

**Feldman v A.R.J.S. Realty Corp.**

2009 NY Slip Op 30532(U)

March 5, 2009

Supreme Court, New York County

Docket Number: 102511/02

Judge: Louis B. York

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

This opinion is uncorrected and not selected for official  
publication.

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

DECENT. **LOUIS B. YORK**  
J.S.C.

PART 2

Justice

Index Number : 102511/2002  
**FELDMAN, NORMAN**  
VS.  
**A.R.J.S. REALTY**  
SEQUENCE NUMBER : # 009  
SUMMARY JUDGMENT

INDEX NO. 102511-02  
MOTION DATE  
MOTION SEQ. NO. #009  
MOTION CAL. NO. \_\_\_\_\_

re 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

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.**

**FILED**  
MAR 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 3/5/09

L. York  
**LOUIS B. YORK**  
J.S.C. 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 2

-----x

NORMAN FELDMAN,

Plaintiff

Index No. 102511/02

v

A.R.J.S. REALTY CORP. and TUSHTAN INC.,

Defendants

-----x

A.R.J.S. REALTY CORP.

Third-Party Plaintiff

Index No. 591003/03

v

SURJIT KUMAR JAIN and SANJAY JAIN,

Third-Party Defendants

-----x

YORK, J.

**FILED**  
MAR 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Defendant A.R.J.S. Realty Corp. (hereinafter "Realty Corp"), moves for 1) summary judgment, or in the alternative 2) if the complaint is not dismissed, an order pursuant to CPLR 3025(b), 3) granting Realty Corp. Leave to amend its Third -Party Complaint to allege a cause of action for breach of contract and 4) such other and further relief as is deemed just and proper.

Third-party defendant Sanjay Jain (hereinafter "Sanjay") is an employee of Tushtan, Inc (hereinafter "Tushtan") and the manager (including on the date of the accident) of the store at 149 Orchard Street, Manhattan, a building owned by Realty Corp. Plaintiff is the President and sole employee of Electric Burglar Alarm Company. He installs and services commercial and

residential alarm systems.

Surjit Kumar Jain called him and indicated that his son-in-law, Sanjay, was opening a store and needed an alarm system. Plaintiff inspected the store, quoted a price and advised Sanjay of the intended location for each motion detector. On the day of the inspection Feldman observed two metal steel doors, built into the cement, at street level, in front of 149 Orchard Street. The doors were padlocked and were not opened during the inspection.

On November 22, 1999, plaintiff proceeded with installation of alarms at the store. He was wearing Timberland boots with a rubber bottom. After installing other alarms, he intended to install contact/motion sensors on the basement door. Some of the store's merchandise was stored in the basement. One part of the sensor is installed on the interior portion of the doorframe, and the other is installed on the interior portion of the door. He got the keys to the padlock and opened the metal doors to the basement. Each door opened to only about 90 degrees since the hinges prevented further opening. Once opened, he saw that there was no staircase leading to the basement floor. Rather, he saw a wooden board, landing or step about six inches below grade. The board was a single step about 5 to 6 feet across and fourteen inches wide. He went inside the store and told Sanjay "... there was no stairs. How do you expect me to do this?" (Id pp 42-43) He also testified that he said "There are no stairs. I'm going to go and see how deep it is, what size ladder I need to take off the truck." (Id p43) He alternately called the board a platform or a step. He tentatively put one foot on the wooden board with to see if it was secure. It held. (Feldman ebt 41, p 46) However, when he stepped on it, it collapsed, so as he was falling (Id p 52), he grabbed the frame of the door with his right hand as his left elbow and left hand rested on another part of the frame. The metal door came across his

right hand, striking his third and fourth fingers, and he saw a piece of his finger on the sidewalk. Sanjay heard the plaintiff cry for help, saw that one of the doors had fallen on Feldman's right hand, and with a passerby lifted the door off his hand and pulled him out. (Sanjay ebt, p 27) The severed part of his finger was recovered, but was not reattached.

Sanjay testified at his deposition that Tushtan leased the store from Realty Corp. He denied ever using the metal doors or ever seeing the metal doors open for any use. Merchandise was not received through the metal doors. Both Sanjay and his father-in-law Surjit signed the lease. When Sanjay signed the lease he received the keys to the front door and to the padlock on the metal doors. Mr. Aaron, a principal of Realty Corp. frequently visited the store "because he has two other stores ... which he wanted to rent ." (Id, p 30) The two other stores were in the same building.

Movant claims entitlement to summary judgment because the lease requires Sanjay to indemnify Realty Corp. against claims occurring in or upon the demised premises. It urges that indemnity permits one held vicariously liable solely because of the negligence of another to shift the burden of loss. It then points to the lease agreement, which only provided a requirement that the tenant maintain public general liability insurance. Surjit signed a guaranty of the lease. (Motion, ex M, lease guaranty) This branch of the motion is wholly without merit. The claim is that Realty Corp is liable not because of vicarious liability, but because of its own fault in not seeing that the board or step or landing on which plaintiff stepped was in good condition and capable of withstanding the weight of a person who used it in performing work on the structure of the premises. See also New York City Building Code §27-127.

Movant next claims entitlement to summary judgment because Realty Corp. was an out

of possession landlord that did not have notice of any dangerous or defective condition and did not retain sufficient control over the demised premises. This argument is also wholly without any merit. Movant cites cases for the proposition that a landlord will generally not be liable for the tenant's failure to maintain the premises in a reasonably safe condition. That truism overlooks the argument that the board or step or landing must have been in unsafe condition seven months before the accident when the lease was executed on March 31, 2002. Movant also urges that the lease provides that tenant has inspected the premises, is thoroughly acquainted with its condition and agrees that taking possession of the premises, is conclusive evidence that it is in good condition at the time possession is taken "except as to latent defects." (Motion, ex M, lease agreement, ¶ 20) Precisely, this is manifestly claimed to be a latent defect - indeed plaintiff put one foot on the step, which seemed secure, and only then fully stepped on it causing its collapse. Presumably if it were patent, a defect would have appeared to Feldman before he put his full weight on the step. Also, Sanjay testified that the metal doors were never used by the store on any prior occasion. (Sanjay ebt, p 14) The claimed lack of notice of the defect by Realty Corp. appears to be grounded solely on the *ipse dixit* of movant's counsel. No affidavit of a principal of Realty Corp is included in the motion. Nor has any party submitted the transcript of the deposition of Ms. Rita Aaron, spouse of Mr. Aaron (of Realty Corp) who died while this action was pending.. Accordingly there is no proof of lack of knowledge by Realty Corp of a defect. Even if there were some proof, that does not close the issue, since we are clearly dealing with a claim of a latent defect, arguably one that should have been known to Realty Corp. Commonsense makes it hard to envision, absent some totally unproven condition, the deterioration of a board so much during the seven months of the occupancy by tenant that it

would collapse when stepped on. The commonsense alternative, in essence argued by plaintiff's counsel, is that the planking simply was not sound, presumably *ab initio* or because of time and deterioration. Furthermore the lease gave Realty Corp the right of re-entry to make necessary repairs (Motion, ex M, ¶¶ 4, 13) although there is no claim in the papers that Mr. Aaron inspected the metal basement doors or the area underneath them. The right of access alone is insufficient to impose liability. *Deebs v Rich-Mar Realty*, 248 Ad2d 185 [1<sup>st</sup> Dept 1998]. The requisite additional circumstance might be found, as claimed here, in the alleged violation of the NYC Building Code. Cf. *Ramirez v 101465 Realty, Inc.*, 39 AD3d 236 [1<sup>st</sup> Dept, 2007] ; see generally *Defenses Available to Out-of-Possession Owners, Landlords*, Martin Adams, NYLJ July 19, 1998, p 5, c 2.

Movant's third argument is that the cause of action based on Labor Law §200 should be dismissed where there is no notice of the alleged dangerous or defective condition and there is no direction, supervision or control of the work by the allegedly culpable party. This argument fails for the reasons just discussed about this being a latent defect. This section of the Labor Law codifies the common law as to the obligation to provide a construction site worker with a reasonably safe place to work. Plaintiff's expert, Peter Pomeranz, an engineer, has opined that "With a reasonable degree of engineering certainty, it is my opinion that Mr. Feldman's accident is the result of an unsafe wooden platform that collapsed under his weight." (Pomeranz affidavit, ¶ 10) Since plaintiff is clearly urging a latent defect that he urges Realty Corp and tenant should have known about, that is they had constructive notice, the cases that movant cites are inapplicable. Those cases stand for the rule that where the alleged dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation,

no liability attaches. For example, in *Vaneer v 993 Intervale* (5 AD3d 161 [1<sup>st</sup> Dept, 2003], the complaint should have been dismissed when the plaintiff, using the same method he had used while employed by the contractor, took one piece of tin and was seeking to hand it to another when a sudden gust of wind picked him up with the piece of tin and threw him onto the road. Here, it is not the method employed by Feldman that is claimed to have caused the accident, but rather that the step or landing or board on which he put his weight was not adequate to hold his weight and collapsed (whether because of deterioration or because it was not sound planking to start with.)

Movant's fourth argument is that the cause of action grounded in Labor Law § 240 should be dismissed because Feldman is not in the class of persons protected by the statute. Here movant correctly relies on *Abbateello v Lancaster Assoc* (3 NY3d 46 [2004]). As movant notes, the Court held that to come within the class for whom absolute liability is imposed, "a plaintiff must demonstrate that 'he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it [the] owner, contractor, or their agent...(citation omitted)'" (3 NY2d at 50,51) The Court held that there could be no Labor Law § 240 (1) liability when the owner did not authorize or even know of the plaintiff's presence on the premises. *Abbateello* also held that the routine maintenance of a cable tv junction box does not constitute the kind of work contemplated by this Labor Law section. That holding presumably does not apply to this case, because this case did not involve the routine maintenance of a cable box but the installation of an alarm system, which courts have held to be structural. See, e.g. *Zgoba v Easy Shopping Corp.* 246 AD2d 539 [2<sup>nd</sup> Dept, 1998]; *Tate v Clancy-Cullen Storage Co.* (171 AD2d 292 [1<sup>st</sup> Dept, 1991]. None of the parties has advanced any claim whatever that Realty Corp or any of its

principals were present at the premises at the time that Feldman was working, nor any claim that Realty Corp or any of its principals authorized or even had any knowledge that Feldman was working at the premises. Accordingly, the plaintiff's cause of action for absolute liability pursuant to Labor Law § 240(1) must be dismissed. It may be noted that movant's additional argument in support of its application to dismiss this cause of action on the ground that the accident was the sole fault of the plaintiff's own negligence in failing to get a ladder and put it down into the basement is unavailing because there is an issue of fact as to whether the accident was solely caused by such claimed negligence on the part of the plaintiff or was caused in whole or in part by the collapse of the step or board or plank (after plaintiff tested its solidity with one foot) by putting his whole weight on the wooden surface.

Movant's fifth argument is that the plaintiff's cause of action pursuant to Labor Law § 241(6) must fail, *inter alia*, on the ground that Realty Corp was an out of possession owner who had not authorized or had any knowledge of the installation of the alarm system. Movant is correct on the ground of the rule stated in *Abbatiello v Lancaster Assoc, supra*. Accordingly, the cause of action grounded on Labor Law § 241(6) must be dismissed.

Plaintiff's counsel's affirmation in opposition also seeks to posit liability on a claimed violation of Labor Law §241-a on the ground that the plaintiff workman was not protected in a shaftway, hatchway or stairwell by sound planking since the plank collapsed when plaintiff put his full weight on it. Since this statute is another absolute liability statute, I must conclude that it cannot apply here because of a failure of proof that the Realty Corp as a landlord out of possession either authorized or had knowledge of the work that plaintiff would be doing. *Abbatiello v Lancaster Assoc, supra*. Plaintiff's argument that the defect must have existed for

so long that Realty Corp had constructive notice of it because the plank was allowed to deteriorate is simply not the equivalent of establishing that Realty Corp as a landlord out of possession authorized the work or knew that the work was to be done. The argument is one that plaintiff may use, to whatever effect, to seek to establish negligence, but it is not enough to invoke an absolute liability statute.

This leaves Realty Corp's alternative request for relief, namely that an order be granted in favor of Realty Corp pursuant to CPLR Rule 3025(b) (permitting an amendment or supplement to a pleading) and granting it leave to amend the third party Complaint to allege a cause of action sounding in breach of contract. The application is denied without prejudice to renewal upon proper papers. First, although paragraph 52 of the moving affirmation asserts that a proposed Amended Third-Party Summons and Complaint is annexed as Exhibit F thereto, it is not in fact attached as part of Exhibit F, nor have I found it elsewhere in the exhibits thereto. Second, even if the proposed Amended Third-Party Complaint was included in the papers, an appropriate showing of merit must still be made. Without the proposed amendment, it appears that Realty Corp seeks to assert a cause of action against both third-party defendants for breach of the lease agreement requiring them to indemnify Realty Corp for any liability that may be imposed on it in this case. Obviously, Realty Corp cannot absolve itself in advance for its own negligence. General Obligations Law §5-321 Also, the liability for a breach of a covenant to provide liability insurance is not full indemnity when Realty Corp had its own liability insurance policy at the time of the accident. *Inchaustegui v 666 5<sup>th</sup> Ave*, 96 NY2d 111 [2001] Rather, Realty Corp would be limited to "its out of pocket expenses (notably, the premiums and any additional costs it incurred such as deductibles, co-payments and increased future premiums) ...Accordingly, it

may not now look to the tenant for the full amount of the settlement and defense costs in the underlying action.” Id, 96 NY2d 111 at 114-115.

Accordingly, it is

**ORDERED** that:

(1) Realty Corp’s application for summary judgment as to negligence, including pursuant to Labor Law §200 is denied;

(2) it’s application to dismiss the causes of action asserted pursuant to Labor Law §240, §241(6) and §241(a) is granted;

(3) and it’s application for leave to amend its Third-Party Summons and Complaint is denied without prejudice to renewal upon proper papers.

Dated: *March 5*, 2009

Enter:

*LY*  
\_\_\_\_\_  
Louis B. York, J.S.C.

**LOUIS B. YORK  
J.S.C.**

**FILED**  
MAR 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK