

**Alberty v Paramount Fee, L.P.**

2009 NY Slip Op 32608(U)

October 28, 2009

Supreme Court, New York County

Docket Number: 115103/06

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan  
*.i.l.c.*

PART 36

Index Number : 115103/2006  
**ALBERTY, BARBARA A.**  
VS.  
**PARAMOUNT LEE, L.P.**  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2  
3, 4  
5

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 *by defendants is granted in accordance with the attached memoranda decision.*

**FILED**

NOV 09 2009

NEW YORK  
COUNTY CLERK'S OFFICE

**HON. DORIS LING-COHAN**

Dated: 10/28/09

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 36

-----x  
BARBARA A. ALBERTY,  
Plaintiff,

Index No.: 115103/06

-against-

DECISION

PARAMOUNT FEE, L.P., and PARAMOUNT FEE  
MANAGEMENT CORP.,  
Defendants.

Motion Seq. No.: 002

-----x  
PARAMOUNT FEE, L.P. and PARAMOUNT FEE  
MANAGEMENT CORP.,  
Third-Party Plaintiffs,

-against-

NEW YORK CITY-OFF TRACK BETTING CORP.,  
Third-Party Defendant.

**FILED**  
NOV 09 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

-----x  
**DORIS LING-COHAN, J.:**

**BACKGROUND**

Defendants Paramount Fee, L.P. and Paramount Fee Management Corp. (collectively, Paramount) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint, or, in the alternative, for summary judgment declaring that third-party defendant New York City-Off Track Betting Corp. (OTB) has a contractual duty to indemnify them.

Plaintiff, an employee of OTB, allegedly injured herself on January 16, 2004 while working on the 10<sup>th</sup> floor of the subject premises, when she was caused to trip on a raised tile on the floor, and fall into a large hole. The premises are owned by Paramount, an out-of-possession landlord, and have been leased to OTB since 1972.

Tahir Kastrati (Kastrati), the superintendent of the subject building, employed by Paramount since 1973, testified at his examination before trial (EBT), that neither he, nor any other building maintenance workers employed by Paramount, ever repaired or maintained the OTB offices (EBT, at 21). Kastrati further testified that Paramount only maintained the washrooms, and that neither he, nor any other Paramount employee, ever inspected the OTB premises (*id.* at 37 and 40). Additionally, according to Kastrati, Paramount never performs any construction at the OTB premises, and that any construction on those premises is performed by OTB (*id.* at 45).

Julius Brody (Brody), the OTB Security Coordinator at the subject premises for 20 years, testified that if OTB had any maintenance problem, an OTB employee would be responsible for correcting it, and that he never had any interaction with Paramount (EBT, at 15). Brody also stated that he did not recall any Paramount employee ever being present when OTB performed any maintenance on the premises (*id.* at 44).

Joseph Iannuzzi (Iannuzzi), a Maintainer in the OTB maintenance department, testified that OTB was responsible for maintaining the 10<sup>th</sup> floor. He further stated that OTB renovated and replaced the flooring and tiles on the 10<sup>th</sup> floor in 2003, and that the new framing and tile work for the floors was contracted by OTB to Tri-State Computer Flooring (EBT, at 23), and that he was asked by OTB to re-position the floor tiles in the area in which the alleged accident took place after the

[\* 4]

installation of the floor (*id.* at 21). Iannuzzi stated that nobody from Paramount was present during the re-installation process (*id.* at 26), and that OTB would not contact anyone from Paramount to make repairs to the leased premises (*id.* at 104). With respect to the 10<sup>th</sup> floor, Iannuzzi said that the laminate was peeling away from the metal panel, creating a tripping hazard, and that he believed that the laminate was caused to peel away due to the buffing machine used when waxing the floors, which belief was confirmed by Tri-State Computer Flooring (*id.* at 62 and 87). The buffing was performed by OTB personnel (*id.*, at 100).

Pursuant to the lease between OTB and Paramount's predecessor-in-interest, OTB must indemnify the landlord for any loss occurring on OTB-leased property, except for any loss occasioned by Paramount's negligence (Ex. M, Art. 40).

Plaintiff opposes the instant motion, arguing that Paramount's right to inspect the premises, and OTB's covenant to use the contractor employed by Paramount to perform waxing, polishing and cleaning services, render Paramount liable for the injuries plaintiff suffered on the premises. Paramount argues that the lease clause in question, paragraph 38, relates to the prices charged by the cleaning service, not to its right to control such services.

