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

PRESENT: HON. JOAN A. MADDEN *Justice* PART 11

John Malloy

Plaintiff,

- v -

Larstrand Corp.

Defendant.

INDEX NO.: 100570/10

MOTION DATE:

MOTION CAL. NO.

MOTION SEQ. NO.

The following papers, numbered 1 to ____ were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that the this motion is decided in accordance with the annexed Memorandum Decision + Order.

Dated: October 18, 2011

J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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JOHN MALLOY,

Index No. 100570/10

Plaintiff,

-against-

LARSTRAND CORPORATION.,

Defendant.

JOAN MADDEN, J.:

In this personal injury action, defendant Larstrand Corporation ("Larstrand") moves for summary judgment dismissing the complaint against it. Plaintiff opposes the motion. For the reasons set forth below, the motion is granted.

Background

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on January 23, 2007, at approximately 11:30 am, when he fell into a trap door while shopping at Hamilton Heights Deli ("the Deli") located at 3787 Broadway New York, NY ("the Building"). The Building is owned by non-parties Melvin Friedland and Lawrence Friedland. Larstrand is the managing agent for the Building.[1] Pursuant to a lease dated February 7, 2006, Melvin Friedland and Lawrence Friedland leased the premises to a Mr. Ahmed Talal Mohsen (hereinafter "the Tenant"), on behalf of the Deli (hereinafter "the Lease"). The Lease was for a six-year term beginning on February 16, 2006 and ending on February 15, 2012.

The Lease required that the Tenant "use and occupy the demised premises for [sic] delicatessen/grocery and for no other purpose." The Lease granted the Tenant a nonexclusive

[1] There is apparently no written management contract.

license to access the basement. Specifically Article 43 of the Rider to the Lease, entitled Basement, provides that:

> Tenant shall have the license to use the basement space appurtenant to the demised premises, for purposes of storage only, for the term of this Lease so long as same is permitted by law... Such basement shall be deemed to be included within the term demised premises for the purposes of Articles, 6, 8.... It is understood that Tenant is paying no rental for use of the basement space and in the event that the use of the basement space is discontinued by Tenant, or is not permitted by law for any reason whatsoever, the rent reserved herein shall not be reduced.

Article 8 of the Lease, entitled Tenant's Liability Insurance Property Loss, Damage, Indemnity, provides in part:

> Owner or its agents...shall not be liable...for any injury or damage to persons...resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner...

Article 13 of the Lease, entitled, Access to Premises, provides that the owner reserves the right to re-enter the premises in an emergency and at reasonable times to make repairs the owner deems necessary. Specifically, it provides:

> Owner or Owner's agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable time to examine the same and to make such repairs, replacements, and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the demised premises following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations, and other directions of governmental authorities.

At his deposition, plaintiff testified that the accident occurred as he approached the refrigerator case of the Deli, that he was looking straight ahead and suddenly felt his leg drop into the floor. Plaintiff stated that he kept going down with only his right leg and landed three and half feet [down] and his left leg splayed out to the side and was swept around, and he hit his teeth against the front edge of the opening. After he was removed from the hole, plaintiff realized he had fallen into a trap door, which opened into the basement area. Shortly after, a Deli employee emerged from the basement.

In 2007, plaintiff commenced an action arising out of this incident against Melvin Friedland, Lawrence Friedland, and Friedland Properties, Inc.[2] (together the "Friedland defendants"), and the Deli ("the Friedland action"). The Deli defaulted. The Friedland defendants moved for summary judgment, arguing that as out-of-possession landlords, they could not be held liable under a theory of constructive notice in the absence of a significant structural defect that is contrary to a specific safety provision. Torres v. West Street Realty Company, 21 A.D.3d 718 (1st Dept. 2005) lv denied, 7 NY3d 703 (2006). Moreover, the Friedland defendants argued that an open trap door is not a structural defect. Almanzar v. Picasso's Clothing Inc., 281 A.D.2d 341 (1st Dept. 2001). In addition, they argued that none of the State Industrial Code provisions relied on by Plaintiff required that trap doors be equipped with a railing. Fant v. Mayer, 250 A.D.2d 355 (1st Dept. 1998).

By decision and order dated July 20, 2009, the court granted summary judgment to the Friedland defendants and dismissed the complaint. In reaching this conclusion, the court found that the trap door was part of the demised premises and was not the responsibility of the owner

[2] Friedland Properties, Inc. is apparently not a corporation. The term is used to reference the properties owned by Melvin and Lawrence Friedland.

and that the open trap door did not constitute a structural defect. The court also rejected the opinion of plaintiff's expert Robert E. Liss, that the trap door was illegal and in violation of New York City and State building codes, finding that the various provisions relied on by plaintiff did not apply to the trap door. Furthermore, the court found that plaintiff failed to submit sufficient evidence to raise a triable issue of fact demonstrating that defendant had actual or constructive notice of the open trap door. The court's decision and order was affirmed by the Appellate Division. Malloy v. Friedland, 77 A.D.3d 583 (1st Dept. 2010).

After the dismissal of the complaint in the Friedland action, plaintiff commenced this action against Larstrand, which was not a party to the earlier action. Larstrand now moves for summary judgment on similar grounds as provided the basis for the motion by the Friedland defendants. Plaintiff initially opposed the motion as premature, and the court ordered certain discovery pursuant to its interim order dated February 10, 2011.

Plaintiff now argues that the new discovery is sufficient to raise an issue of fact as to whether Larstrand had actual notice of the existence of the dangerous condition causing plaintiff's injuries. Specifically, plaintiff relies on the deposition testimony of two employees of Larstrand, Manuel Dominguez and Marc Lapointe.

Mr. Dominguez, who is employed as a member of the maintenance staff at Larstrand, testified that he was responsible for performing clean-up work after a tenant has vacated a space, and that this work including going down to the basement and cleaning it. Mr. Lapointe, who is employed by Larstrand as a Director of Architecture, testified that he visited the Building between three and six times a year. Like Mr. Dominguez, he testified regarding the clean up procedure upon the end of a tenant's occupancy, and that it involved going into the basement. He

also testified when shown photos of the trap door in both an open and closed condition that he would not report it to Larstrand as a dangerous condition.

Plaintiff also relies on the expert affidavit of Robert Liss. Notably, this is the same affidavit that was submitted in opposition to the summary judgment motion in the Friedland action. Plaintiff argues that the Liss's opinion as to the illegal status of the trap door, together with the testimony of Mr. Dominguez and Mr. Lapointe, establishes that Larstrand had actual notice of the trap door.

Larstrand counters that the evidence relied on by plaintiff is insufficient to raise an issue of fact that as to notice of the open trap door. To the contrary, defendant asserts that testimony of Mr. Dominguez and Mr. Lapointe reveals that neither man observed the condition of the trap door during the Deli's store hours. Larstrand also notes that Lapointe's testimony reveals an absence of notice, since he had no recollection of a tenant requesting permission to install a trap door and never observed the trap door in an unsafe condition at the subject premises.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tending sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Under this standard, Larstrand is entitled to summary judgment. As a preliminary matter, as it did in connection with the decision in the Friedland action, the court finds that Liss's expert opinion does not establish that the trap door violates any applicable New York City or State

structural or design defect that is contrary to a specific statutory safety provision. In the absence of such a finding, the defendant cannot be held liable under a theory of constructive notice. Velazquez v. Tyler Graphics, Ltd., 214 AD2d 489 (1st Dept 1995).

Defendant also cannot be found liable under a theory of actual notice based on the deposition testimony of Larstrand's employees. Although both employees had been the basement of the subject premises and were aware of the trap door, there is no evidence showing that either employee observed the trap door in an open or unsafe condition during store hours. Under these circumstances, no actual notice can be attributed to Larstrand.

Accordingly, as Larstrand has provided proof that there is no basis for its liability and plaintiff has failed to controvert this showing, summary judgment in Larstrand's favor is warranted.

In view of the above, it is

ORDERED that the Larstrand's motion for summary judgment is granted, and it is further

ORDERED that the complaint against Larstrand is dismissed, and the Clerk shall enter judgment accordingly.

DATED: October 18, 2011

J.S.C.