

**Howard v Alexandra Rest.**

2010 NY Slip Op 31385(U)

June 1, 2010

Supreme Court, New York County

Docket Number: 109987/07

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMOND**

PART **15**

Index Number : 109987/2007  
HOWARD, RYAN J.  
vs  
ALEXANDRA RESTAURANT  
Sequence Number : 001  
VACATE NOTE OF ISSUE/READINESS

INDEX NO \_\_\_\_\_  
MOTION DATE 5/14/10  
MOTION SEQ NO \_\_\_\_\_  
MOTION CAL NO \_\_\_\_\_

The following papers, numbered \_\_\_\_\_, are filed in this motion to \_\_\_\_\_  
\_\_\_\_\_ of Motion/ Order to Show Cause \_\_\_\_\_  
\_\_\_\_\_ Supporting Affidavits - Exhibits \_\_\_\_\_  
\_\_\_\_\_ Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that the motion

Motion sequences 001-002 and 003 are granted. A Memorandum Decision is hereby  
Memorandum Decision. It is hereby

**ORDERED** that the motion is granted and the court hereby vacates the  
Special Preference in accordance with the provisions of the Domestic Relations Law  
and the provisions for trials are hereby ordered.

**ORDERED** that the motion is granted and the court hereby orders that the  
Executor of the Estate of John J. ...  
and the complaint is hereby

**ORDERED** that the motion is granted and the court hereby orders that  
Alexandra Restaurant to submit their ...  
preference, and it is further

**ORDERED** that counsel for ...  
serve a copy of this order with notice of entry ...

Dated: 5/14/10  
**HON. CAROL EDMOND**

Check one:  FINAL DISPOSITION  **MEMORANDUM DECISION**  
Check if appropriate:  **REPLY**  **REPLY**

WHEN THIS CASE IS FULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

-----X  
HOWARD, RYAN J.,

Plaintiff,

-against-

Index No.  
109987/07

ALEXANDRA RESTAURANT, GEORGE REPETTI as  
Executor of the Estate of JOHN REPETTI, and MAXWELL-  
KATES, INC.,

Defendants.

**FILED**  
JUN 03 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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**EDMEAD, CAROL R., J.:**

Motion sequence numbers 001, 002, and 003 are consolidated herein for disposition.

This matter arises in connection with the slip and fall of plaintiff, Ryan J. Howard (Howard), at the premises having the address 455 Hudson Street, New York, NY 10014 (the Premises). At the time of the injury, December 3, 2006, the Premises was leased by defendant D.E.L. Inc. d/b/a Alexandra Restaurant, improperly sued herein as Alexandra Restaurant (the Restaurant). John Repetti, deceased, was the owner of the Premises at the time of accident, while defendant Maxwell-Kates was the manager for the Premises (these defendants will sometimes be collectively be referred to as the "Owners").<sup>1</sup>

According to the complaint, on December 3, 2006, Howard was a guest at the Restaurant. He was descending a flight of metal stairs at the Premises to the restrooms, when he slipped and fell "on a defective condition." The defective condition was later described by him as a clear,

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<sup>1</sup>By stipulation of May 20, 2010, defendant George Repetti as Executor of the Estate of John Repetti was substituted for defendant John Repetti. Despite having noted the mistake in the moving papers, the stipulation failed to substitute D.E.L. Inc. d/b/a Alexandra Restaurant for defendant Alexandra Restaurant.

wet, unknown, liquid substance smeared on the sixth step of the stairs. Howard EBT, at 25-26, 27, 59, 62. Meanwhile the verified bill of particulars of July 7, 2008 (§ 13) describes the defective condition as related to the environment and structure of the staircase. As a result of his fall, Howard allegedly sustained extensive personal injuries, including traumatic injury to his left shoulder, oblique fracture of the left clavicle, and multiple contusions. Howard was hospitalized, bed-ridden, home bound, and unable to work as a result of the injury.

In motion sequence number 001, the Restaurant moves to vacate “plaintiff’s Note of Issue and Certificate of Readiness for Trial as to the Special Preference in accordance with CPLR §3403 or, in the alternative, denying plaintiff’s request for Special Preference in accordance with CPLR §3403, together with such other and further relief as the Court deems just and proper.” The motion is dismissed as moot.

CPLR 3403 (b) states that “notice of motion for preference shall be served with the note of issue by the party serving the note of issue, or ten days after such service by any other party; or thereafter during the pendency of the action upon the application of a party who reaches the age of seventy years, or who is terminally ill.” As no notice of motion for special preference was served with the note of issue, and this court has not otherwise ordered, there was never any actual request for preference. As such, the motion seeks to address a nullity.

In motion sequence number 002, the Owners seek summary judgment dismissing the complaint in its entirety, as the Premises was leased to the Restaurant, which was responsible for all cleaning and maintenance of the area in which the injury occurred. The Owners also seek summary judgment as to their right of common-law and contractual indemnification against the Restaurant. The Owners argue that as Howard only testified as to a clear, wet, unknown, liquid

substance smeared on the sixth step of the stairs, and the Owners were not responsible for cleaning, but as out-of-possession landlords only for structural defects, they cannot be held liable for Howard's injury. *See Hausmann v UMK*, 296 AD2d 336 (1<sup>st</sup> Dept 2002). The motion for summary judgment dismissing the complaint is denied.

Upon a motion for summary judgment, the movant must show that "there is no defense to the cause of action or that the cause of action or defense has no merit." CPLR 3212 (b). Thus, the Owners 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.

*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). They have failed to do so.

The verified bill of particulars (§ 13) states that the "nature of the dangerous and defective conditions are improper and poor lighting, improper height step risers, improper construction of a staircase, and negligent design of a staircase." In order to be granted summary judgment, then, the Owners must show that the staircase on the Premises had none of the structural defects or other indicated defective conditions. They have not attempted to make any such showing.

Rather than making the required showing, the Owners simply point out that Howard made no allegations as to any structural defects of the staircase in his deposition testimony. However, this is insufficient to obtain summary judgment: "[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615 (4<sup>th</sup> Dept 1992).

Likewise, the Owners' motion for summary judgment as to their right to common-law and contractual indemnification is denied. The motion is based upon the assumption that, as the Restaurant was responsible for the cleaning of the stairs, and the condition that caused the injury was related to those responsibilities, the Owners are entitled to indemnification. There is a contractual provision that would appear to operate to indemnify the Owners, should the cause of the accident and injury be determined to be solely due to the negligence of the Restaurant. *See e.g. Lease between John Repetti and the Restaurant (the Lease), Notice of Motion, Exh. G, ¶ 52.* However, as noted above, the actual cause of the accident and injury has not been determined or proven. As such, any determination as to the operation of indemnification would be patently premature. The motion for summary judgment as to indemnification of the Owners is denied without prejudice.

In motion sequence number 003, the Restaurant moves for summary judgment dismissing any part of the complaint, and all cross claims, as they pertain to structural defects in the staircase of the Premises, in confirmation of their lack of liability for the same. The Lease between the Restaurant and John Repetti indicates that the Restaurant: (i) may make alterations that are non-structural (¶ 3); (ii) shall make non-structural repairs (¶ 4); and (iii) shall make all repairs necessary to the interior and exterior of the Premises, except for structural repairs (¶ 53).

As the Restaurant had no obligation to make structural repairs to the Premises, and the Owners retained the right and obligation to make such repairs, generally, the Restaurant cannot be liable for injury resulting solely from failure to make those same repairs. *See Bush Term. Assoc. v Federated Dept. Stores*, 73 AD2d 943, 944 (2<sup>nd</sup> Dept 1980) (tenants may be responsible for "structural alterations or repairs to comply with local laws or regulations when such

compliance was required because of the character of a tenant's occupancy"); *Josam Assoc. v General Bowling Corp.*, 135 AD2d 502, 503 (2<sup>nd</sup> Dept 1987) ("absent an express clause to the contrary, the tenant has no obligation to make structural changes"); *see also Morel v City of New York*, 192 AD2d 428, 429 (1<sup>st</sup> Dept 1993). However, as noted above, no specific determination has yet been made as to cause of Howard's injury. As such, this motion for summary judgment is premature at best, and moot at worse; it is denied without prejudice.

Accordingly, it is hereby

**ORDERED** that the motion of defendants (sequence number 001) to vacate plaintiff's Special Preference in accordance with CPLR 3403 with regard to the note of issue and certificate of readiness for trial is denied; and it is further

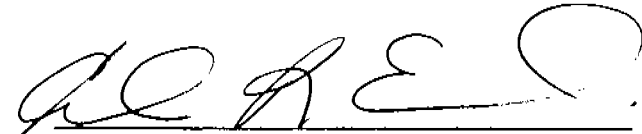
**ORDERED** that the motion of defendants (sequence number 002) George Repetti as Executor of the Estate of John Repetti, and Maxwell-Kates, Inc., for summary judgment dismissing the complaint is denied without prejudice; and it is further

**ORDERED** that the motion of defendant (sequence number 003) D.E.L. Inc. d/b/a Alexandra Restaurant for summary judgment dismissing the complaint is denied without

prejudice; and it is further

**ORDERED** that counsel for defendant D.E.L. Inc. d/b/a Alexandra Restaurant, shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: June 1, 2010



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Carol Robinson Edmead, J.S.C.

**FILED**  
JUN 03 2010  
NEW YORK  
COUNTY CLERK'S OFFICE