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

**PRESENT:** **HON. ARLENE P. BLUTH** **PART** **14**

***Justice***

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PATRICIA BRECHT,

Plaintiff,

- v -

24 W. 89TH ST., LLC, MARK D. MILITANA,

Defendants.

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**INDEX NO.** 157267/2019

**MOTION DATE** 02/13/2025

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139

were read on this motion to/for SUMMARY JUDGMENT.

Defendant 24 W. 89th St., LLC's motion for summary judgment is denied.

**Background**

In this trip and fall action, plaintiff seeks to recover for injuries allegedly sustained on the exterior stairway at 24 W. 89th Street, New York, New York on May 3, 2019. However, this motion concerns a dispute between the co-defendants, who are co-owners of the premises.

The first listed defendant is 24 W. 89th Street, LLC (the "LLC") whose only member at the time of the alleged trip and fall was Angelina Militana ("Ms. Militana"), the mother of co-defendant Mark D. Militana ("Mark"). The mother owned her share in an LLC and the son owned his share in an individual capacity.

LLC brings this motion for summary judgment seeking to dismiss the complaint as against LLC, to dismiss Mark's crossclaim for contribution, and granting LLC's crossclaim for declaratory judgment against Mark declaring that Mark is solely responsible for plaintiff's injuries if any liability is found.

After her husband died, Ms. Militana inherited his share of the subject building and shortly thereafter, in 2012, transferred her interest to the LLC in which she was the only member. Soon thereafter she started showing signs of dementia and eventually had two guardians appointed. One guardian was charged with managing Ms. Militana's personal needs. The other guardian was appointed Property Management Guardian and was charged with managing several properties in which Ms. Militana had an interest, including the subject premises (*see* NYSCEF Doc. No. 127, Order to Show Cause in Guardian Part CC15 in Nassau County Supreme Court dated May 19, 2017). Her son, Mark, who had co-owned the building with his father, remained a co-owner with the LLC and was in communication with the Guardian. The Guardian was in place for about two years by the time this accident happened in 2019.

LLC contends that leading up to and at the time of the accident, LLC did not exercise any control over or have any responsibility for the property and urges this Court to find that therefore it was an out-of-possession landlord that owed no duty of care to plaintiff. There is no question that Mark took an active role in running the building – he lived on the block, collected rents, hired workers, initiated eviction proceedings, etc. LLC details that Ms. Militana, who died in 2021 (after the plaintiff's accident), did not participate in any way in the management or maintenance of the building, was not involved with the finances, and lived on Long Island. LLC contends that Mark should bear sole responsibility for any injury allegedly caused to plaintiff due to a failure to maintain the premises, since he lived nearby and took care of the day-to-day running of the building.

Mark opposes LLC's motion and details that on March 15, 2016, Joel Kaplan, Esq. ("Mr. Kaplan") was appointed as Property Management Guardian of Ms. Militana's properties for a period of 2 years. On May 19, 2017, Mr. Kaplan filed an order to show cause in Nassau County

seeking to extend his appointment as Ms. Militana's Property Management Guardian indefinitely based upon what he described as "chaotic management" of Ms. Militana's multiple properties, including the subject premises (NYSCEF Doc. No. 127). Mr. Kaplan also submitted "…that Mark Militana should be removed as property manager and the Court permit Wolinetz Management Co. LLC to manage the property located at 24 West 89th Street, New York, New York" (*id.*). The verified petition attached to the order to show cause also shows that Mr. Kaplan requested the power to oversee the management of the subject premises, to authorize others to do repairs on the subject premises, and to retain a management company to manage the subject premises (*id.*).

In Mark's affidavit in opposition to this motion, he details that Mr. Kaplan was appointed as Ms. Militana's guardian but never retained the management firm (NYSCEF Doc. No. 126 at ¶ 6). Mark further alleges that Mr. Kaplan visited the building on at least one occasion, and that Mark never had any agreement with the LLC whereby Mark had exclusive possession of the subject building or that he was solely responsible for the management of the property (*id.* at ¶¶ 8, 9). Mark produces email communications dating from 2015 to 2017 evincing that he consulted with Mr. Kaplan regarding financing, leasing, and repairs at the subject premises (NYSCEF Doc. No. 128).

Plaintiff also opposes LLC's motion and argues that the record shows that LLC never relinquished its duty to maintain the premises, that LLC was not an "out-of-possession landlord" under the case law, and submits that Mark was acting as an agent of the co-owner LLC.

LLC does not dispute that Mr. Kaplan was the court-appointed Property Management Guardian of Ms. Militana's properties at the time of the alleged accident and that Mr. Kaplan was in touch with Mark Militana regarding the premises and various issues happening in the

building. LLC argues that since LLC did not actively take part in maintaining the building, that it did not have a responsibility to do so, and that the communications Mark had with Mr. Kaplan occurred too long before the accident to be relevant.

**Discussion**

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

The court's task in deciding a summary judgment motion is to determine whether there are bona fide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Here, the Court finds that there are clearly issues of fact and denies LLC's motion. LLC's argument is premised on the fact that Ms. Militana was the only member of the LLC at the time of the incident, that she was unable to participate in the management of the building, and that Mark was solely responsible for the day-to-day operations at the subject premises.

While LLC does mention that Ms. Militana had a "legal guardian" in its memorandum in support of this motion, the evidence shows that Ms. Militana in fact had two legal guardians, one of whom was a Property Management Guardian. This Property Management Guardian communicated with Mark about the property, and it is alleged that the guardian visited the property. Importantly, the guardian knew that there was a problem with the management at the subject premises, represented this fact to the Court when he sought to be appointed Ms. Militana's Property Management Guardian indefinitely, requested that Mark be removed from managing the property, and was apparently empowered to hire a professional property management agency.

Furthermore, the cases that LLC cites to support the notion that it was an out-of-possession landlord are clearly distinguishable as will be discussed below. Most notably, to be considered an out-of-possession landlord, there must be clear evidence of an agreement whereby an owner relinquishes control of its property. There is no such evidence here.

Out of Possession Landlord

LLC's legal argument commences by correctly noting that "[a]s a general rule, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition" (*Augustine v. City of New York*, 188 A.D.3d 969, 970-971 [2d Dept 2020]). LLC then argues that this rule does not apply to LLC, since LLC should be considered as out-of-possession.

In initial support of the proposition that LLC is an out-of-possession landlord, LLC cites to *Butler v. Rafferty*, 100 N.Y.2d 265 [2003]. *Butler* involved a property where a brother and his sister owned a single-family dwelling together, and they contracted to grant each party exclusive possession to a portion of the property. When a guest of the sister's son was injured on the part

of the property that was under the exclusive control of the sister, the Court found that the co-tenant brother could not be held liable.

The facts here are distinguishable. Here, LLC and Mark are co-owners of a rental-property where neither party lives, and there was no agreement that granted LLC and Mark exclusive control over separate parts of the building.

LLC then switches to *Kraft v. Loso*, 154 A.D.3d 1265 [3d Dept 2017]. There, a brother and sister were the co-owners of a building where a tenant was injured. The uncontroverted evidenced established that the sister surrendered possession and control of the property. The brother testified that he was solely responsible for the property's care and upkeep. Furthermore, the sister had never seen the property and was not a party to the relevant lease, whereas her brother was.

Unlike in *Kraft*, here, Mark does not testify that he was solely responsible for the upkeep of the property. LLC points to Mark's deposition testimony in its reply in support of this motion (NYSCEF Doc. No. 138). Mark was asked, "From January 1, 2016 through May 3, 2019, the date of the accident, did anyone on behalf of the LLC do anything to try to maintain the property?" to which Mark replied, "No" (*id.* at ¶ 7). Mark was then asked, "Did anybody on behalf of the LLC do anything to try to repair any part of the premises between January 1, 2016 through May 3, 2019?" and Mark against responded, "No" (*id.*).

LLC contends that this testimony made it "very clear that [Mark] was the sole person responsible for managing the property and emphasized how he controlled the property" (*id.*). The Court does not agree. This testimony shows that LLC did nothing to maintain the property and that Mark bore the administrative responsibility of completing maintenance-related tasks. It does not show LLC was relieved of its the legal responsibility to maintain the property.

