

<b>Vaughn v Triumphant Church of Jesus Christ</b>
2019 NY Slip Op 31293(U)
March 21, 2019
Supreme Court, Kings County
Docket Number: 501243/2015
Judge: Devin P. Cohen
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Supreme Court of the State of New York  
County of Kings

Index Number 501243/2015  
*SEQ # 015*

Part 91

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

HORACE VAUGHN,

Plaintiff,

against

TRIUMPHANT CHURCH OF JESUS CHRIST, DELI  
GROCERY, KAID M. YAFAI, NORMAN A. ALQADERI, ALI  
G. TOFEEK AND UNITED EXPRESS DELI,

Defendants.

**Papers**

Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>2</u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>    </u>
Other.....	<u>    </u>

Upon review of the foregoing papers, defendant Triumphant Church of Jesus Christ's ("Triumphant Church") motion for summary judgment is decided as follows:

**Factual Background**

Plaintiff brings this action against defendants to recover for injuries he sustained on January 13, 2015, when he fell through a cellar door of a deli. Plaintiff testified at his deposition that he was at the deli shopping. He walked along the right-side aisle to the back of the store, and saw no opening in the floor at that time. When he turned around to exit, he took about a step and a half, and fell through the cellar doors approximately eight to ten feet to the floor below.

Delroy Smith, the general secretary and assistant pastor of Triumphant Church, testified at his deposition that Triumphant Church owns the building, which includes the church, the United Express Deli and other commercial spaces. The church is located 94-13 Church Avenue, with its main entrance on 94th Street. The United Express Deli, where the accident occurred, is located at 94-11 Church Avenue, with its entrance on Church Avenue.

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Mr. Smith further testified that there is only one entrance and exit to and from the deli, and there is no access from the church to any of the retail stores spaces, including the deli. Moreover, the only access to the cellar is through the cellar door inside the deli. During his deposition, Mr. Smith recounted his tour of the premises when Triumphant Church purchased the building. He recalled that the cellar door in the deli already existed and that he used the door to view the cellar beneath the deli. The electrical and gas meters are not located in the cellar below the deli, but are in a different tenant's cellar, which is not accessible from the deli.

The church leased the space to the United Express Deli pursuant to a written lease agreement. The agreement states, in paragraph 4, that the deli was responsible for taking care of the demised premises and for all non-structural repairs. Paragraph 13 of the lease states that Triumphant Church has the right, but not the obligation, to enter the premises during an emergency. Paragraph 46 of the rider to the lease states that the deli is responsible for interior repairs, while Triumphant Church is responsible for repairs to the structure of the building, including the roof. Paragraph 47 of the rider states that the deli may make alterations to the premises, at its own expense, while paragraph 50 of the rider states that prior to any "alteration", the deli must show Triumphant Church the plans for the "alteration or modification" and the church must approve those plans.

Finally, Mr. Smith submits an affidavit in which he states that he is not aware of any prior complaints about the inside of the deli in the area where plaintiff fell, and that no one from Triumphant Church has been notified of any prior complaints. Likewise, Mr. Smith testified at his deposition that he has no knowledge of any modifications to the basement.

### Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Generally, a landowner owes a duty to maintain his or her property in a reasonably safe condition (*Agbosasa v City of New York*, 168 AD3d 794, 795 [2d Dept 2019]). However, there is an exception to this common law duty for landowners that are not in possession of the premises (*Richer v JQ II Assoc., LLC*, 166 AD3d 692, 693 [2d Dept 2018]; *Keum Ok Han v Kemp, Pin & Ski, LLC*, 142 AD3d 688, 688-89 [2d Dept 2016]). Out-of-possession landlords are not entitled to this exception when they retain control over the premises and have a statutory or contractual duty, or a duty assumed by a course of conduct (*Richer*, 166 AD3d at 693).

Triumphant Church argues that it is not liable for the accident in the deli because it is an out-of-possession landlord. Triumphant Church refers to Mr. Smith's deposition testimony, in which Mr. Smith explained that the church and the deli occupy different spaces, and the church has no keys for, or access to, the deli or the cellar beneath the deli. Triumphant Church also references the terms of the lease, which state that United Express Deli was responsible for maintaining the premises in good condition and for any non-structural repairs.

In opposition, plaintiff argues that the church retained sufficient control over the deli's premises pursuant to the lease such that the church is responsible for the accident. Specifically, plaintiff argues that Triumphant Church is liable because it is responsible for structural repairs

pursuant to the lease and because it retains a right to re-enter the deli.

The lease does not define a structural repair, and states only that such repairs may include the roof. Plaintiff submits the affidavit of Scott M. Silberman, a professional engineer. Mr. Silberman opines in paragraph 13 of his affidavit that the trap door is a structural component of the building. Triumphant Church does not submit any expert testimony that claims the cellar door is not structural. Consequently, there remains a triable issue of fact about whether the cellar door is part of the structure of the building. If the trap door is, in fact, part of the building structure, then Triumphant Church may not be able to rely on their out-of-possession status (*Washington-Fraser v Indus. Home for the Blind*, 164 AD3d 543, 545 [2d Dept 2018]; *Quituzaca v Tucchiarone*, 115 AD3d 924, 926 [2d Dept 2014]).

Triumphant Church also argues that its mere right to re-enter does not establish control over the premises (*see Richer*, 166 AD3d at 693). However, a right to re-enter combined with a statutory violation or a structural or design defect may subject Triumphant Church to liability, even if it is not in possession of the premises (*Derosas v Rosmarins Land Holdings, LLC*, 148 AD3d 988, 991 [2d Dept 2017]). Plaintiff asserts several violations of the Fire Code, the Building Code, as well as ANSI/ASSE and OSHA. Through the affidavit of Mr. Silberman, plaintiff also argues that the cellar door and floor surrounding the door contained structural defects. Triumphant Church argues that the provisions plaintiff references are not actionable, and that the door was open, not defective. Even if Triumphant Church is correct on these points, it may still be subject to liability because it retained the contractual duty to make structural repairs, as discussed above.

Without the protection of its out-of-possession status, Triumphant Church must prove

that it did not create the condition, or have actual or constructive notice of the condition (*Washington-Fraser*, 164 AD3d at 545). Mr. Smith testified at his deposition that he does not have access to the deli from the church and he has no key to the deli. He also testified that he never heard of any prior accidents in the deli. However, Triumphant Church has not shown the last time it inspected the cellar door. Without that information, Triumphant Church has not proven a lack of constructive notice of the condition (*Quinones v Starret City, Inc.*, 163 AD3d 1020, 1022 [2d Dept 2018]).

**Conclusion**

For the foregoing reasons, defendant Triumphant Church's motion is denied.

This constitutes the decision and order of the court.

March 21, 2019  
**DATE**



**DEVIN P. COHEN**  
Justice of the Supreme Court

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