

**Ebrahim v Twin Dev., LLC**

2024 NY Slip Op 32921(U)

August 13, 2024

Supreme Court, New York County

Docket Number: Index No. 161012/2014

Judge: Richard G. Latin

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to the tenant (NYSCEF # 57 at 5). Thus, defendant Twin Development would not be liable for the alleged dangerous condition (*id.*).

Plaintiff opposes defendant's motion (NYSCEF # 74). Plaintiff advances two primary bases to argue that defendant's motion should not be granted (*id.*). First, defendant failed to sufficiently establish that it "relinquished control of the premises and did not retain or assume a duty to maintain property" (*id.* at 2). Second, plaintiff avers that even if defendant was found to be an "out of possession landlord," defendant can still be found liable for the dangerous condition (*id.* at 14).

### **Discussion**

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

#### **Out of Possession Landowner**

Defendant Twin Development avers it is not liable because it was an "owner out of possession," of the real property upon which plaintiff suffered his accident (NYSCEF # 57 at 5). In support of its motion, defendant submits the affirmation of Ronald Rogers, as well as the lease agreement (NYSCEF # 76; NYSCEF # 84). Defendant argues the affirmation of Ronald Rogers "further establishes that defendant did not construct, create, the trap door and did not have actual or constructive knowledge of the existence of the trap door prior to the accident" (NYSCEF # 57

at 5). In addition, the lease agreement demonstrates defendant “gave possession and control over the property to JAAB, and in fact, did not exercise control over the premises, the business of the tenant, the trap door, or the employees of JAAB” (*id.*).

In opposition, plaintiff responds that defendant “failed to establish that it relinquished control of the premises and did not retain or assume a duty to maintain property” (NYSCEF # 74 at 2). In addition, plaintiff claims that even if defendant was an “out of possession landlord,” Twin Development could still be found liable for the dangerous condition regarding design of the trap door (*id.* at 14). The court agrees with plaintiff.

As a general rule, landowners owe a duty of reasonable care to people on their property (*see Basso v Miller*, 40 NY2d 233, 241 [1976]). Liability for unsafe conditions on property must be predicated on ownership, occupancy, control, or special use of the premises (*see Casale v Brookdale Med. Assoc.*, 43 AD3d 418, 418 [2d Dept 2007]; *see also James v Stark*, 183 AD2d 873, 873 [2d Dept 1992]; *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988]). N.Y. Multiple Dwelling Law (“MDL”) defines “owner” to “include the owner or owners of the freehold of the premises or lesser estate therein, a mortgage or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent, or any other person, firm or corporation, directly or indirectly in control of a dwelling” (MDL § 4(44)).

Generally, an out-of-possession owner who has no supervision or control over the premises, and who has no obligation to maintain or repair cannot be held liable for dangerous conditions on the property (*see Davis v HSS Properties Corp.*, 1 AD3d 153, 154 [1st Dept 2003]). Thus, an out-of-possession owner can be held liable for injuries resulting from a dangerous condition through constructive notice only where it has reserved the right to enter the premises to perform inspection, maintenance and repairs at the tenant's expense (*id.*) The injury must be caused

by “a significant structural or design defect that is contrary to a specific statutory safety provision” (*id.*, quoting *McDonald v Riverbay Corp.*, 308 AD2d 345, 346 [1st Dept 2003]). However, merely retaining the right of re-entry will not be sufficient to impose a duty to maintain; rather under such circumstances a statutory violation must be alleged (*see Quinones v 27 Third City King Rest., Inc.*, 198 AD2d 23, 23 [1st Dept 1993] [finding the “lease provided that the owner or its agent retained the right, but was not obligated, to enter the demised premises at any time in any emergency”]; *see also Chery v Exotic Realty, Inc.*, 34 AD3d 412, 413 [2d Dept 2006]). While most often § 78 of the Multiple Dwelling Law is pled, the rule has been stated to require a specific statutory violation coupled with a significant structural or design defect (*see Yadegar v Intl. Food Mkt.*, 37 AD3d 595, 597 [2d Dept 2007]). When specific non-delegable duties are breached, the owner may not escape liability under the net lease agreement for dangerous conditions on the premises (*see Bonifacio v 910-930 S. Blvd. LLC*, 295 AD2d 86, 90 [1st Dept 2002]). “In any event, the mere absence of a right of re-entry provision in the net lease does not in itself conclusively establish, in all circumstances, that the owner has “completely parted with” control of the building” (*id.*). “Rather, retention of a right of re-entry is merely one way an owner may maintain a degree of control (*id.*).

Here, the affirmation from Ronald Rogers corroborates the existence of a right to reentry onto the premises based on the lease (NYSCEF # 76 at 112). Ronald Rogers’ deposition provided the wording of the lease and confirmed the right to reentry and obligation, stating “[t]he owner shall have the right and shall be obligated to enter the demised premises in an emergency at any time and at other reasonable times to examine the same and make such repairs, replacements and improvement that owner may deem necessary,” which Mr. Rogers confirmed (*id.*). Thus, Twin

Development's right of reentry demonstrates Defendant's degree of control to the property (*see Bonifacio*, 295 AD2d at 90).

### **Constructive Notice**

When the right of re-entry is for the purpose of inspection and repair, charging the owner with constructive notice of dangerous conditions may exist, even in the absence of statutory violations (*see Guzman v Haven Plaza Hous. Dev. Fund Co., Inc.*, 69 NY2d 559, 566 [1987] [finding although there was no evidence of actual notice of the claimed dangerous condition, defendant's right to reenter the premises was sufficient to charge it with constructive notice]). Notice of a defect or dangerous condition can be established by prior accident reports, maintenance reports regarding remedial efforts, or testimony of workers concerning their knowledge (*see Tucker v New York City Tr. Auth.*, 42 AD3d 316, 317 [1st Dept 2007]). Constructive notice can be established if there was a visible and apparent defect that existed for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*see id.*). In addition, notice of a general or unrelated problem is not sufficient; rather, the particular defect must have been apparent (*see Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 500 [1st Dept 2007]). In addition, a defendant who has actual knowledge and was aware of an ongoing and recurring dangerous condition is on constructive notice of specific reoccurrences of the condition (*see O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 106 [1st Dept 1996]). Thus, even if the owner is not alleged to have created the defective condition, liability may be predicated on the owner's failure to remedy the condition based on notice and sufficient time to do so (*see Walsh v Super Value, Inc.*, 76 AD3d 371, 375 [2d Dept 2010]; *Birthwright v Mid-City Sec., Inc.*, 268 AD2d 401, 402 [2d Dept 2000]; *Perlongo v Park City 3 & 4 Apartments, Inc.*, 31 AD3d 409, 411 [2d Dept 2006]).

Here, there is a triable issue of fact whether defendant was on notice of the alleged dangerous condition involving plaintiff's injury. Although defendant argues through the deposition of Ronald Rogers, that it had no knowledge of overseeing renovations, nor provided any permission of any alternations, the court finds this claim unavailing (NYSCEF # 76 at 95). Roger's statements of receiving no permission, and his outright denial of scenarios where a tenant would not need any permission by the owner for alternations, is flat out contradicted by opposing counsel quoting "[t]ake a look at that part highlighted there and Paragraph 3 on the first page on the left column. "Tenant shall make no changes to the demised premises of any nature without owner's prior written consent"" (*id.* at 102). In addition the deposition shows that Rogers personally visited the property about 10 times since 1988 and demonstrated knowledge of the existence of the trapdoor with the stair case to the basement (*see id.* at 81-83). Furthermore, notice is further imputed with Rogers admitting to visiting the property prior to Pazzo Pizza (the current restaurant which Plaintiff worked) taking over the property and also taking "more than fifty" photographs of the property (NYSCEF # 77 at 117).

### **Dangerous or Defective Condition**

Where liability is predicated on the owner's creation of a dangerous or defective condition, "usual questions of notice of the condition are irrelevant since the defendant created the condition" (*Cook v Rezende*, 32 NY2d 596, 599 [1973]; *see Ohanessian v Chase Manhattan Realty Leasing Corp.*, 193 AD2d 567, 567 [1st Dept 1993]). Within the exercise of reasonable care, there must be either proof that defendant created the condition or had a sufficient opportunity to remedy the situation (*see Lewis v Metro. Transp. Auth.*, 99 AD2d 246, 250 [1st Dept 1984]; *see also Madrid v City of New York*, 42 NY2d 1039, 1039 [1977]). In addition, expert opinion may be admitted when an expert offers an opinion on an issue which involves professional or scientific knowledge

or skill not within the range of ordinary training or intelligence (*see Dufel v Green*, 84 NY2d 795, 798 [1995]). An expert may opine upon custom and usage in a particular industry such as building construction, renovations, and alternations (*see Trimarco v Klein*, 56 NY2d 98, 103 [1982]). Furthermore, expert testimony on the issue of whether conditions or conduct constitute a violation of a statute or regulation is permissible (*see Franco v Jay Cee of New York Corp.*, 36 AD3d 445, 448 [1st Dept 2007]).

Accordingly, the expert affidavit of a forensic engineering firm submitted by plaintiff was sufficient to raise a triable issue of fact as to whether a dangerous or defective condition existed (NYSCEF # 81). The expert affidavit claims “it has been generally good and accepted practice in the construction, engineering, and safety industries for many years that open hatchways or trap doors in floors at stairs shall be guarded or otherwise protected when the hatch door in an open position” (*id.* at 5). The affidavit goes on further to claim the risk of a fall accident at the property “was particularly high when exiting the adjoining bathroom since the bathroom doorway was only 26 inches away from the edge of the stair opening” (*id.* at 5). The expert affidavit further claims the combination of the proximity of the bathroom entrance and the trap door without any walls constituted a hazard and defective condition, which further supported the claim that plaintiff’s accident was foreseeable and preventable (*id.* at 7). In addition, the expert affidavit claims the “failure to maintain the stair in a good condition violates §28-301.1 of the New York City Administrative Code and is an omission on behalf of the owner” (*id.*). Thus, the expert affidavit submitted by plaintiff raises an issue of triable fact on whether proximity of the bathroom to the trapdoor with no barriers constitute a dangerous or defective condition (*id.*).


Accordingly, defendant’s motion for summary judgement, dismissing the complaint is denied due to the existence of triable issues of fact.

**Conclusion**

In view of the above, it is

ORDERED that the motion by the defendant for summary judgment is denied.

This constitutes the decision and order of the Court.

8/13/2024		
DATE		RICHARD G. LATIN, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE