, existing on his land, known or reasonably ascertainable by him through the use of reasonable and ordinary care. Cupo v. Karfunkel, 1 A.D.3d (2nd Dept. 2003). No duty to warn exists, however, if the dangerous condition complained of is open and obvious and reasonably discernible through the use of one's own senses. Id.; Orlando v. Audax Construction Corp., 14 A.D.3d 500 (2nd Dept. 2005); Reuscher v. Pergament Home Centers, Inc., 247 A.D.2d 603 (2nd Dept. 1998); Jackson v. Supermarkets General Corporation, 214 A.D.2d 650 (2nd Dept. 1995). While the existence of an open and obvious condition negates a defendant's duty to warn of the same's existence, it does not negate a defendant's duty to abate said condition if the same is dangerous. Westbrook v. WR Activities-Cabrera Markewts, 5 A.d.3d 69 (1st Dept. 2004); Orellana v. Merola Associates, Inc., 287 A.D.2d 412 (1st Dept. 2001); Tuttle v. Anne LeConey, Inc. 258 A.D.2d 334 (1st Dept. 1999); Cupo v. Karfunkel, 1 A.D.3d (2nd Dept. 2003). Stated differently, an open and obvious condition does not negate a defendant's duty to maintain his premises in a

reasonably safe condition and instead bears on whether the plaintiff, in failing to see what was readily observable through the use of his or her senses, is comparatively negligent. Id

Premises liability is by no means predicated solely on ownership. Liability for a dangerous condition on or within a property, is instead predicated upon occupancy, ownership, control or special use of the premises at issue. Balsam v. Delma Engineering Corporation, 139 A.D.2d 292 (1st Dept. 1998); Valmon v. 4M & M Corporation, 291 A.D.2d 343 (1st Dept. 2002); Allen v. Pearson Publishing, 256 A.D.2d 528 (2nd Dept. 1998); Millman v. CitiBank, N.A., 216 A.D.2d (2nd Dept. 1995); Bruhns v. Antonelli, 255 A.D.2d 478 (2nd Dept. 1998); Kraemer v. K-Mart Corporation, 226 A.D.2d 590 (2nd Dept. 1996). Additionally, it is well established that no liability will be found absent proof that a defendant actually created the dangerous condition or, alternatively, had actual or constructive notice of the same. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967 (1994); Bogart v. F.W. Woolworth Company, 24 N.Y.2d 936 (1969); Armstrong v. Ogden Allied Facility Management Corporation, 281 A.D.2d 317 (1st Dept. 2001); Wasserstrom v. New York City Transit Authority, 267 A.D.2d 36 (1st Dept. 1999); Allen v. Pearson Publishing, 256 A.D.2d 528 (2nd Dept. 1998); Kraemer v. K-Mart Corporation, 226 A.D.2d 590 (2nd Dept. 1996).

A defendant is charged with having constructive notice of a defective condition when said condition is visible, apparent, and exists for a sufficient length

of time prior to the happening of an accident to permit the defendant to discover and remedy the same. Gordon v. American Museum of Natural History, 67 N.Y.2d 836 (1986). The notice required must be more than general notice of any defective condition. Id.; Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967 (1994). The law requires notice of the specific condition alleged at the specific location alleged. Id. A general awareness that a dangerous condition may exist, is insufficient to constitute notice of a particular condition alleged to have caused an accident. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967 (1994). Instead, liability can only be predicated on defendant's failure to remedy a dangerous condition after actual or constructive notice of the condition. Id.

It is axiomatic that before negligence can be found it must be established that the accident causing instrumentality constitutes a dangerous condition, defect, or trap. Crawford v. Pick Quick Foods, Inc., 300 A.D.2d 431 (2nd Dept. 2002); Garry v. Rockville Centre Union Free School District, 272 A.D.2d 437 (2nd Dept. 2000); Reynolds v. Reynolds, 245 A.D.2d 498 (2nd Dept. 1997).

