

**Raymond v P & J Richmond Corp.**

2011 NY Slip Op 30371(U)

February 8, 2011

Supreme Court, Richmond County

Docket Number: 101136/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Calendar No.:**  
**2866-001**  
**3038-002**  
**3042-003**

**MELISSA RAYMOND,**

**Index No.:**  
**101136/08**

*Plaintiff,*  
*against*

**DECISION**  
**HON. JOSEPH J. MALTESE**

**P & J RICHMOND CORPORATION  
and DELILAH STYLISTS, INC.**

*Defendants.*

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**P & J RICHMOND CORPORATION**

*Third-Party Plaintiff,*

**Index No.:**  
**A101136/08**

*against*

**MICHAEL PASTORE d/b/a MASTERPIECE TATTOO  
and MASTERPIECE TATTOO, INC.,**

*Third-Party Defendants*

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The following papers numbered 1 to 13 were fully submitted on the 17<sup>th</sup> day of December 2010.

Notice of Motion for Summary Judgment  
by Defendant Delilah Stylists, Inc.,  
with Supporting Papers and Exhibits  
(dated August 19, 2010) \_\_\_\_\_ **1**

Notice of Cross Motion for Summary Judgment  
by Plaintiff, with Supporting Papers  
(dated September 3, 2010) \_\_\_\_\_ **2**

Notice of Cross Motion for Summary Judgment  
by Defendant/Third-Party Plaintiff P & J Richmond Corporation,  
with Supporting Papers and Exhibits  
(dated September 8, 2010) \_\_\_\_\_ **3**

Affirmation in Opposition by Plaintiff (dated September 6, 2010)	4
Affirmation in Opposition by Defendant/Third-Party Plaintiff P & J Richmond Corporation, with Supporting Papers and Exhibits (dated September 20, 2010)	5
Reply Affirmation by Defendant/Third-Party Plaintiff P & J Richmond Corporation (dated September 30, 2010)	6
Affirmation in Opposition to Defendant’s Cross Motion by Defendant Delilah Stylists, Inc. (dated October 18, 2010)	7
Affirmation in Opposition to Plaintiff’s Cross Motion by Defendant Delilah Stylists, Inc. (dated October 18, 2010)	8
Affirmation in Opposition by Third-Party Defendants Michael Pastore d/b/a Masterpiece Tattoo and Masterpiece Tattoo, Inc., with Supporting Papers and Exhibits (dated October 18, 2010)	9
Reply Affirmation by Defendant/Third-Party Plaintiff P & J Richmond Corporation (dated November 24, 2010)	10
Affirmation in Opposition by Defendant/Third-Party Plaintiff P & J Richmond Corporation (dated November 29, 2010)	11
Reply Affirmation by Defendant Delilah Stylists, Inc. (dated November 29, 2010)	12
Reply Affirmation by Defendant Delilah Stylists, Inc. (dated December 15, 2010)	13

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Upon the foregoing papers, the cross motion (No. 3038-002) for summary judgment by defendant/third-party plaintiff P & J Richmond Corporation (hereinafter “P&J”) is granted; the motion (No. 2866-001) for summary judgement by defendant Delilah Stylists, Inc. (hereinafter “Delilah”), and plaintiff’s cross motion (No. 3042-003) for like relief are denied.

To the extent relevant, plaintiff claims that on February 14, 2007, she was standing outside business premises located at 1401 Richmond Avenue on Staten Island, when the entrance door “flew” open and struck her in the face (*see* Complaint). As a result, plaintiff alleges personal injuries, including a laceration and scarring to her forehead (*see* Plaintiff’s Bill of Particulars). The gravamen of her complaint is that defendants were negligent in allowing the outside door to remain in a dangerous and defective condition by, *e.g.*, failing to insure that the arm of the door check regulating its movement was properly screwed into the interior of the door frame (*id.*; *see* EBT of Melissa Raymond, pp 14-15).

The subject property was owned by defendant P&J and leased to co-defendant Delilah pursuant to a lease dated April 1, 2003 (*see* Delilah’s Exhibit “L”). Contemporaneously therewith, Delilah sublet the basement of the premises to third-party defendants Michael Pastore d/b/a Masterpiece Tattoo and Masterpiece Tattoo, Inc. (collectively, hereinafter “Masterpiece”) (*see* Delilah’s Exhibit “M”). It appears without dispute that the entrance door in question opened from the sidewalk into a vestibule and hallway where there were two interior doors, one which lead to the tattoo parlor of defendant Masterpiece, while the other provided access to the hair salon owned by defendant Delilah.

Plaintiff testified at her deposition that she had previously been to the subject premises on many occasions in order to visit friends who worked at the tattoo parlor (EBT of Melissa Raymond, p 6). She had also made prior complaints to the owner of the tattoo parlor, stating that the front door tended to swing open by itself (*id.* at 10-12). According to plaintiff, the door “was always like that” during the months preceding her accident (*id.* at 10-15). On the day of the accident, plaintiff claimed that she was “standing still” at the entrance door of the premises when she heard someone call her name, at which point the door “just came up and hit [her]” on the forehead over the left eye (*id.* at 18-24).

The owner of Delilah testified at her deposition that at no time prior to the date of plaintiff’s injury had she been made aware of any complaints about the condition of the entrance door or the need to effect repairs (EBT of Sonia Mirizzi, pp 13,18). However, she did admit that the door had been altered post-accident, but not until 2009 (*id.* at 12-13).

Edward Nolan, a former employee of Delilah, testified that if something had been wrong with the outside of the building, including the door, the landlord would have been contacted to handle the problem (EBT of Edward Nolan, pp 13, 27-28). He too, was not aware of any prior complaints regarding the door, and had never seen the landlord performing maintenance on same (*id.* at 13, 17, 33-34, 53-54). On the other hand, he had registered complaints with the landlord about other problems at the premises, including the air conditioning in the building, flooding and leaks in the ceiling (*id.* at 32-33).

Michael Pastore, the owner of Masterpiece, testified at his deposition that any questions or complaints he had about the premises were directed to his lessor, “Sonya... [who] said [that] she would call [the landlord]” (*id.* at 19-22). Moreover, Pastore claimed that he had complained to “Sonya and Ed” about the front door on numerous occasions prior to plaintiff’s accident (*id.*). More particularly, the witness said that he had complained to both Sonya and Ed about their “disconnect[ing the door and using...] a string” to keep it open (*id.*). According to Pastore, he considered Sonya and Ed to be his landlords, and has never spoken with anyone from P&J (*id.* at 19-22, 28, 66-68). The witness further stated that he was unaware of any repairs or maintenance being performed to the door in question prior to plaintiff’s accident (*id.* at 23-24), and insisted that it was not his responsibility since the owners of Delilah had taken “control over that door,” going so far as to ask him to remove his signage therefrom (*id.* at 20, 23, 53-59).

Philip Fioriglio, a co-owner of defendant P& J, testified on its behalf that the tenants were responsible for all maintenance at the premises (EBT of Philip Fioriglio, p 17). He denied knowledge of any prior complaints about the entrance door, or any requests to repair or install a door check on the door in question (*id.* at 24, 32). The witness acknowledged that the only time he would visit the premises would be “if a tenant call[ed],” but said that the tenants did not need his permission prior to making repairs on their own (*id.* at 30-32). In support of its motion for summary judgment, Fioriglio maintained that P&J was an out-of-possession landlord that was responsible neither for maintenance or repairs, and exercised no control over the business activities of its tenants.

It is well settled that an owner or party in possession or control of premises will be held liable for damages arising out of a dangerous condition on the property only if it created the alleged dangerous condition or had actual or constructive notice of it and failed to ameliorate the situation in a timely fashion (*see Crosthwaite v. Acadia Realty Trust*, 62 AD3d 823 [2<sup>nd</sup> Dept 2009]). Contrariwise, an out-of-possession landlord is not liable for injuries sustained on the premises unless it retains control of the premises or is contractually obligated to repair unsafe conditions (*see Seney*

*v. Kee Assocs*, 15 AD3d 383, 384 [2<sup>nd</sup> Dept 2005]). Although a landlord's reservation of the right of reentry for purposes of inspection and repair may constitute sufficient indicia of control by an out-of-possession landlord to warrant imposing liability for injuries caused by a defective or dangerous condition existing thereon, such liability is limited to injuries arising out of a significant structural or design defect that violates a specific statutory provision (*id.*). Alternatively, control may be shown by the presence of lease provisions making the landlord responsible for repairs to the property, or by a course of conduct demonstrating that the landlord has assumed the duty to maintain that particular portion of the premises which precipitated the injury (*see Taylor v. Lastres*, 45 AD3d 835 [2<sup>nd</sup> Dept 2007]).

Here, defendant P&J has established its prima facie entitlement to judgment as a matter of law by demonstrating that it was an out-of-possession owner which retained no control over the premises; bore no contractual obligation to repair dangerous or unsafe conditions arising thereon; and did not violate any specific statutory safety provision proximately related to plaintiff's injury (*see Green v. City of New York*, 76 AD3d 508, 509 [2<sup>nd</sup> Dept 2010]; *McElroy v. Bernstein*, 72 AD3d 757 [2<sup>nd</sup> Dept 2010]; *Landy v. 6902 13<sup>th</sup> Ave Realty Corp*, 70 AD3d 649 [2<sup>nd</sup> Dept 2010]). In opposition, both plaintiff and its co-defendants have failed to raise a triable issue of fact (*see Espada v. City of New York*, 74 AD3d 1276, 1277 [2<sup>nd</sup> Dept 2010]). Accordingly, the motion for summary judgment by defendant/third-party plaintiff P&J must be granted.

As for co-defendant, Delilah, it is a general rule that liability for dangerous conditions existing upon property is generally predicated upon proof of ownership, occupancy, control or special use (*see Sanchez v. 1710 Broadway, Inc.*, \_\_AD3d\_\_, 2010 NY Slip Op 9244 [2<sup>nd</sup> Dept]; *Quick v. G.G.'s Pizza & Pasta, Inc.*, 53 AD3d 535, 536 [2<sup>nd</sup> Dept 2008]), any one of which may be sufficient to give rise to a duty to exercise reasonable care (*id.*). Where one or more of these elements is present, liability can be imposed upon an owner or lessee who either creates the defective condition allegedly giving rise to plaintiff's injury, or had actual or constructive notice of said condition and a reasonable time to cure (*see Sanchez v. 1710 Broadway, Inc.*, 2010 NY Slip Op 9244 at \*2; *Gover v. Mastic Beach Prop Owners Assn*, 57 AD3d 729 [2<sup>nd</sup> Dept 2008]).

Here, it is the opinion of this Court that defendant Delilah failed to establish that it neither created the alleged defective condition affecting the entrance door, or lacked actual or constructive notice of same. In fact, there is testimony indicating that this defendant was responsible for disabling the door check. As plaintiff has similarly failed to establish her freedom from contributory negligence as a matter of law, both their motion and cross motion for summary judgment must be denied.

Finally, that branch of Delilah's motion which is for summary judgment on its cross claims against the third-party defendant based on its purported failure to procure liability insurance is denied. It is undisputed that such claims have yet to be served on Masterpiece (*see* Masterpiece's Exhibit "A"). Thus, there are no pending claims by Delilah against the third-party defendant which require adjudication (*see e.g. Cuomo v. Long Is Light Co*, 71 NY2d 349 [1988]).

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendant/third-party plaintiff P & J Richmond Corporation is granted; and it is further

ORDERED that the complaint, third-party complaint and any cross claims by or against the above defendant are hereby severed and dismissed; and it is further

ORDERED that the motion and cross motion for summary judgment by defendant Delilah Stylists, Inc. and plaintiff Melissa Raymond are denied; and it is further

ORDERED that the action shall continue as to the remaining defendant; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

The remaining parties shall appear in **DCM Part 3, 130 Stuyvesant Place, 3<sup>rd</sup> Floor, for a pre-trial conference on February 22, 2011 at 9:30 a.m.**

ENTER,

DATED: February 8, 2011

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Joseph J. Maltese  
Justice of the Supreme Court