SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

WILFREDO SANTIAGO and ELENA SANTIAGO,

Plaintiffs,

- against -

MILLENNIUM REALTY, LLC,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 22352/09
Motion Seq. No.: 01
Motion Date: 12/08/11
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation and Memorandum of Law	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing plaintiffs' Verified Complaint. Plaintiffs oppose the motion.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Wilfredo Santiago ("WS") on May 29, 2007, when he fell in the internal staircase between the third and fourth floors of the premises known as Millennium Super Store, Ltd., located at 286 North Franklin Street, Hempstead, New York. Defendant is a domestic limited liability company organized in the State of New York with a Florida business address. Mr. John Staluppi is the sole member of defendant, as well as the sole officer, director and shareholder of Millennium Super Store, Ltd. In 1998, defendant purchased the land and buildings located at the

subject premises. On the date in issue, Millennium Super Store, Ltd. operated and conducted business under the name of Millennium Toyota. Plaintiff WS was employed by Millennium Super Store, Ltd. on the date of the subject incident and was injured during the scope of his employment. Plaintiffs commenced the instant action with the filing of a Summons and Verified Complaint on or about November 2, 2009. Issue was joined on or about February 23, 2010. In their Verified Complaint, plaintiffs allege that defendant failed to care for, maintain and repair the interior staircase at the subject premises where the incident took place.

Defendant argues that the evidence proves that it is an out-of-possession landlord and, as such, it owed no duty to plaintiff WS and cannot be held liable for any alleged injuries sustained by plaintiff WS at the subject premises. Defendant submits that, on December 31, 2001, it entered into a lease agreement whereby defendant, as landlord, leased the land and buildings at several locations in Hempstead, New York to Millennium Super Store, Ltd., as tenant. Said lease agreement included the land and buildings located at 286 North Franklin Street, the location of the subject incident. *See* Defendant's Affidavit in Support Exhibit 3. Said lease was in effect at the time of the subject incident, as the terms of the lease ran from January 1, 2003 through December 31, 2013. Defendant contends that the second paragraph of the lease specifically states that the tenant is responsible to "take good care of the demised premises, fixtures and appurtenances, and all alterations, additions and improvements together; make all repairs in and about the same necessary to preserve them in good order and condition...forever indemnify and save harmless the Landlord for an against any and all liability, penalties, damages, expenses and judgments arising from injury during said term to person or property, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant... " *See* Defendant's Affidavit in Support Exhibit 3 ¶ 2. Additionally, the third paragraph of the lease states that "the Tenant will not obstruct or permit the obstruction of the light, halls, stairway or entrances to the building,..." *See* Defendant's Affidavit in Support Exhibit 3 ¶ 3.

Defendant submits that it is well-settled that an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless that entity retained control of the premises or is contractually obligated to repair the unsafe condition. Defendant states that, according to plaintiffs' Verified Bill of Particulars, plaintiff WS was descending the stairway of the subject

premises when he was "caused to be precipitated to the floor by reason of the dangerous, hazardous and defective condition of the stairway and lighting." *See* Defendant's Affirmation in Support Exhibit 4 ¶¶ 7 and 8. Defendant argues that plaintiffs' Verified Bill of Particulars does not allege any structural defect on the subject premises nor on the subject internal staircase.

Defendant contends that, according to the aforementioned lease agreement, it did not retain any obligation to repair or maintain the subject premises, including the internal stairway.

