Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: **HONORABLE AUGUSTUS C. AGATE** IAS PART 24
Justice

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JOANNE RISO,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY , UNITED AIRLINES, AIRWAY MAINTENANCE, LLC and AIRWAY CLEANERS LLC.,

Defendants.

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Index No.: 13211/07

Motion Dated: 07/21/09

Motion Cal. No.: 23

m# 1

The following papers numbered 1 to 34 read on this motion by the defendants Airway Maintenance, LLC and Airway Cleaners, LLC ("Airway") for summary judgment dismissing the complaint insofar as asserted against them and the cross claims of the co-defendants; cross motion by defendant Port Authority of New York and New Jersey ("Port Authority")for summary judgment dismissing the complaint insofar as asserted against it; cross motion by defendant United Airlines for summary judgment dismissing the complaint insofar as asserted against it; cross motion by defendants Port Authority and United Airlines (i) for summary judgment on United Airlines' cross claim for common law and contractual indemnification and (ii) for summary judgment on Port Authority's cross claim for common law indemnification.

	PAPERS NUMBERED
Notice of Motion – Affidavits – Exhibits	1 – 3
3 Notices of Cross Motion – Affidavits – Exhibits.	4 – 15
Affirmations in Opposition – Exhibits	16 – 26
Replying Affirmations – Exhibits	27 – 34
Memorandum of Law of defendants Airway	
Memorandum of Law of defendant United Airlines	
Memorandum of Law of defendant Port Authority	
Reply Memorandum of Law of defendants Airway	

Upon the foregoing papers it is ordered that this motion and these cross motions are decided as follows:

Plaintiff allegedly sustained serious injuries when she fell in the baggage claim section of the B Terminal at LaGuardia Airport on July 18, 2005. The subject premises was leased by the defendant Port Authority of New York and New Jersey to defendant United Airlines and was maintained by defendants Airway Maintenance, LLC and Airway Cleaners, LLC pursuant to a contract. Plaintiff alleges that she fell on a thick, liquid substance. Plaintiff did not notice the substance prior to her fall. Plaintiff asserts that the attendant told her that the substance leaked from someone's luggage. According to the plaintiff, the attendant told her he called someone to clean up the spill before plaintiff arrived at the terminal. Plaintiff subsequently commenced this action to recover damages for negligence. The instant motion and cross motions for summary judgment ensued.

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 demonstrate the absence of any material issues of fact. (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (Peerless Ins. Co. v Allied Bldg. Prods. Corp., 15 AD3d 373, 374 [2005].)

In order to recover damages in a slip and fall case, a plaintiff must show that the landowner created the dangerous condition which caused the accident or had actual or constructive notice of it. (Muniz v New York City Hous. Auth., 38 AD3d 628 [2007]; Kraemer v K-Mart Corp., 226 AD2d 590, 590 [1996].) In order to constitute constructive notice, a defect must be visible and apparent and it must exist fr a sufficient length of time before the accident to permit the defendant to remedy it. (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986].)

The motion by the Airway defendants for summary judgment is granted. Airway Maintenance, LLC contracted with United Airlines to provide janitorial services at LaGuardia Airport. Airway Cleaners, LLC did not have a contract with United Airlines but provided employees to Airway Maintenance. There is no evidence that Airway assumed a duty to exercise reasonable care to prevent

foreseeable harm to a third party such as the plaintiff. (Alvarez v First Natl. Supermarkets, Inc., 11 AD3d 572, 574 [2004].) Indeed, defendant Airway established, through the contract and the deposition testimony of its representative that it did not launch a force or instrument of harm, that plaintiff did not detrimentally rely on the continued performance of its duties and that it did not entirely displace United's duty to maintain the premises safely. (Espinal v Melville Snow Contrs., Inc., 98 NY2d 136, 140 [2002]; Fung v Japan Airlines Co. Ltd., 31 AD3d 707, 708 [2006].) The evidence in the record establishes that following a spill, United Airlines would put up cones around the affected area. No party has raised a triable issue of fact with respect to the liability of defendant Airway.

The cross motion by defendant Port Authority for summary judgment is granted. An out-of-possession landlord is not liable for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to repair an unsafe condition. (Lindquist v C & C Landscape Contrs., Inc., 38 AD3d 616 [2007]; Chery v Exotic Realty, Inc., 34 AD3d 412, 413 [2006]; Stark v Port Authority of New York and New Jersey, 224 AD2d 681, 682 [1996].) However, a landlord who has the right to re-enter the premises to make repairs may be liable if the dangerous condition constitutes a significant structural or design defect and violates a specific statutory violation. (Rhian v PABR Assoc., LLC, 38 AD3d 637 [2007]; (Melendez v American Airlines, Inc., 290 AD2d 241, 242 [2002].)

Here, the lease between Port Authority and United Airlines expressly relieves Port Authority of any obligation to repair the subject premises. (see D'Orlando v Port Authority of New York and New Jersey, 250 AD2d 805, 805 [1998]; Love v Port Authority of New York and New Jersey, 168 AD2d 222, 222 [1990].) Indeed, Section 29 of the lease provides that "the Port Authority shall not be liable for any claims ... by reason of the conduct, operation and maintenance of the Airport." Further, Section 6 of the lease provides that "[t]he lessee shall repaint, repair, replace or rebuild all or any part of the Terminal Building Space ..." In addition, in his affidavit, Gary Lonieski, the Manager of Planning Administration for Flight Operations for defendant United Airlines, avers that defendant Port Authority did not have any control over or any responsibility to maintain the subject area where plaintiff fell. Furthermore, Theresia H. Schatz, a principal property representative for defendant Port Authority, testified at her deposition that it is her understanding that under the lease between Port Authority and United Airlines, Port Authority is not responsible for maintenance in the baggage claim area. Thus, inasmuch as defendant Port Authority is an out-of-

possession landlord and did not have an obligation to maintain the subject premises under the lease, it cannot be held liable for plaintiff's injuries.

The cross motion by defendant Untied Airlines for summary judgment is granted. Defendant United Airlines made a prima facie showing of its entitlement to judgment as a matter of law by showing that it did not create the hazardous condition or have actual or constructive notice of it. At his deposition, Michele Lagrasta, the service director of United Airlines at the time of plaintiff's accident, testified that he did not know long the liquid had been on the floor prior to plaintiff's fall. Also, Gary Lonieski, airport operations manager and global service manager for defendant United Airlines, did not have knowledge of how long the spill had been on the floor when he testified at his deposition.

Plaintiff, in opposition, asserts that defendant United Airlines had notice of the spill since the attendant in the baggage area had said that the liquid substance leaked from someone's luggage and he had called for someone to clean up the spill before the plaintiff arrived. However, such statement constitutes inadmissible hearsay. Contrary to plaintiff's contention, this statement does not fall within the admission against interest hearsay exception. Plaintiff was never able to identify this attendant, and, thus, it is unclear exactly who this attendant was that made the statement, or if he was even employed by defendant United Airlines. Moreover, assuming arguendo that the attendant was employed by United Airlines, there is no evidence that he made the statement within the scope of his authority. (Tyrrell v Wal-Mart Stores, Inc., 97 NY2d 650, 652 [2001]; Loschiavo v Port Auth. Of New York and New Jersey, 58 NY2d 1040, 1041 [1983]; Lowen v Great Atl. & Pac. Tea Co., 223 AD2d 534, 535 [1996].)

Based upon the above decisions, it is not necessary for this court to consider the claims regarding common law and contractual indemnification.

Accordingly, the branch of the motion by defendants Airway Maintenance, LLC and Airway Cleaners, LLC for summary judgment dismissing the complaint insofar as asserted against them is granted.

The cross motion by defendant Port Authority for summary judgment dismissing the complaint insofar as asserted against it is granted.

The cross motion by defendant United Airlines for summary judgment dismissing the complaint insofar as asserted against it is granted.

The branch of the motion to dismiss the cross claims and the cross motion by defendants Port Authority and United Airlines for summary judgment on the cross claims are denied as moot.

Date: October 6, 2009

AUGUSTUS C. AGATE, J.S.C.