Dangerous Conditions Upon Premises

It is axiomatic that before negligence can be found it must be established that the accident causing instrumentality constitutes a dangerous condition, defect, or trap. Crawford v. Pick Quick Foods, Inc., 300 A.D.2d 431 (2nd Dept. 2002); Garry v. Rockville Centre Union Free School District, 272 A.D.2d 437 (2nd Dept. 2000);

Reynolds v. Reynolds, 245 A.D.2d 498 (2nd Dept. 1997). It is equally well settled that the Court can and should, when the facts are clear and compelling, decide whether the defect alleged by plaintiff is inherently dangerous and thus actionable as a matter of law. WestBrook v. WR Activities-Cabrera Markets, 5 A.D.3d 69 (1st Dept. 2004) (Court held that cardboard box in supermarket aisle over which plainitff tripped was inherently dangerous); Ezpinoza v. Henar Supermarket, Inc., 43 A.D.3d 855 (2nd Dept. 2007) (Empty milk crates on floor in supermarket over which plaintiff tripped and fell not an inherently dangerous condition.); Bernth v. King Kullen Grocery Store Co., Inc., 36 A.D.3d 844 *2nd Dept. 2007) (Shopping cart in supermarket aisle over which plaintiff tripped not inherently dangerous condition.); Mansueto v. Worster, 1 A.D.3d 412 (2nd Dept. 2003) (Unsecured piece of carpet over which plaintiff fell, not an inherently dangerous condition.); Schoen v. King Kullen Grocery Co., Inc., 296 A.D.2d 486 (2nd Dept. 2002) (Flat pieces of cardboard on floor within supermarket over which plaintiff tripped and fell not inherently dangerous condition.); Gibbons v. Lido and Point Lookout Fire District, 293 A.D.2d 646 (2nd Dept. 2002) (Cement block on floor within premises over which plaintiff tripped and fell were not inherently dangerous conditions.); Tresgallo v. Danica, L.L.C., 286 A.D.2d 326 (2nd Dept. 2001) (Masonite boards on floor within a premises over which plainitff tripped and fell not inherently dangerous.).

Out of Possession Landlords

It is well settled that generally an owner who leases property is not liable for injuries sustained upon his land absent an agreement or covenant to keep demised premises in good repair, Putnam v. Stout, 38 N.Y.2d 607 (1976); Manning v. New York Telephone Company, 157 A.D.2d 264 (1st Dept. 1990), and absent actual control, or a course of conduct demonstrating assumed responsibility to maintain, Cherubini v. Testa, 130 A.D.2d 380 (1st Dept. 1987); Reidy v. Burger King Corporation, 250 A.D.2d 747 (2nd Dept. 1998); Davidson v. Wiggand, 259 A.D.2d 799 (3rd Dept. 1999).

Accordingly, an out of possession landlord cannot generally be liable for the condition of his property unless he maintains a contractual obligation to keep the premises in good repair, Putnam v. Stout, 38 N.Y.2d 607 (1976); Negron v. Helmsley Spear, Inc., 280 A.D.2d 305 (1st Dept. 2001); DeLeon v. The Rajon Company, 243 A.D.2d 366 (1st Dept. 1997); Canela v. Foodway Supermarket, 188 A.D.2d 416 (1st Dept. 1992); Russo v. 491 West Street Corp., 176 A.D.2d 672 (1st Dept. 1991) (Landlord who retained right to re-enter property and make repairs at tenants expense, was obligated to make repairs), and he has notice, constructive or actual, of said defect. Davis v. HSS Properties Corporation, 257 A.D.2d (1st Dept. 1999); Velasquez v. Tyler Graphics, LTD., 214 A.D.2d 489 (1st Dept. 1995).

There are, however, two exceptions to the general rule. First, an out of possession landlord maybe held liable if he has a general right to reenter the

premises, reserving the right to make repairs, and the condition alleged involves a significant structural or design defect, which is contrary to statutory safety provisions. Hausmann v. UMK, Inc., 296 A.D.2d 336 (1st Dept. 2002); Nameny v. East New York Savings Bank, 267 A.D.2d 108 (1st Dept. 1999) (Court held that provision in lease granting the landlord right to reenter, inspect, and repair at tenant's expense coupled with statutory obligation requiring that owner maintain building, was sufficient to confer liability on out of possession landlord); Raynor v. 666 Fifth Avenue Limited Partnership, 232 A.D.2d 226 (1st Dept. 1996). Thus, while a wobbling stair has been deemed to be a structural defect, Nameny v. East New York Savings Bank, 267 A.D.2d 108 (1st Dept. 1999), snow and ice removal, Cepeda v. 3604-3610 Realty Corp., 298 A.D.2d 175 (1st Dept. 2002), debris removal, Uhlich v. Canada Dry Bottling Company of New York, 305 A.D.2d 107 (1st Dept. 2003), security and crowd control, DeLeon v. Port Authority of New York and New Jersey, 306 A.D.2d 146 (1st Dept. 2003), ran water in a lobby, Brooks v. Dupont Associates, Inc., 164 A.D.2d 847 (1st Dept. 1990), an overly waxed floor, Manning v. New York Teplephone Company, 157 A.D.2d 264 (1st Dept. 1990), have not. A structural defect is one where the defect violates a statute rather than a regulation. Guzman v. Haven Plaza Housing Development Fund Company, Inc., 69 N.Y.2d 559 (1987); Velasquez v. Tyler Graphics, LTD., 214 A.D.2d 489 (1st Dept. 1995). General maintenance of a premises, and a failure stemming therefrom, is not akin to a structural defect. Manning v. New York Telephone Company, 157 A.D.2d 264 (1st Dept. 1990).

When an owner of a demised property, pursuant to the lease, retains a right to reenter the premises to inspect and make necessary repairs, he shall be liable, even if he is out of possession, for any structural defects, design defects, violations of the Multiple Dwelling Law, and violations of the Administrative Code, absent the assumption to make repairs. Guzman v. Haven Plaza Housing Development Fund Company, Inc., 69 N.Y.2d 559 (1987); Worth Distributors, Inc. v. Latham, 59 N.Y.2d 231 (1983). The defect must violate a specific statute, and the violation itself constitutes constructive notice upon the landlord. Id. The court in Guzman, relying on Worth, and Tkach v. Montefiore Hospital for Chronic Diseases, 289 N.Y. 387 (1943), stated that despite being out possession, the owner was nevertheless liable inasmuch as defendant owner

> [l]ike the owners of the buildings in *Tkach* and *Worth Distribs.* which were specifically bound by statute to keep the premises "in good repair" (Multiple Dwelling Law § 78), Village East, as owner, had obligations under the Administrative Code which, it has been held, has the force and effect of statute *(see,* n 3, *supra).* Village East had both a general responsibility for safe maintenance of the building and its facilities (Administrative Code §§ C26-105.1, C26-105.2 [now §§ 27-127, 27-128]) and specific obligations pertaining to minimum handrail clearance (Administrative Code § C26-604.8 [now § 27-375]) and minimum illumination (Administrative Code § C26-605.1 [a] [now § 27-281 (a)]). Also, as in *Tkach* and *Worth Distribs.,* Village East, as owner-lessor, could enter the premises" at all times" to inspect. In addition, it had the right to make repairs "if the tenant fail[ed] to make" them and to change the "arrangement and/or location " of the

stairs.

Guzman v. Haven Plaza Housing Development Fund Company, Inc., 69 N.Y.2d 559, 453-454. The Court further held, again relying on Tkach, that under these circumstances, meaning a right of reentry and a structural Administrative Code violation, there was a basis for liability against the owner even absent actual knowledge. Id. The court held that the right to reenter the premises constituted actual notice to the owner of the structural violation alleged. Id. In particular, the court stated

> Although there is no evidence that Village East had actual notice of the claimed dangerous condition, its right to reenter the premises is sufficient to charge it with constructive notice *(Tkach v Montefiore Hosp., supra,* at 390). Its failure to act to remedy the defect as it could have done under the lease is the basis for its liability under the various provisions of the New York City Administrative Code

Id. at 454. To the extent that Guzman, relies upon Tkach, an owner can only be charged with constructive notice of defects within parts of the building upon which he, as defined by the lease, may enter. Tkach v. Montefiore Hospital for Chronic Diseases, 289 N.Y. 387; Manning v. New York Telephone Company, 157 A.D.2d 264 (1st Dept. 1990).

In Guzman, plaintiff was injured within leased premises on an allegedly defective handrail, erected by lessee and due to inadequate lighting. Id. it was undisputed that the owner leased the property in question and that the same had

never inspected the premises and had no actual knowledge of the defect alleged. Id. Pursuant to the lease, the owner retained a right of re-entry for purposes of inspection and to make repairs at tenant's expense. Id. The court in affirming the lower court's decision concluded that to the extent that the defects alleged were violations of the Administrative Code and the owner had a right of reentry, the owner was liable and was charged with constructive notice of the defect alleged. Id.

In order to confer constructive notice the defect alleged must violate a statute rather than a regulation and the statute must be applicable to the defect alleged. Velasquez v. Tyler Graphics, LTD., 214 A.D.2d 489. (Court dismissed complaint against landlord/owner finding lack of notice. Court concluded that Administrative Code violation alleged was not applicable to the defect alleged).

The second exception to the general rule is where the owner retains control of the demised premises and there is a violation of a particular statute. Even if there is no right to reenter the demised property, as in the case of a net lease, an owner will be liable for violations of the multiple dwelling law, and charged with constructive notice of the same if it retained control of the demised premises. Bonifacio v. 910-930 Southern Boulevard, 295 A.D.2d 86 (1st Dept. 2002) (Court denied summary judgment to defendant owner who claimed he was out of possession landlord when the defect in question violated the Multiple Dwelling law

and it was unclear whether defendant, absent right of reentry, nevertheless retained control over the demised premises).

Right of reentry to make repairs is not akin to affirmative obligation to make repairs and thus does not obligate or confer liability on out of possession landlord for a subsequent arising dangerous condition. Plung v. Cohen, 250 A.D.2d 430 (1st Dept. 1998); Canela v. Foodway Supermarket, 188 A.D.2d 416 (1st Dept. 1992). This is particularly true where the dangerous condition alleged is not structural in nature and is instead in the nature of general maintenance. Henderson v. Hickory Pit Restaurant, 221 A.D.2d 161 (1st Dept. 1995) (Summary judgement granted to out of possession landlord, where plaintiff alleged to have slipped on rotten vegetables. Court concluded that while owner had right of reentry, the defect alleged was not structural, did not involve design and did not violate specific Administrative Code provisions); Manning v. New York Telephone Company, 157 A.D.2d 264 (1st Dept. 1990) (Summary judgment granted to out of possession landlord, where plaintiff alleged to have slipped on overly waxed floor. Court concluded that while owner had right of reentry, the defect alleged was not structural, did not involve design and did not violate specific Administrative Code provisions); Brooks v. Dupont Associates, Inc.,164 A.D.2d 847 (1st Dept 1990). Accordingly, a right of reentry does not confer liability when the defective condition does not violate the Administrative Code or some other statute imposing an obligation to maintain.

Discussion

Defendants' motion seeking summary judgment over and against plaintiff is hereby denied insofar as they failed to establish prima facie entitlement to summary judgment based on all grounds upon which the motion is premised. Defendants' evidence fails to establish that the condition herein was not inherently dangerous. Defendants' evidence further fails to establish that they did not create the condition herein and that they did not have actual notice of the same. Lastly, defendants' evidence fails to establish that Terrinaz, as an alleged owner out of possession had no contractual obligation to maintain the premises herein.

With regard to defendants' first contention, that summary judgment must be granted because the condition herein was not inherently dangerous, defendants' evidence fails to establish prima facie entitlement to summary judgment insofar as the very evidence submitted by defendants raises a question of fact with regard to whether the condition alleged was inherently dangerous. It is axiomatic that before negligence can be found it must be established that the accident causing instrumentality constitutes a dangerous condition, defect, or trap. It is equally well settled that the court can and should, when the facts are clear and compelling, decide whether the defect alleged by plaintiff is inherently dangerous and thus actionable as a matter of law. In this case, plaintiff's deposition testimony, submitted by defendants, establishes that she tripped and fell over a box of

tangerines. Said box laid on the floor in the aisle of the premises herein, a supermarket. Said box, was similar in size to the basket plaintiff was holding. The Court takes judicial notice that an average shopping basket is about two feet wide, one foot long, and one foot high. Based on the forgoing, the Court concludes that plaintiff's testimony, at the very least creates an issue of fact with regard to whether the box she tripped over constitutes an inherently dangerous condition. Contrary to defendants' assertion at least one case, substantially analogous to the facts herein and controlling and binding on this Court, held that a box sitting on the floor of a supermarket aisle constituted a dangerous condition. WestBrook v. WR Activities-Cabrera Markets, 5 A.D.3d 69 (1st Dept. 2004). In WestBrook, the court denied defendants' motion seeking summary judgment for a host of reasons, not the least of which was that the box over which plaintiff fell was inherently dangerous as a matter of law. Id. In WestBrook, plaintiff tripped and fell while traversing an aisle within a supermarket. Id. The box that caused her to trip was two and one half feet long, one half feet wide and a foot high. Id. The court held that such a box, situated by itself on the floor of an aisle, could easily be overlooked, created a hazard, and was thus an inherently dangerous condition. Accordingly, based on the evidence and the case law, the very evidence submitted by defendants raises an issue of fact with regard to whether the box herein was an inherently dangerous condition. Defendants' motion, inasmuch as it seeks summary judgment on the aforementioned basis must be denied.

