SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

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ILENE LULKA,

Plaintiff,

- against -

828 ENTERPRISES CORP. and
EMERALD SERVICES, INC.,

Defendants.

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INDEX NO. 17102/2008

DECISION AND ORDER

Original Return Date: 10/6/10
Motion Sequence Nos. 003 & 004

P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court

The following named papers numbered 1 to 8 were submitted on these two Motions on December 10, 2010:

	Papers numbered
Notice of Motion and Affirmation (Seq. No. 003)	1-2
Notice of Motion and Affirmation (Seq. No. 004)	3-4
Affirmation and Affidavit in Opposition	5-6
Reply Affirmation	7
Reply Affirmation	8

The motions pursuant to CPLR 3212 by defendant 828 Enterprises Corp. and by defendant Emerald Services, Inc. for summary judgment dismissing the complaint as to said defendants is decided as follows:

BACKGROUND

In this action commenced on or about September 15, 2008, plaintiff, an employee and assistant branch manager at North Fork Bank located in a strip mall at 2843 Jerusalem Avenue, Bellmore, New York, sustained injury when she slipped and fell while conducting an early morning walk-through inspection of the premises on October 28, 2005. According to plaintiff, she stepped into the ladies bathroom to make a visual inspection. Her fall occurred after she stepped back into

the hallway. Although prior to her fall plaintiff did not notice any water on the floor in the vicinity of the ladies room, after she fell, she went into the ladies room and observed that the floor was covered with water and that a little bit of water had seeped out under the door onto the hallway floor at the accident site. Plaintiff further testified at her deposition that she was uncertain as to where the water came from but believed it emanated from a leaking pipe under the bathroom sink because the day before her fall, a pipe under the sink in the ladies bathroom had been leaking. A small bucket was allegedly placed below the sink to catch the dripping water which, according to plaintiff, was in place when the bank closed. On the following morning (the morning of plaintiff's accident), the bucket was no longer in place.

Pursuant to the order of Hon. William R. LaMarca dated December 3, 2009, the action was dismissed as to plaintiff's employer, defendant North Fork Bancorporation, Inc.

In support of their motions for summary judgment dismissing the complaint, defendant 828 Enterprises Corp., the owner of the premises where the accident occurred, and defendant Emerald Services, Inc., which provided nightly cleaning services to the bank pursuant to a written contract, argue respectively that as an out-of-possession landlord, under the lease agreement assumed by North Fork Bancorporation, defendant 828 Enterprises Corp. bore no responsibility for the interior maintenance of the bank, specifically plumbing maintenance or repairs and defendant Emerald Services, Inc. neither created the condition which caused plaintiff's accident nor had a duty to remedy the alleged dangerous condition caused by the accumulation of water from a dripping pipe.

Even viewing the evidence in the light most favorable to plaintiff, and drawing all reasonable inferences in her favor (*Segree v St. Agatha's Convent,* 77 AD3d 572, 573 [2nd Dept. 2010]), the complaint must be dismissed as to the defendants.

ANALYSIS

The summary judgment standards are well settled. The movant must establish the cause of action or defense by submitting evidentiary proof in admissible form "sufficiently to warrant the court as a matter of law in directing judgment" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *Mejia v. Era Realty Co.*, 69 A.D.3d 816 [2nd Dept. 2010]). Failure to do so "requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When such a showing has been made by the movant, then to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212, subd [b])" (*Zuckerman v City of New York, supra* at 562). On a summary judgment motion, the evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]).

Liability for a dangerous condition on property may only be predicated on occupancy, ownership, control or special use of the premises. *Franks v G&H Real Estate Holding Corp.*, 16 AD3d 619, 620 [2nd Dept. 2005]. To hold a party with a duty of care liable for a defective condition, it must have notice, actual or constructive, of the hazardous condition which caused the injury. *Jackson v Board of Educ. of City of New York*, 30 AD3d 57, 62 [1st Dept. 2006]. Liability based on constructive notice may only be imposed where a defect is visible and apparent and has existed for a sufficient length of time prior to the accident to permit defendant to discover and remedy it. *Williams v Wal-mart Stores, Inc.*, 10 AD3d 653 [2nd Dept. 2004].

An out-of-possession landlord, such as defendant 828 Enterprises Corp., is not liable for injuries sustained on the premises unless the landlord retains control over the premises or is contractually obligated to perform maintenance and repairs. *Greco v Starbucks Coffee Co.*, 58 AD3d

681, 682 [2nd Dept. 2009]; *Stein v Harriet Management, LLC*, 51 AD3d 1007, 1008 [2nd Dept. 2008]. When an out-of-possession landlord reserves the right to re-enter the premises to inspect and repair, this reservation may constitute constructive notice of a defective condition in the event of a specific statutory violation. *Laundry v 6902 13th Ave. Realty Corp.*, 70 AD3d 649, 650 [2nd Dept. 2010]. An out-of-possession landlord, however, who only retains the right to visit and inspect the premises, does not have sufficient control over the premise to be held liable for a defective condition therein. *Grady v Hoffman*, 63 AD3d 1266, 1268 [3rd Dept. 2009].

Here, defendant 828 Enterprises Corp. has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it relinquished control of the leased premises and was not obligated under the terms of the lease to maintain or repair the premises. *O'Connell v L.B. Realty Co.*, 50 AD3d 752, 753 [2nd Dept. 2008].

Pursuant to paragraph 2 of the lease agreement, the tenant was obligated to take good care of the premises, fixtures and appurtenances and to make all necessary repairs to keep them in good order and condition. Paragraph 13 of the lease agreement specifically provides that:

> The Landlord shall not be liable for any failure of water supply or electrical current, sprinkler damage or failure of sprinkler service, nor for injury or damage to person or property caused by the elements or by other tenants or persons in said building, or resulting from steam, gas, electricity, water, rain or snow, which may leak or flow from any part of said buildings, or from the pipes, appliances or plumbing works of the same, or from the street or sub-surface, or from any other place nor for interference with light or other incorporeal hereditaments by anybody other than the Landlord, or caused by operation by or for a governmental authority in construction of any public or quasi-public work, neither shall the Landlord be liable latent defect in the building.

Plaintiff's reliance on paragraph 18 for the proposition that defendant 828 Enterprises Corp. retained

control over the premises to make or facilitate repairs is unavailing as the landlord's right of re-entry under that provision applied only during the seven months prior to expiration of the least term.[1] In any event, the paragraph specifically provides that the landlord did not assume any responsibility or liability whatsoever for the care or supervision of the premises or any pipes, fixtures, appliances or appurtenances thereon. In light of the out-possession status of defendant 828 Enterprises Corp., plaintiff has failed to raise a factual issue as to whether defendant landlord may be held liable for the alleged dangerous condition.

With respect to defendant Emerald Services, Inc., as a general matter, a contractual obligation standing alone will generally not give rise to tort liability in favor of a third party so that the breach of a contractual obligation to maintain and inspect building premises is not in and of itself sufficient to impose tort liability upon the promisor to a non-contracting third party. *Kaehler-Hendrix v Johnson Controls, Inc.*, 58 AD3d 604, 605-606 [2nd Dept. 2009]. There are, however, three exceptions to this general rule whereby a party who enters into a contract to render services may be

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[1] Paragraph 18 provides as follows: "That during seven months prior to the expiration of the term hereby granted, applicants shall be admitted at all reasonable hours of the day to view the premises until rented; and the Landlord and the Landlord's agents shall be permitted at any time during the term to visit and examine them at any reasonable hour of the day, and workmen may enter at any time, when authorized by the Landlord or the Landlord's agents, to make or facilitate repairs in any part of the building; and if the said Tenant shall not be personally present to open and permit an entry into said premises, at any time, when for any reason an entry therein shall be necessary or permissible hereunder, the Landlord or the Landlord's agents may forcibly enter the same without rendering the Landlord or such agents liable to any claim or cause of action for damages by reason thereof if during such entry the Landlord shall accord reasonable care to the Tenant's property) and without in any manner affecting the obligations and covenants of this lease; it is, however, expressly understood that the right and authority hereby reserved, does not impose, nor does the Landlord assume, by reason thereof, any responsibility or liability whatsoever for the care or supervision of said premises, or any of the pipes, fixtures, appliances or appurtenances therein contained or therewith in any manner connected."

said to have assumed a duty of care and thus be potentially liable in tort to third persons where: 1) the contracting party, in failing to exercise reasonable care in the performance of its duties launches a force or instrument of harm; 2) the plaintiff detrimentally relied on the continued performance of the contracting party's duties; and 3) when the contracting party has entirely displaced the other party's duty to maintain the premises safely. *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002].

Where the contracting party seeks summary dismissal of an injured person's complaint, the contracting party establishes entitlement to judgment as a matter of law by showing *prima facie* that none of the three conditions to tort liability exists. *Georgotas v Laro Maintenance Corp.*, 55 AD3d 666, 667 [2nd Dept. 2008], *lv to app den.* 12 NY3d 703 [2009]; *Hutchinson v Medical Data Resources, Inc.*, 54 AD3d 362, 364 [2nd Dept. 2008].

Here none of the three conditions to tort liability is satisfied. Although plaintiff speculates that defendant Emerald Services, Inc. may have removed the bucket which was catching the dripping water, the record is devoid of any evidence to substantiate such a claim. The record is devoid of any basis to indicate that defendant Emerald Services, Inc. assumed a comprehensive and exclusive maintenance obligation at the subject premises sufficient to give rise to a duty to third parties. The fact that, on the day before the accident, plaintiff saw the Bank's maintenance man proceed downstairs, presumably heading to the ladies room, with another gentleman to attend to the leaking pipe, is insufficient to raise a factual issue as to defendant Emerald Services, Inc.'s liability to plaintiff under the circumstances extant.

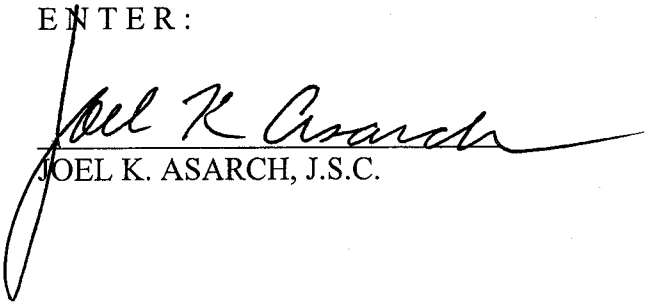
Defendant Emerald Services, Inc. was hired to perform basic cleaning services i.e., pull the garbage, save the garbage, clean the windows, vacuum the carpets, clean the lavatories. It did not

perform any electrical, plumbing or carpentry maintenance or repairs. Plaintiff was not aware of any complaints made to defendant Emerald Services, Inc. about the alleged leaking pipe in the ladies room prior to the accident. Nor is there any evidence to support the entirely speculative assertion that defendant Emerald Services, Inc. created the condition which caused plaintiff's accident by removing the bucket from its position under the sink thereby causing water to collect on the floor of the ladies room and seep out into the hallway.

Accordingly, the respective motions by defendant 828 Enterprises Corp. and by defendant Emerald Services, Inc. for summary judgment dismissing the complaint are **granted** and the complaint is **dismissed** against both defendants.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



JOEL K. ASARCH, J.S.C.

Dated: Mineola, New York
March 29, 2011

Copies mailed to:

Epstein, Frankini & Grammatico, Esqs.
Attorneys for defendant Emerald Services, Inc.

Perez & Varvaro, Esqs.
Attorneys for defendant 828 Enterprises Corp.

Budin Reisman Kupferberg & Bernstein, LLP
Attorneys for plaintiff Ilene Lulka