Defendant alternatively argues that, even if plaintiffs allege and prove that defendant is an in-possession landlord to its tenant, Millennium Super Store, Ltd., in that event Millennium Super Store, Ltd. would be the alter-ego of defendant and plaintiff WS's sole remedy would be possible benefits under the New York State Workers' Compensation Law. Defendant submits that, at the time of the alleged incident, John Staluppi was the sole member of defendant and the sole officer, director and shareholder of Millennium Super Store, Ltd., which, as previously mentioned, was plaintiff WS's employer at the time of said incident. *See* Defendant's Affidavit in Support Exhibits 1 and 2. Defendant states, "[i]f the position of the Plaintiffs in this action is that Millennium Realty is an 'in-possession landlord' with control over the Premises, in particular the stairway and the lighting, then Millennium Realty and Millennium Super Store, Mr. Santiago's employer, meet the threshold of being alter ego entities, as Millennium Super Store was a 'dominated entity' as defined by the Appellate Division, Second Department. First, Mr. Staluppi, at the time of the alleged incident, was the sole member of Millennium Realty (the owner of the Premises), as well as the sole owner of 100% of the outstanding shares of Millennium Super Store (the lessee of the Premises)....Second, as stated above, there is a clear 'overlap in ownership, officers, directors, and personnel' between Millennium Realty and Millennium Super Store, as evidenced by the role played by Mr. Staluppi with regard to both entities....Third, as evidenced by the Lease, between the two entities owned and operated by the same individual, leasing the Premises from Millennium Realty to Millennium Super Store, the two entities clearly did not engage in 'arms length transactions.'"

In opposition to defendant's motion, plaintiffs first argue that there are questions of fact as to whether defendant, as an out-of-possession landlord, is liable for the dangerous and defective lighting in the stairway at the subject premises. Plaintiffs submit that it is well-settled

that an out-of-possession landlord that retains the right to re-enter premises and make repairs can only be held liable for a significant structural or design defect that constitutes a specific statutory violation. Plaintiffs contend that defendant's lease establishes that it not only maintained a right of re-entry, but it also retained the right to make repairs. Plaintiffs contend that triable issues of fact exist as to whether the absence of lighting in the subject stairway constituted a structural defect and comprised a statutory violation. Plaintiffs state "while defendant argues that the duty was that of the tenant to repair the subject dangerous and defective condition, it is submitted that the defect, the absence of any lighting fixture in the internal staircase, was structural in nature, and as such the onus was on the landlord to not only remedy same, but will also render the landlord liable for any injuries that were proximately caused by said structural defect. Defendant's argument that the tenant was under a duty to repair the lighting in the internal stairway must fail. This (*sic*) not the case where the lighting fixture was not in good working condition, but rather there was no lighting fixture. As such, it falls within the landlord's responsibility."

Plaintiffs add that it is well settled that dangerous and defective conditions regarding lighting in stairways constitute structural defects. Plaintiffs further add that New York State Uniform Fire Prevention and Building Code, Part 103.1(a) & (b) is applicable to the case at hand.

Plaintiffs also argue that their failure to specify the New York State Building Code violations prior to the filing of the Note of Issue and the fact that they served their subsequent Second Supplemental Bill of Particulars after defendant filed its Motion for Summary Judgment is not fatal to plaintiffs' claim. Plaintiffs contend that the Building Code violations alleged by plaintiffs raise no new theories of liability or any surprise or prejudice. Plaintiffs state that their "service, without leave of court, of a supplemental bill of particulars identifying an (*sic*) the Building Code violations was proper under C.P.L.R. § 3043(b) since allegations of the Building Code violations merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars and raise no new theory of liability."

Plaintiffs further submit that there is no evidence that defendant and plaintiff WS's employer were a single entity entitled to tort insulation afforded by the Workers' Compensation Law. Plaintiffs state, "[i]n the instant matter, plaintiff's employer has already been identified as Millennium Super Store, Ltd. and there has been no evidence submitted by defendant that it had

the right to control plaintiff's work, furnished equipment to the plaintiff, or had the right to fire the plaintiff."

Plaintiffs contend that defendant and Millennium Super Store, Ltd. are separate legal entities as they were formed for different purposes, their finances are not integrated, neither is a subsidiary of the other, their assets are not commingled and the principal treat the two entities as separate and distinct. Additionally, the lease between defendant and Millennium Super Store, Ltd. clearly contains provisions which indicate that the entities were not operating as one, but rather, maintained separate and distinct roles set down by the provisions of said lease.

In reply to plaintiffs' opposition, defendant states, "[i]n opposition to Millennium Realty's motion for summary judgment, Plaintiff does not dispute that Millennium Realty is an out-of-possession landlord. Rather, Plaintiff argues that Millennium Realty's motion should be denied because **(a)** Millennium Realty retained the right to re-enter the premises; and **(b)** the alleged defect in question, to wit, insufficient lighting, was a 'structural defect' which constitutes a specific statutory violation....Plaintiff fails to establish that Plaintiff's accident was caused by any structural defect, or that such alleged defect constitutes a specific statutory violation."

Defendant contends that, in an attempt to defeat defendant's *prima facie* showing of entitlement to summary judgment, plaintiffs offer the argument that insufficient lighting at a premises is tantamount to a structural defect. Defendant submits that plaintiffs allege, for the first time in opposition to defendant's motion, that defendant violated a particular statutory code relating to lighting conditions.

Defendant argues that "Plaintiff's purported Supplemental Bill of Particulars (which is actually an Amended Bill of Particulars) should not be considered by this Court, as the new code section was alleged for the first time more than three months after the filing of the Note of Issue, without leave of Court. The code sections cited in Plaintiff's initial Bill of Particulars do not provide any notice to Millennium Realty that Plaintiff might amend the Bill of Particulars to allege a violation of a building code relating to lighting. In fact, the code sections cited by Plaintiff in the original Bill of Particulars do not specify the lighting requirement which Plaintiff alleges Millennium Realty violated. As such, Plaintiff should not be permitted to unfairly prejudice Millennium Realty by attempting to amend the Bill of Particulars without leave of Court almost two months after service of Defendant's summary judgment motion."

Defendant adds that plaintiffs' citation to the Building Code is insufficient to create an issue of fact in opposition to defendant's motion because plaintiffs failed to retain an expert to proffer an opinion as to whether defendant violated said Building Code. Defendant further states, "contrary to Plaintiff's contention, the First and Second Departments have both held that claims relating to inadequate lighting are not significant structural defects....Plaintiff's claim that the existing light fixtures, as testified to by Mr. Rizzuto, were inoperative at the time of the accident, is, at best, a transitory maintenance condition that did not constitute structural or design defects....Notably, this Court is bound by the principles of stare decisis to follow the very clear decisions of the First Department that inadequate lighting does not constitute a significant structural or design defect that violates a specific statutory building code provision, absent a contrary ruling from the Second Department....As the First Department holding on the issue is very clear, this Court is bound to adhere to the precedent set forth in its decision."

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish his or her claim or defense by tendering proof, in admissible form, sufficient to warrant the Court to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion. *See Mgrditchian v. Donato*, 141 A.D.2d 513, 529 N.Y.S.2d 134 (2d Dept. 1998). Assertions set forth by an opposing attorney, which are unsupported by competent proof, lack probative value and are insufficient to raise a triable issue

of fact. *See Zuckerman v. City of New York, supra* at 562. When considering a motion for summary judgment, the function of the court is not to resolve factual issues but rather to determine if any such material issues of fact exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

An out-of-possession landlord establishes its *prima facie* entitlement to judgment as a matter of law dismissing a claim for premises liability by establishing lack of control over the premises and no contractual obligation to maintain or repair the premises. *See Panico v. Jiffy Lube Intern., Inc.* 86 A.D.3d 553, 926 N.Y.S.2d 833 (2d Dept. 2011); *McElroy v. Bernstein*, 72 A.D.3d 757, 898 N.Y.S.2d 471 (2d Dept. 2010) *lv app. den.* 15 N.Y.3d 704, 907 N.Y.S.2d 752 (2010); *Euvino v. Loconti*, 67 A.D.3d 629, 888 N.Y.S.2d 571 (2d Dept. 2009). A landlord's reservation of the right to inspect and repair does not suffice to establish liability where the alleged defect violated no statutory obligation. *See Espada v. City of New York,* 74 A.D.3d 1276, 903 N.Y.S.2d 237 (2d Dept. 2010); *O'Connell v. L.B. Realty Co.*, 50 A.D.3d 752, 856 N.Y.S.2d 165 (2d Dept. 2008).

The reservation of the right to enter premises for inspection and repair may constitute sufficient retention of control to impose liability upon a landlord for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision and there is a significant structural design or defect. *See Nikolaidis v. La Terna Restaurant*, 40 A.D.3d 827, 835 N.Y.S.2d 726 (2d Dept. 2007).

The Court first finds that defendant is an out-of-possession landlord. Defendant, although organized as a limited liability company in the State of New York, has a Florida business address and its sole member, John Staluppi, resides in Palm Beach Gardens, Florida. As previously mentioned, paragraph two of the lease between defendant and Millennium Super Store, Ltd., the tenant of the building where plaintiff WS's accident occurred, specifically states that the tenant is responsible to "take good care of the demised premises, fixtures and appurtenances, and all alterations, additions and improvements together; make all repairs in and about the same necessary to preserve them in good order and condition...forever indemnify and save harmless the Landlord for an against any and all liability, penalties, damages, expenses and judgments arising from injury during said term to person or property, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant... " *See* Defendant's Affidavit in

Support Exhibit 3 ¶ 2. Additionally, the third paragraph of the lease states that "the Tenant will not obstruct or permit the obstruction of the light, halls, stairway or entrances to the building,..." *See* Defendant's Affidavit in Support Exhibit 3 ¶ 3. Furthermore, while said lease contains a right of re-entry in favor of defendant, defendant cannot be held liable based upon any constructive notice which may result therefrom given the absence of any evidence as to a "significant structural or design defect that is contrary to a specific statutory safety provision." *See Jackson v. U.S. Tennis Ass'n, Inc.*, *supra*, *quoting Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325, 642 N.Y.S.2d 897 (1st Dept. 1996).

While plaintiffs are correct that defendant's lease maintained a right to re-entry and also maintained the right to make repairs (*see* Defendant's Affidavit in Support Exhibit), they have failed to raise a triable issue of fact that the alleged defect in the premises constituted a statutory violation.

Even accepting plaintiffs' Amended Bill of Particulars (*see* Plaintiffs' Affirmation in Opposition Exhibit B), despite defendant's arguments against doing so (*see* Defendant's Reply Memorandum of Law, Point II, A), the Court finds that plaintiffs' mere allegations that defendant violated The New York State Uniform Fire Prevention and Building Code Part 103.1(a) & (b) do not create an issue of fact. Plaintiffs have failed to provide any evidence that said statutory violations exist. The affirmation of plaintiffs' counsel and plaintiff WS's own Examination Before Trial testimony do not constitute evidence that defendant violated said statutes. As previously stated, assertions set forth by an opposing attorney, which are unsupported by competent proof, lack probative value and are insufficient to raise a triable issue of fact. *See Zuckerman v. City of New York*, *supra* at 562. Plaintiffs did not provide the Court with any type of report or affidavit from a qualified expert to support their allegations that alleged defect in the premises constituted a statutory violation. Plaintiffs' opposition, lacking an expert report stating that defendant violated any applicable section of The New York State Uniform Fire Prevention and Building Code Part 103.1(a) & (b), is insufficient to defeat defendant's motion for summary judgment. *See Garcia-Rosales v. 370 Seventh Avenue Associates, LLC*, 88 A.D.3d 464, 930 N.Y.S.2d 183 (2d Dept. 2011); *Veccia v. Clear Meadow Pistol Club, Ltd.*, 300 A.D.2d 472, 752 N.Y.S.2d 84 (2d Dept. 2002).

Since the Court has determined, based upon the evidence before it, that defendant is an out-of-possession landlord, it need not address defendant's arguments that it be treated as the

alter-ego of Millennium Super Store, Ltd., thereby limiting plaintiff WS's remedy to benefits under the New York Workers' Compensation Law.

As plaintiffs have failed to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial, defendant's motion, pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing plaintiffs' Verified Complaint is hereby **GRANTED**.

All applications not specifically addressed are hereby denied.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
March 21, 2012