With regard to defendants' contention that summary judgment is warranted insofar as defendants neither created the condition alleged nor had notice of the same, defendants fail to establish prima facie entitlement to summary judgment insofar as they fail to negate actual notice and fail to negate creation of the condition alleged herein. In order to prevail in a case sounding in the negligent maintenance of a premises, a plaintiff must demonstrate that a defendant, who owns or controls a premises, caused or created the condition alleged or had prior notice of the same. Notice can be actual or constructive. Based on the foregoing, it follows that in order to establish prima facie entitlement to summary judgment based on the absence of the elements just discussed, a defendant must establish that it neither created the condition alleged nor had notice of the same. In this case, none of the evidence submitted by defendants conclusively establishes the absence of actual notice. Furthermore, none of the evidence submitted establishes that defendants did not create the condition herein. The evidence submitted by defendants, namely plaintiff's deposition transcript, Rodriguez' transcript, and Diaz' transcript, establishes that plaintiff, by her own testimony, never made any complaints regarding the box herein. Rodriguez testified that boxes would not be placed on the floor in the aisles of the premises herein unless an employee was working with the same. Rodriguez also testified that upon reporting to the scene of the accident he did not see the box purported to have caused plaintiff's accident. Diaz' testimony establishes that she never received any

complaints regarding the manner in which ED and defendant C-TOWN SUPERMARKET (C-Town) conducted business or with regard to structural issues related to 228. The foregoing evidence fails to negate actual notice of the condition herein insofar as neither Rodriguez nor Diaz were ever asked and thus denied that they had received complaints about the condition herein prior to plaintiff's accident. Similarly, these same witnesses were never asked whether they had observed the box herein prior to the accident herein. Lastly, neither Diaz no Rodriguez testified that they did not create the condition herein. The fact that plaintiff made no prior complaints regarding the condition herein does not avail defendants, since it does not foreclose the possibility that someone else complained, a fact defendants have the burden of negating. Thus, the evidence tendered by defendants fails to negate actual notice or creation of the condition alleged. Thus, they fail to establish prima facie entitlement to summary judgment to the extent that they allege that they did not create the condition herein nor did they have notice of the same.

With regard to defendants contention that Terrinaz is entitled to summary judgment insofar as it is a landlord out of possession, the evidence tendered by defendants fails to establish prima facie entitlement to summary judgment on that ground. It is well settled that absent an agreement to maintain and repair, an owner of real property is not subject to liability for a dangerous condition existing within his property when the same has leased said property to another. Two

exceptions exist, which do in fact make the landlord of demised premises liable for dangerous conditions therein even absent a covenant to repair and maintain the demised premises. First, a landlord, who retains the right to reenter demised premises to make necessary repairs is liable for any structural defects existing within the demised premises. Structural defects are those which violate statute and a landlord who retains a right to reenter demised premises is charged with constructive notice of any structural violations existing within the demised premises. Second, a landlord who retains control of demised premises is liable for structural defects therein absent a covenant to repair or a right to reenter. Like the first exception, a structural defect, to the extent that it violates statute, constitutes constructive notice upon the owner. In this case defendants have failed to establish prima facie entitlement to summary judgment insofar as they fail to establish that Terrinaz had no contractual obligation to maintain and repair the premises herein. While Diaz testified that Terrinaz did not undertake to repair and maintain the premises herein, nothing tendered establishes that no such obligation existed. If such obligation existed, assuming notice or creation of the defective condition, Terrinaz like ED and C-Town, would be subject to liability. Thus, defendants fail to establish prima facie entitlement to summary judgment in favor of Terrinaz.

Insofar as defendants fail to establish prima facie entitlement to summary judgment, the Court need not address the adequacy of nor the arguments made

within plaintiff's papers.

ORDERED that plaintiff serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : April 21, 2008

Bronx, New York

04/21/08

Nelson S. Roman, J.S.C.