OTB only opposes that portion of the instant motion concerning its alleged indemnification obligation.

[\*5]

## DISCUSSION

"The 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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

"A landlord is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless the landlord: (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision... Here, the lease...imposes no obligation on the [landlord] to make repairs or maintain the demised premises [internal citations omitted]."

*Vasquez v The Rector*, 40 AD3d 265, 266 (1<sup>st</sup> Dept 2007).

Similarly, in the case at bar, Paramount relinquished possession to OTB, and, pursuant to the lease, OTB was responsible for maintaining and repairing the demised premises. Further, the uncontroverted testimony indicates that Paramount

[\* 6]  
never maintained or repaired the floor on which the accident took place, and that the floor was installed, waxed, buffed and inspected by servants and agents of OTB, with Paramount never being involved in any of that work.<sup>1</sup>

In opposition, plaintiff primarily relies on two judicial decisions, both of which are clearly distinguishable from the facts of the within case. The first case, *Sergio v Benjolo N.V.* (168 AD2d 235 [1<sup>st</sup> Dept 1990]), concerns an action instituted pursuant to the provisions of Labor Law § 241, in which a specific provision of the Industrial Code was alleged to have been violated. The second case, *White v Gabrielli* (272 AD2d 469 [2d Dept 2000]), similarly involves a violation of a specific provision of the Administrative Code of the City of New York. The courts in these cases indicated that the code violations may put the out-of-possession landlord on constructive notice that a dangerous condition might exist. In the instant matter, however, plaintiff has not alleged that a specific statutory provision, which might engender liability for Paramount, has been violated.

Moreover,

"the burden is on the plaintiff to prove not only that a dangerous condition existed on the premises but also that the landlord had notice of that condition and a reasonable opportunity to repair it. Constructive notice may be found where an out-of-possession landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection and maintenance or repair

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<sup>1</sup>Paragraph 38 of the lease does specify, as argued by Paramount, that the covenant to use Paramount's contractors for waxing and buffing relates to questions of price for performing such services, not to control over such services. However, since the buffing and waxing in question were performed by OTB employees, this issue becomes moot.

and a specific statutory violation exists [internal quotation marks and citations omitted]."

*Reddy v 869 Lexington Avenue Co., L.P.*, 31 AD3d 732, 733 (2d Dept 2006); see also *Davis v HSS Properties Corp.*, 1 AD3d 153 (1<sup>st</sup> Dept 2003). Here, the record does not "support a finding of constructive notice as plaintiff neither alleged nor proved a significant structural or design defect contrary to a specific statutory safety provision." *Gomez v 192 East 151<sup>st</sup> Street Associates, L.P.*, 26 AD3d 276, 278 (1<sup>st</sup> Dept 2006). Basically, "plaintiff failed to submit evidence that the floor condition over which she tripped constituted a significant structural defect which violated a statutory duty to repair." *Eckers v Suede*, 294 AD2d 533, 533 (2d Dept 2002). Mere allegations that general safety provisions have been violated cannot support a claim of liability against an out-of-possession landlord. *Ram v 64<sup>th</sup> Street-Third Avenue Associates, LLC*, 61 AD3d 596 (1<sup>st</sup> Dept 2009).

"Here, [Paramount] presented unrefuted evidence that it was an out-of-possession owner and had vested exclusive possession and control of the premises to plaintiff's employer; that [Paramount] had no workers or other personnel on the property, and that it did not own and/or maintain any of the equipment there. Consequently, summary judgment dismissing the complaint [is] appropriately granted to [Paramount]."

*Negron v Rodriguez & Rodriguez Storage & Warehouse, Inc.*, 23 AD3d 159, 160 (1<sup>st</sup> Dept 2005).

Based on the foregoing, Paramount's alternative request for relief, seeking summary judgment on the issue of contractual indemnification from OTB, is rendered moot.

**CONCLUSION**

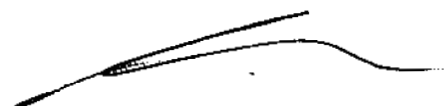
Based on the foregoing, it is hereby

ORDERED that defendants Paramount Fee, L.P.'s and Paramount Fee Management Corp.'s motion for summary judgment of dismissal is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the third-party action is dismissed as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 10/28/09

  
Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Alberty.paramount.wpd

**FILED**  
NOV 09 2009  
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