IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WALTER JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 08C-03-092 WCC
	)	
ADJ REALTY OF DELAWARE LLC AND A&A REALTY OF DELAWARE LLC,	)	
	)	
Defendants/Third Party Plaintiffs,	)	
	)	
v.	)	
	)	
FREIHOFER SALES COMPANY, INC.	)	
	)	
Third Party Defendant.	)	

Submitted: December 4, 2009
Decided: March 17, 2010

OPINION

On Defendants' Motion for Summary Judgment - **GRANTED**

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CARPENTER, J.

Before this Court is ADJ Realty of Delaware LLC and A&A Realty of Delaware LLC's ("Defendants") Motion for Summary Judgment. Plaintiff Walter Johnson ("Plaintiff") filed a complaint against Defendants alleging negligence in failing to properly maintain the floor of a warehouse leased by the Defendants and failing to warn Plaintiff of the dangerous condition of the warehouse floor. Defendants filed a third-party complaint against Freihofer Sales Company, Inc. ("Freihofer") alleging that Freihofer was responsible for maintaining and repairing the warehouse floor pursuant to the lease agreement. For the reasons set forth below, this Court hereby grants the Defendants' Motion for Summary Judgment.

FACTS

On February 4, 2005, Defendants purchased from Southgate Associates I, LP ("Southgate") the property located at 78 Southgate Boulevard, New Castle, Delaware 19720. At the time of this purchase, 10,600 square feet of the property was under lease to Freihofer. Defendants succeeded Southgate's interest as landlord pursuant to the Southgate Lease Agreement dated March 31, 1997 and two subsequent lease amendments. The lease that held Defendants and Freihofer in privity ended on March 31, 2006.

After that date, Freihofer continued using the leased property and negotiations between Defendants and Freihofer to renew the lease continued. As part of these

negotiations, on July 15, 2006, Freihofer obtained a proposal from RFC Contractors, Inc. to furnish labor and materials necessary to complete repairs to the warehouse floor for $17,000. This proposal was attached to the new lease executed between Defendants and Freihofer dated September 1, 2006. Under the new 2006 lease, Freihofer was responsible for these repairs.

On August 4, 2006, during the interim period between leases, Plaintiff, Freihofer's employee, was injured at work when a stack of bread trays fell on his back after tipping over due to the poor condition of the warehouse floor.[1] Defendants bring forth this Motion for Summary Judgment on the basis that Defendants had no responsibility to repair the warehouse floor under the terms of the lease and since they did not "control" the leased property, they had no duty to warn Plaintiff of such flooring conditions as they were not notified by the lessee that repairs were needed.

STANDARD OF REVIEW

When considering a motion for summary judgment the Court must determine whether there is a genuine issue as to any material fact.[2] It is the burden of the moving party to demonstrate that the legal claims are supported by undisputed facts.[3] If the moving party properly supports his claims, the burden then shifts to the

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[1] While not specifically mentioned in the pleadings filed with the Court, it will assume that the Plaintiff has received workers compensation benefits for these injuries.
[2] Super. Ct. Civ. R. 56(c).
[3] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

nonmoving party to demonstrate that there are issues of material fact to be resolved by a fact-finder.[4] The Court must view the evidence in a light most favorable to the nonmoving party.[5]

DISCUSSION

(a) Lease Provisions

Plaintiff suggests that pursuant to the terms of the lease agreement, it was Defendants' responsibility to repair the warehouse floor. Because commercial leases are constructed using general contract principles[6], the Court must look to the lease to define the obligations between Defendants and Freihofer. Only when there is ambiguity, will the Court inquire beyond the terms of the lease.[7]

Prior to examining the terms of the lease, the Court must first determine which lease held the parties in privity. The lease between Defendants and Freihofer expired on March 31, 2006. After the expiration of the lease on March 31, 2006, Freihofer continued to occupy and use the premises and a new lease was executed on September 1, 2006. However, it was during this negotiation period that Plaintiff was injured.

An examination of the original lease does not set forth the status between the parties after the expiration of the lease and during a period of negotiations. While paragraph 30 of the lease, "Tenant Holding Over" appears to be relevant,[8] a closer

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[4] *Id.* at 879-80.
[5] *Id.* at 880.
[6] *Stayton v. Cumberland Engineering Co., Inc.*, 2008 WL 2582665, *at 3 (Del. Super. May 2, 2008) (citing *Martin v. Hopkins*, 2006 WL 1915555, at *6 (Del. Super. June 27, 2006); s*ee also* 25 *Del. C.* § 5101(b).
[7] *Id.*
[8] *See* Defs.' Ex. B – Southgate Lease Agreement ¶ 30.

examination reveals that this section only considers situations where the tenant fails to vacate the premises and fails to notify the landlord to continue the tenancy. But that does not appear to be the situation here, as Freihofer's continued use of the leased premises was with the consent and to the economic benefit of the landlord.

Because the lease itself does not clearly speak to the relationship between the parties during a negotiation stage, the Court will look to landlord-tenant principles to resolve this ambiguity. A "holdover tenant" is addressed under 25 *Del. C.* § 5108. That section states: "the term [of the holdover agreement] shall be month-to-month, and all other terms of the rental agreement shall remain in full force and effect."[9] Therefore, under this principle, the terms of the second lease amendment between Defendant and Freihofer would govern the relationship between the parties during the March 31, 2006 to September 1, 2006 period.

The second lease amendment provided "except as herein provided, all terms and conditions of said lease shall remain the same."[10] The terms of the original lease began on April 1, 1997 and ended on March 31, 2002. Two subsequent lease amendments were then entered into under the same terms of the original lease. The first lease amendment extended the original lease from April 1, 2002 to March 31, 2005. The second lease amendment extended the lease from April 1, 2005 to March 31, 2006.

[9] 25 *Del. C.* § 5108(a).
[10] *See* Defs.' Ex. B – Second Amendment to Lease.

Both subsequent lease amendments stated "all terms and conditions of said Lease shall remain the same." As such, Defendants were bound to the terms of the original lease since they came into the lease during the second lease amendment. Therefore, looking to the original lease entered into on March 31, 1997, the Court must determine which provisions are relevant to the issue in question.

Plaintiff points the Court to paragraph 11(A) of the lease agreement, entitled "Alterations and Improvements" to show responsibility on behalf of the Defendants.[11] This provision states that: "Tenant shall accept the building in accord with the Improvement Schedule D attached."[12] Plaintiff suggests that the punch list from the building inspection dated 3/10/97 is the "Improvement Schedule D" referenced in paragraph 11(A) and draws the Court's attention to #5 on the list stating Defendants were responsible for "seal cracks in expansion joints in concrete slab."[13]

After an examination of the building inspection punch list, it would appear to the Court that the punch list contained improvements to be made by the previous landlord prior to Freihofer's occupation of the building. Once Freihofer took possession, Freihofer accepted the premises in its condition and the Defendants satisfied the terms of the contract as to provision 11. Because provision 11 was

[11] *See* Defs.' Ex. B – Southgate Lease Agreement ¶ 11.
[12] *Id*.
[13] Pl.'s Opp'n to Def. ADJ Realty of Del. LLC's Mot. for Summ. J. ¶ 4.

satisfied at the time of possession, the Court believes that the Defendants' obligation to make repairs during the tenancy falls under provision 12 of the lease agreement.

In pertinent part, provision 12 states: "Landlord agrees to diligently perform at its expense in no more than 30 days of written notice from Tenant, maintenance to the interior and exterior structure of the building and roof except when such repairs are necessitated by negligence of the Tenant." Plaintiff alleges that the Defendants' responsibility to repair the warehouse floor is found within the phrase "interior and exterior structure."[14]

Unfortunately, the lease fails to define "interior and exterior structure" which would assist the Court in determining the Defendants' responsibility. However, even if the Court viewed the facts in a light most favorable to the Plaintiff and found that the warehouse floor was included in the phrase "interior and exterior structure," the record fails to reflect that any written notice to repair the warehouse floor was given by Freihofer to Defendants. Under provision 12, such action is required to give notice to Defendants of needed repairs.

Because general contract principles must be used to examine the terms of the commercial lease, the Court finds that the only possible obligation of the Defendants to repair the floor would be if notified by Freihofer of the defect. There is nothing in the record to indicate that the Defendants were notified and as such, the Court cannot

[14] *See* Defs.' Ex. B – Southgate Lease Agreement ¶ 12(C).

find a contractual basis to place the responsibility of the floor repairs upon the Defendant.

(b) Common Law

Plaintiff also suggests that the Defendants have a duty to warn under common law landlord-tenant principles. However, it is a well-established common law principle that a lessor who has neither possession nor control of the leased premises is not liable for injuries to third persons.[15] This concept is also summarized in the *Restatement (Second) of Torts* § 355 which states: "[A] lessor of land is not subject to liability to his lessee or others upon the land with the consent of the lessee or sublessee for physical harm caused by any dangerous condition which comes into existence after the lessee has taken possession."[16] However, an exception arises when the lessor retains control of portions of the land, which the lessee is entitled to use.[17]

In Delaware, to impose a duty upon a landowner/landlord requires "actual control" of the premises.[18] Actual control in this context refers to "actual management of the leased premises"[19], more specifically, the landowner/landlord must have "the

[15] *Volkswagen of America, Inc. v. Costello*, 880 A.2d 230, 233 (Del. 2005) (citing Thompson, *Commentaries on the Modern Law of Real Property*, § 1241, p. 243 (1981)).
[16] *See Volkswagen of America, Inc.*, 880 A.2d at 233 (stating Landowners who are out of possession after relinquishing possessory interests are not liable for dangerous conditions that arise after the lessee has taken possession).
[17] RESTATEMENT (SECOND) OF TORTS § 360 (1965).
[18] *Monroe Park Apartments Corp. v. Bennett*, 232 A.2d 105, 108 (1967) (*aff'g Young v. Saroukos*, 185 A.2d 274 (Del. Super. 1962)).
[19] *Craig v. A.A.R. Realty Corp.*, 576 A.2d 688, 695 (Del. Super. 1989), *aff'd*, 571 A.2d 786 (Del. 1989).

authority to manage, direct, superintend, restrict or regulate."[20] Thus, where the landowner/landlord reserves only some limited rights, such as the right to inspect or the right to inspect coupled with the right to retake will not be considered "actual control." [21] It is necessary to show actual control because once a landlord leases property, he generally relinquishes both control and possession of the leased area to the lessee.[22]

Based on the record, the evidence does not support that Defendants had "actual control" over the area where Plaintiff was injured. Although the Plaintiff cites the correct legal premise that a duty is owed where the lessor retains some control or possession over the premises,[23] Plaintiff fails to allege facts to support a finding that the Defendants actually retained some control or possession over this property.

There is no indication that Defendants managed, directed, or supervised any part of Freihofer's operations within the leased premises. Plaintiff's accident occurred within the confines of Freihofer's own leased premises and not within a common area controlled by the Defendants.[24] The Court notes that the Defendants did reserve the right to inspect the premises under the lease; however, this Court has held that the right to inspect does not create a duty on behalf of the landlord.[25]

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[20] *Id*.
[21] *Williams v. Cantera*, 274 A.2d 698, 701 (Del. Super. 1971).
[22] RESTATEMENT (SECOND) OF TORTS § 355 (1965).
[23] Pl.'s Opp'n to Def. ADJ Realty of Del. LLC's Mot. for Summ. J. ¶ 4.
[24] *See Kendzierski v. Del. Fed. Credit Union*, 2009 WL 342895, at *4 (Del. Super. Feb. 4, 2009) (finding Plaintiff's sustained injuries were within a common area under the responsibility of the landlord because under the lease terms, the tenants were in control of only the first two floors and basement).
[25] *Blair v. Berlo Vending Corp.*, 287 A.2d 696, 697 (Del. Super. 1972); *see also Cantera*, 274 A.2d at 701.

Defendants relinquished control to Freihofer of the specific area on the premises where Plaintiff was injured. Without any indication in the record to the contrary, the Court must reasonably hold that Defendants did not have "actual control" of the premises, and therefore, did not have a duty to Plaintiff under general landlord-tenant principles.

(c) Title 25 *Del. C.* § 5305

Plaintiffs also cite to 25 *Del. C.* § 5305 and *Koutoufaris v. Dick*[26] for the legal principle that if a landlord intends to shift it's responsibility and common law duty, it must do so clearly and explicitly in a writing separate from the rental agreement.[27] Furthermore, the agreement between the parties must be entered into good faith and is not for the purpose of evading an obligation of the landlord.[28]

In reviewing § 5305 and *Koutoufaris*, it would appear to the Court that the legal principle set forth therein do not apply to our facts here. There is no indication that Defendants intended to shift any responsibility during the signing of the lease that would have controlled the relationship between the landlord and tenant. In fact, the Defendants agreed to maintain and make repairs to the interior and exterior of the building as long as they were given notice of the repairs that were needed. What the Court believes the Plaintiff is attempting to argue is that the new lease entered into on

[26] 604 A.2d 390 (Del. 1992).
[27] Pl.'s Opp'n to Def. ADJ Realty of Del. LLC's Mot. for Summ. J. ¶ 8.
[28] *Id.*

September 1, 2006 after the accident that contained the tenant's obligation to fix the flooring cannot be viewed as definitive evidence that the landlord had no obligation to make such repairs under the previous lease. The Court agrees since this new lease was not in effect at the time of the accident. As such, the fact that the Plaintiff's employer agreed to fix the floor in the new lease agreement has no bearing upon the Court's ruling in this matter. Title 25 *Del. C.* § 5305 is not applicable to the facts of this case.

CONCLUSION

For the foregoing reasons, the Defendants' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.