Furthermore, unlike in *Kraft*, the uncontroverted evidence in this case shows that the LLC was managed by a court-appointed Property Management Guardian. It is alleged that the guardian did see the property and there is no evidence to suggest that only Mark was a party to the leases at the subject premises.

Next, LLC points to *Turner v Davis*, 105 AD3d 946 [2d Dept 2013]. There, the subject rental property where the injury occurred had been co-owned by a married couple. They divorced, the settlement granted the rental property to the husband, and the ex-wife executed a quitclaim deed conveying her interest in the rental property to her ex-husband. The Court found that she never exercised any control over the property and never had any responsibilities for it. Again, in that case, there is a written instrument whereby one party surrendered control of the property. Here, the Property Management Guardian for LLC asked a court to be more involved with the management of the subject premises, and there is no evidence of a written (or any) agreement where Mark got exclusive possession of the property or took full responsibility for the upkeep of the property.

LLC also cites to *Squires v Carting*, 2023 N.Y. Misc. LEXIS 32098, at *1-4 [Sup Ct, Nassau County Feb. 27, 2023, No. 603308/2021]. There, a motorcyclist was injured when he struck a dumpster that was left on public property. That court found that only one co-owner was liable because the dumpster was placed in the roadway in front of the premises at the behest of that co-owner. The non-liable co-owner did not own the dumpster, had nothing to do with ordering the dumpster or where it was placed, and did not contract for or consent to the placement of the dumpster. That case has nothing to do with the duty to repair. One of the co-owners purposefully placed an object in a public roadway which caused a motorcycle accident. LLC's reliance on this case is misplaced.

LLC's argument relies on the fact that Ms. Militana was the sole member of the LLC at the time of the accident and did not have an active role in the maintenance or finances at the subject premises. The Court observes that this case was not brought against Ms. Militana in her personal capacity. It was brought against the LLC which was under the control of a court appointed Property Management Guardian. That guardian informed the court that the management of Ms. Militana's properties was "chaotic," requested that Mark be removed as property manager from the subject premises, and asked the court for permission to hire a property management company. But the Guardian did not actually do anything to make matters less chaotic, did not hire a management company or apparently even make sure there was insurance on the building.

Perhaps Mr. Kaplan (the Property Guardian) viewed Mark as both the co-owner and managing agent for the property. He may not have liked the way Mark was managing the property, but there is no indication that the LLC had any sort of agreement that rendered it an out-of-possession landlord in the eyes of the law. Rather, it is quite clear that the LLC was aware that there were potential issues with the management of the subject premises and was empowered to hire a different managing agent—it did not do so.

When an owner's managing agent does not do a good job – for example, allows insurance to lapse, fails to make repairs, fails to keep proper records, fails to maintain proper registrations - the owner cannot hide behind its managing agent. The owner may be able to make claims against the managing agent, but as it pertains to an injured third party, the owner remains on the hook.

**Summary**

There is no question, as both defendants have made it abundantly clear to the Court, that the LLC did little to nothing to maintain the building or take part in the day-to-day management of the rental property that it co-owned. But abandoning its obligations, or looking the other way, does not automatically mean that LLC did not have the *responsibility* to maintain the building in a safe manner. Critically, there was no agreement submitted on this record that absolved the LLC of such a duty.

As its core, LLC's argument is that it should not be liable for an accident on the steps of its building because it chose not to maintain the building. The LLC claims that Mark should be liable even though it claimed it knew Mark wasn't doing a good job and got permission to hire someone to replace him, but never bothered to hire anyone to fix those issues.

Quite simply, it would defy both logic and case law if a building owner could disclaim responsibility for maintaining its rental property simply by virtue of choosing not to maintain its property.

Accordingly, it is hereby

ORDERED that defendant 24 W. 89TH ST., LLC's motion is denied in its entirety.

3/7/2025
DATE

ARLENE P. BLUTH, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | X | DENIED | | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |