SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

VIRGINIA GILMORE and VIRGINIA GILMORE, as Administrator of the Estate of EDWARD GILMORE, Deceased,

Plaintiff,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 12/15/10

DIMAGGIO'S WATERFRONT RESTAURANT INC. and B.C.M. OF PORT WASHINGTON INC.,

INDEX NO.: 017681/06

Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Motion [BCM].....1
Affirmation in Opposition [DIMAGGIO'S].....2
Affirmation in Opposition [Plaintiff].....3
Affirmation in Further Opposition [DIMAGGIO'S].....4
Reply Affirmation [BCM].....5

Motion by defendant B.C.M. of PORT WASHINGTON INC. ("BCM") pursuant to **CPLR §3212** for summary judgment dismissing the complaint and the cross claim by defendant DiMaggio's Waterfront Restaurant, Inc. ("DIMAGGIO'S") is hereby determined as follows.

This action arises from an accident on September 12, 2006 in which plaintiff VIRGINIA GILMORE ("Plaintiff") was injured when she tripped and fell at a restaurant operated by DIMAGGIO's located at 45 Orchard Beach Boulevard, Port Washington (the "Premises"). Plaintiff has discontinued the derivative claim by her husband, Edward Gilmore, now deceased. Specifically, Plaintiff alleges that she fell on a ramp in the Premises which led from the patio/terrace dining area and proceeded to an interior restaurant. Plaintiff claims that the ramp had a lip which was raised above the floor, creating a tripping hazard. Plaintiff also alleges that a handrail running alongside the ramp, did not begin to run at the end of the ramp, but began to run approximately twelve inches from the beginning of the ramp, "which did not allow for an individual to make proper and safe use of the ramp." Defendant BCM seeks summary judgment predicated

on grounds that as an out of possession landlord, BCM (1) owed no legal duty to Plaintiff pursuant to a lease agreement in effect at the time of the accident; and (2) BCM did not create or have notice of the alleged defective condition. BCM also seeks to dismiss the cross claim asserted by DIMAGGIO'S on grounds that as BCM is not liable to Plaintiff for negligence, BCM may not be held liable to DIMAGGIO'S for contribution or indemnification.

It is undisputed that the lease agreement in effect at the time of the accident was a lease agreement entered into by BCM, as landlord and DIMAGGIO'S predecessor, as tenant, in November 30, 1999 which was assigned to DIMAGGIO'S by an Assignment and Assumption of Lease Agreement-Landlord's Consent to Assignment, dated March 22, 2001 and as amended by an Amendment to Lease Agreement, dated that date (collectively, the "Lease Agreement") [Motion Exh. F].

BCM argues that the Lease Agreement establishes that DIMAGGIO'S, not BCM, is obligated to repair the ramp and, consequently, BCM cannot be held liable to Plaintiff. Specifically, the Lease Agreement ¶ 9(a) provides that the tenant [DIMAGGIO'S herein] accept the Premises "as is" and requires the tenant, at his expense to

> take good care of the Premises, the building systems therein, the lansdscaping and the sidewalks and curbs adjacent thereto, keep the same in good order and condition and make all necessary repairs and replacements thereto, interior and exterior, ordinary and extraordinary, foreseen and unforeseen, whether or not resulting from the negligence or willful act of Tenant, its employees, agents, invitees or contractors.

BCM also argues that the Lease Agreement does not require the landlord to repair or maintain the ramp which is located within the Premises. BCM is only obligated to maintain and repair 'Common Areas' and is responsible for necessary repairs and replacement of 'Structural Parts' [Lease Agreement ¶¶ 5(b), 9(b)] neither of which encompasses a ramp. Common Areas and Common Facilities are defined in ¶5(a) of the Lease Agreement as

> those parts of the Marina Facility that are not leased to a tenant or which, by their very nature, are not leasable to a tenant for the purpose of sale of merchandise, or the rendition of services to the general public within a fully enclosed area. The term Common Area and Common Facilities shall include, but not be limited to, docks, gangways, parking areas, access roads, driveways, retaining and exterior walls, landscaped areas, truck serviceways, restrooms, utilities, pedestrian walks and outside courts, picnic areas, swimming pool, roofs, canopies, equipment, signs and special services provided by Landlord for the common or joint use and benefit of all tenants in the Marina Facility (including any expansion thereof to adjacent and contiguous land) their employees, agents, customers and other invitees.

Structural Parts are defined in ¶9(b) of the Lease Agreement as "the roof, exterior structural walls (except for windows), structural support beams and the foundation of the Building."

BCM contends that it did not create or have notice of the alleged defective condition. Steven F. Wachter ("Wachter"), General Manager and Vice President of BCM, testified at a deposition held on November 3, 2010, that he believed that the ramp was present and in place when BCM purchased the property in September 1999 and that at no time prior to Plaintiff's accident, did BCM repair or maintain the ramp, hire or contract with a third party to maintain the ramp, or had notice of a defective condition relating to the ramp. BCM also proffers an Affidavit of Wachter, sworn to on September 30, 2010 (the "Wachter Affidavit") [Motion Exh. H]. Wachter attests that he personally executed the Lease Agreements, and that at the time of the accident, the Lease Agreement was in effect. Further, Wachter attests that BCM did not build or modify the ramp and that neither he nor any employee of BCM ever repaired or maintained the ramp or hired a third party to do so. The Court notes that although the Wachter Affidavit attests that the ramp was present when BCM purchased the Premises in 1999, Wachter's deposition testimony is more equivocal on that point.

In addition, BCM contends that DIMAGGIO'S cross claim against BCM for indemnification should be dismissed. BCM refers to the Lease Agreement which provides for indemnification of DIMAGGIO'S by BCM against all liabilities that may be imposed upon DIMAGGIO'S only in the event of BCM's "negligent or willful acts" [Lease Agreement ¶16(d)]. BCM argues that without a duty owed by BCM to repair or maintain the ramp and given that BCM did not create or have notice of the defective condition, BCM is not obligated to indemnify DIMAGGIO'S.

An out of possession landlord is not liable for injuries occurring on the premises unless it has retained control of the premises or is contractually obligated to perform maintenance and repairs. *See* **Travers v. RCPI Landmark Properties, Inc.**, 74 AD3d 956; **Sanchez v. Barnes & Noble, Inc.**, 59 AD3d 698; **Brewster v. Five Towns Health Care Realty Corp.**, 59 AD3d 483; **Valenti v. 400 Carlls Path Realty Corp.**, 52 AD3d 696; **Conte v. Frelen Associates, LLC**, 51 AD3d 620; **Grippo v. City of New York**, 45 AD3d 639. Reservation of a right to enter the premises for the purpose of inspection and repair constitutes sufficient retention of control to impose liability for injuries caused by a dangerous condition, only where the condition violates a specific statutory provision. **Travers v. RCPI Landmark Properties, Inc.**, *supra*; **Brewster v. Five Towns Health Care Realty Corp.**, *supra*; **Valenti v. 400 Carlls Path Realty Corp.**, *supra*; **Conte v. Frelen Associates, LLC**, *supra*. Plaintiff has not alleged herein that the condition of the ramp constituted a statutory violation.

The Court finds that BCM has made a *prima facie* showing of entitlement to judgment as a matter of law. It is undisputed that BCM was at the time of the accident an out-of-possession landlord. Pursuant to the Lease Agreement, BCM was under no contractual duty to maintain or repair the ramp. BCM was only responsible for repair and maintenance of Common Areas and for the repair and replacement of Structural Parts. The definition of Common Areas and Structural Parts in the Lease Agreement do not include the ramp. In addition, the Lease Agreement provides that it is the tenant, DIMAGGIO'S, who at his own expense is responsible to *inter alia* make all necessary repairs to the interior of the Premises [Lease Agreement ¶9(a)]. As asserted by Plaintiff in her bill of particulars, the ramp was located in a patio/terrace dining area and as testified by Wachter in his deposition, said patio was enclosed.

BCM has also met its burden in establishing that it did not create or have notice of the alleged condition through the Wachter Affidavit wherein he attested that BCM never modified the ramp, that neither he or any employee of BCM ever repaired or contracted with a third party to repair or maintain the ramp and that neither he or any employee of BCM had notice of an alleged defective condition of said ramp either before or after Plaintiff's accident. Based on the foregoing, BCM has in addition met its *prima facie* burden establishing that DIMAGGIO'S is not entitled to indemnification or contribution on its cross claim against BCM.

In opposition, DIMAGGIO'S argues that BCM, as owner of the Premises, owed a duty to provide Plaintiff with a reasonably safe Premises which was a restaurant open to the general public. DIMAGGIO'S claims that said duty is nondelegable and therefore cannot be delegated to DIMAGGIO'S. DIMAGGIO'S proffers an Affirmation in Further Opposition based on the deposition of Wachter. DIMAGGIO'S contends that Wachter's testimony, that had he been alerted to a problem with the ramp, "we would have acted on it the same day" establishes that DIMAGGIO'S was not the entity responsible for repairing or maintaining the ramp. Further, DIMAGGIO'S claims that Wachter's testimony that floors are considered structural, raises an issue of fact as to whether the ramp was a structure requiring BCM to repair or maintain the ramp under ¶9(b) of the Lease Agreement. DIMAGGIO'S also argues that BCM had notice of the subject defect on the ramp, based on Wachter's testimony that he inspected the Premises on numerous occasions before the date of the accident.

Plaintiff in opposition claims that an out of possession landlord such as BCM which rents premises for a public use, has a duty to maintain it in a reasonably safe condition and may be held liable when it knows or should have known of a dangerous condition at the time of the Lease Agreement. Plaintiff states that the issue is between both defendants, and in any event, BCM's motion is premature because depositions had

not taken place.

In reply, BCM contends that (i) the cases cited by DIMAGGIO'S to support its argument that BCM owes a nondelegable duty to Plaintiff concern vicarious liability imposed upon an owner who hires a contractor to perform construction on a premises; and (ii) DIMAGGIO'S denies that a defective condition existed, and provides no evidence to establish the existence of a defective condition or that BCM knew of an alleged defective condition. BCM also states that Wachter testified at his deposition that he was neither aware of any problems with respect to the ramp prior to the accident nor had he ever received any complaints. His statement that he would have acted on the same day was in response to a hypothetical question and does not create a duty by BCM to repair the ramp. BCM argues that Wachter's testimony did not raise an issue of fact as to whether or not a floor is a structure since, as is relevant to this action, he testified that structural repairs did not involve internal repairs.

The Court finds that Plaintiff and DIMAGGIO'S have failed to raise an issue of fact. DIMAGGIO'S and Plaintiff have failed to establish that there was a legal duty owed by BCM to Plaintiff. Even though BCM leased the Premises to DIMAGGIO'S for a public use, DIMAGGIO'S support for its contention that BCM owes a nondelegable duty to Plaintiff is not relevant to the facts of this case. In addition, DIMAGGIO'S proffers no evidence that BCM had knowledge of a defective condition or a prior accident involving the ramp. *Cf* **Fuller v. Marcello**, 38 AD3d 1162 (out-of-possession landlord liable where lessor rents premises for a public purpose and knows or should have known of a dangerous condition at the time of the lease). Wachter testified at his depostion that prior to the accident, he was not aware of any problems with the ramp and that he had not received any complaints generally with respect to the restaurant. Wachter's testimony that "we would have acted on it the same day" had it known of a problem with the ramp fails to create a duty where none existed under the Lease Agreement. Further, Wachter's deposition testimony fails to establish that, contrary to the express provision of the Lease Agreement defining Structural Parts, that a floor on the ramp could be structural thereby requiring BCM to assume the responsibility to repair and maintain the ramp. The term 'Structural Parts' does not include floors and Wachter testified that BCM was not responsible for internal areas, which, the Court notes, would include the location of the ramp. Further, there is no evidence establishing that BCM created the alleged defective condition on the ramp.

Likewise, the Court finds that DIMAGGIO'S cross claim against BCM for common-law and/or contractual indemnification fails. The Lease Agreement provides that "the landlord [BCM] shall indemnify and hold harmless Tenant [DIMAGGIO'S], its employees, agents and contractors, from and against all liabilities, including reasonable

attorneys' fees, which may be imposed upon or incurred by or asserted against Tenant or such other persons as a result of Landlord's negligence or wilful acts." [Lease Agreement ¶16(d)]. Having failed to establish that BCM was negligent or committed wilful acts, DIMAGGIO'S is not entitled to enforce its cross claim against BCM. As BCM is not invoking its cross claim against DIMAGGIO'S for indemnification, the Court need not reach the issue of whether the relevant provision in the Lease Agreement runs afoul of **General Obligations Law §5-321**.

Moreover, DIMAGGIO'S claim that BCM's motion is premature is equally unavailing. DIMAGGIO'S has "failed to offer an evidentiary basis to suggest that further discovery may lead to relevant evidence." **Brewster v. Five Towns Health Care Realty Corp.**, 59 AD3d 483; **Conte v. Frelen Associates**, 51 AD3d 620, 621.

Based on the foregoing, it is

ORDERED, that the motion by defendant BCM for summary judgment dismissing the complaint and any cross claim asserted against it is **granted.**

Dated: March 14, 2011

J.S.C.

ENTERED
APR 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE