Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

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WILLIAM F. CORR and CHRISTINE CORR,
Plaintiff,

Index No.: 14187/08
Motion Date: 12/21/09

-against-

MACQUARIE AVIATION NORTH AMERICA NO. 2, INC. and AVPORTS.
Defendants.

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The following papers numbered 1 to 13 read on this motion by defendant MACQUARIE AVIATION NORTH AMERICA NO. 2, INC., d/b/a AVPORTS (hereinafter, "defendant") for an order granting summary judgment in its favor and dismissing the amended complaint. On December 21, 2009, this motion was referred to Part 17 by Justice Ritholtz.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-.....	1-4
Memorandum of Law.....	5-6
Affirmation in Opposition-Affidavit-Exhibits.....	7-10
Reply Affirmation-Exhibits.....	11-13

Upon the foregoing papers it is ordered that the motion by defendant for an order granting summary judgment in its favor and dismissing the amended complaint is granted, for the following reasons:

According to plaintiff, the action herein stems from plaintiff sustaining a medial meniscus tear of the left knee while he and other co-workers moved a bookcase/metal cabinet that had been left in front of his cubicle at the offices of the Federal Aviation Administration at Republic Airport, Farmingdale, New York. Plaintiff was employed by the FAA as a Flight Safety Inspector. Plaintiff claims that the cabinet was moved from its usual position against the opposite wall by painters employed by defendant AVPORTS and left there despite repeated requests that it be moved. As such, plaintiff brought this action claiming that defendant created an obstacle, a dangerous condition, and permitted that dangerous condition to remain, thereby setting in motion the course of events that resulted in plaintiff's injuries.

Defendant has now moved for summary judgment on the following grounds: there is no genuine issue of material fact requiring a trial because it had no obligation to protect the plaintiff from the consequences of his own actions in trying to move the cabinet, (ii) there is no evidence

that AvPorts' painters ever moved this cabinet, let alone created a dangerous condition, or that any such a condition was ever brought to AvPorts' attention; (iii) as a matter of law the alleged hazard – the location of cabinet(s) - was not inherently dangerous; indeed, it was "in plain view" and therefore "open and obvious" and "precisely the type of claimed hazard that would necessarily be noticed by any careful observer, so as to make a warning superfluous"; (iv) plaintiff worked under the exclusive supervision and control of FAA, whose sole duty it was to provide plaintiff a safe place to work; and (v) the location of the cabinet is not what caused plaintiff's injuries; plaintiff's own attempt to move the cabinet was the cause of his injuries.

Plaintiff opposes this motion, claiming that the cabinet was moved by defendant, and there were complaints that it should be moved, and the conflicting testimony on these issues raises an issue of fact that cannot be resolved as a matter of law. Plaintiff also claims that defendant had a special use of the premises and this imputed upon it a duty to keep the premises in a reasonably safe condition. Plaintiff also claims that the injury was a result of the unsafe cabinet left uncorrected at the premises by defendant and even if it was open and obvious, the issue of comparative fault due to plaintiff's actions raises an issue that must be resolved by the jury.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v County of Albany, 50 NY2d 247 (1980); Miceli v Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v. March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v Johnson, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

In support of its motion, defendant relies upon, *inter alia*, the deposition testimony of plaintiff, wherein he states that upon returning to his office after a week away on February 12, 2007, he found that "there was a large book cabinet, two of them, in the area of [his] cubicle" and that "[he] had about a foot to 14 inches to squeeze in." Plaintiff also testified that he informed his FAA supervisor, Miguel Soto, about the situation, and Soto said that defendant AvPorts' painters had moved them and that he would call AvPorts to get them moved back. On Tuesday, February 13th, plaintiff again complained to Soto about the cabinets and Soto told him "he called them several times." On Wednesday, February 14th, plaintiff again complained to Soto, and Soto allegedly said he would "call them again." Plaintiff admits he did not hear Soto make any of the alleged calls; and that he, plaintiff, did not call AvPorts or speak with any employee of Avports about the situation. Subsequently, Soto approached plaintiff and said they should move the cabinet. These two, Duval Thomas, and supervisor Ron Hughes, attempted to move the cabinet.

Plaintiff stated that, a few minutes later he started to feel sore in his left knee. Plaintiff stated that he had never tripped over the cabinet during any of the three days as he entered his cubicle, however, he decided the bookcases needed to be moved because it made it difficult for him to get in and out of his cubicle

Defendant also relies upon the deposition testimony of Miguel Soto, an FAA Front Line Management Supervisor, and plaintiff's immediate supervisor. He testified that he had no responsibilities that would require him to be concerned with painting work at FAA's office, he did not see the "bookcase" being moved from its usual position against the opposite wall closer to plaintiff's cubicle; and he did not know who had moved it. Soto also testified that plaintiff had never asked him to contact anyone about having the bookcase moved back; and that he had no conversations with AvPorts' painters about their work or with AvPorts' representatives, including its maintenance manager, William Lachnicht. Defendant also relies upon the deposition testimony of Ronald Hughes, a Frontline Manager of the Operations Unit at the FAA's office. He testified that he was one of three people, including plaintiff, but not Soto who moved back a grey metal filing cabinet that was "out a way from the wall", "somewhere in the halfway point" of the four feet or so usually separating wall cabinets from cubicles. Hughes did not know who had moved the cabinet from against the wall and he made no request to anyone at AvPorts to move the cabinet back to the wall and did not know and has never heard about anyone who did. Defendant also relies upon the deposition testimony of Duval Thomas, an FAA computer specialist, who stated that he had helped plaintiff move the cabinet after plaintiff had asked him to help. Thomas also stated that he thought Soto had also helped them move the cabinet back against the wall. Finally, defendant relies upon the deposition testimony of William Lachnicht, defendant's maintenance manager at Republic Airport. He stated that defendant, under subcontract from URS, performed certain maintenance at Republic Airport, principally maintenance of the airfield to FAA standards, but also painting and general plumbing. AvPorts had performed painting work at the FAA's premises in February 2007 at the request of URS pursuant to its contract with the State of New York and pursuant to AvPorts' maintenance subcontract. The painting began on January 31 and continued on and off until February 28, 2007. He stated that there were cabinets against the walls at FAA's premises, but "my men would have painted around them if they [FAA] didn't want them moved." He stated that at no time between February 12 and 14, 2007 did he have any conversations "with anyone from the FAA regarding bookcases or cabinets of some kind blocking one of the cubicles." He received no complaints about cabinets blocking plaintiff's cubicle, or any request that they be moved away from it.

It is axiomatic that "before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff … In the absence of duty, there is no breach and without a breach there is no liability" Further, it is well settled that "'liability for a dangerous or defective condition on property is generally predicated upon ownership,

occupancy, control or special use of the property … Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property'" Dugue v 1818 Newkirk Mgmt. Corp., 301 AD2d 561 (2d Dept 2003.) (Citations omitted.)

Here, the Court finds that defendant has met its burden to establish its entitlement to summary judgment and plaintiff has not met his burden to raise an issue of fact. Defendant has shown that it did not owe plaintiff a duty to maintain the office area in a reasonably safe condition. Here, it is indisputable that defendant neither owned nor leased the subject premises, but was merely an airport maintenance contractor; and that FAA was at all times the tenant in possession of the premises under a lease from the State of New York. Further, it is not disputed that defendant exercised no supervisory control over and had no input into how plaintiff and his FAA co-workers went about moving the cabinet. Even if defendant did own or control the premises by some special use, it is settled law that while a landowner owes a duty to another on his land to keep it in a reasonably safe condition, the law imposes no duty to protect the plaintiff from the unfortunate consequences of his own actions. *See*, Macey v. Truman 70 N.Y.2d 918 (1987.) Here, the injury resulted not from any unsafe condition defendant left uncorrected at the office, but as a direct result of the course plaintiff and his companions decided to pursue in attempting to move the cabinet. As such, defendant owed no duty to plaintiff regarding the moving of the cabinet. Marino v. Bingler, 60 A.D.3d 645 (2d Dept. 2009.)

Furthermore, contrary to plaintiff's claim, even if defendant moved the cabinet and failed to move it back, there is nothing to suggest that this was an inherently dangerous condition. Rather, it was a condition that was readily visible upon approaching plaintiff's cubicle and is precisely the type of claimed dangerous condition that would necessarily be noticed by any careful observer, and cannot support a claim of negligence. Fitzgerald v. Sears, Roebuck & Co., 17 A.D.3d 522 (2d Dept. 2005.) Contrary to plaintiff's claim, this does not present an issue of comparative negligence since the open nature of the condition is not relevant to the injury suffered by plaintiff, but rather, pertinent to the inherent lack of danger presented.

Furthermore, defendant has established that it had no obligation, even if it is considered a landowner, to warn plaintiff of the proper method to move the cabinet since defendant neither directed nor supervised the moving of the cabinet in any manner. Defendant has shown that what caused plaintiff's injuries was his own action in response to a condition he no longer wanted to exist. As such, the law imposes no legal liability upon defendant to protect plaintiff from the unfortunate consequences of his own actions. Macey v. Truman , *supra.* Similarly, plaintiff's claim that defendant created a fire safety hazard by allegedly failing to maintain "[a] continuous and unobstructed way of egress travel from any point in a building or facility that provides an accessible route to an area of refuge, a horizontal exit or a public way," in violation of § 1002.1 of the Fire Code of the State of New York, is unavailing. Even assuming defendant had such responsibilities under the Fire Code, the plaintiff was not injured because defendant failed to

adhere to this Code, as a result, there can be no negligence based on this Code. Finally, plaintiff's claims regarding there being a triable issue regarding whether there were prior complaints about the condition fail since, as discussed above, the readily observable cabinet did not present an inherently dangerous condition. Moreover, there is no admissible evidence that suggests defendant received any complaints regarding the cabinet presenting a danger.

For the reasons set forth above, the motion by defendant for summary judgment and dismissal of the amended complaint is granted.

Dated: December 22, 2009 **.....**

ORIN R. KITZES, J.S.C.