SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

JORGE OSPINA,

Plaintiff(s),

- against -

LONG ISLAND INDUSTRIAL GROUP ONE LLC and CAMMEBY'S MANAGEMENT COMPANY LLC, CAMMEBY'S MANAGEMENT COMPANY OF LONG ISLAND, LLC,

Defendant(s).

TRIAL/IAS PART 6

INDEX NO. 5619/08

MOTION SEQUENCE NO. 3

MOTION SUBMISSION DATE: July 27, 2011

The following papers read on this motion:

Order to Show Cause	**X**
Affirmation in Opposition	**X**
Reply Affirmation	**X**

Upon the foregoing papers, the motion by defendants for an Order pursuant to CPLR §3212 granting these defendants summary judgment and dismissing the complaint, is determined as hereinafter provided:

This personal injury action arises out of an incident that occurred on April 14, 2005 at approximately 2:00 pm at the premises located at 575 Underhill Avenue, Syosset, New York. At that time, the plaintiff who was employed by the Third-party defendant Quest Diagnostics, Inc. which was a tenant at the premises leased from the defendants was struck on the head by a piece of sheet rock which allegedly fell from the ceiling in the warehouse area.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562,

427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

The Court initially observes that the submissions by the defendant of the deposition transcripts of James Mugford and John Piscitello, together with said witness' respective post deposition affidavits together with the deposition transcript of the Third Party defendant's witness Ellen Extract and the affidavit of Jeff Cohen establish in totality that the defendants have no records and/or evidence or knowledge that would establish what entity installed the sheet rock panel that allegedly fell nor that the defendants had any notice of a defective condition.

In examining the liability of an out of possession landlord, the Court in **Alnashmi v Certified Analytical Group, Inc.,** ___AD3d___, ___NYS2d___, 2011 WL 4090289 stated:

"Historically, cases arising under the common law concerning an out-of possession landlord's "Control" generally spoke of two different concepts. The first, which applied in situations where the plaintiff was not actually on the premises when injured, described the ability of the landlord to remedy a dangerous condition (*see Appel v Muller, 262 NY 278, 283-284, 186 NE 785; Jennings v Van Schaick, 108 NY at 534-535, 15 NE 424*). For example, in *Appel v Muller, 262 NY 278, 186 NE 785*, the plaintiff was injured when part of a plate-glass window fell on him as he as walking on the sidewalk past the defendant's building. A provision in the lease required the tenant to maintain the windows in good condition, but the landlord retained the right to enter the premises "at all reasonable hours" to make repairs. No convenant in the lease, however, obligated the landlord to make repairs (*id. at 283, 186 NE 785)*. Nevertheless, the Court of Appeals found the landlord's retention of the right to reenter to make repairs dispositive, holding that this right continued the landlord's original duty" "[t]he landlord ... had never parted so completely with possession and control that he had disabled himself from performing his duty of care ... He continued under the duty to keep his building in a safe condition" (*id, at 283-24, 186 NE 785; see Jennings v Van Schaick, 108 NY at 534-535, 15 NE 424; cf. Federal Ins. Co. v Evans Constr. of NY Corp., 257 AF2d 508, 509, 684 NYS2d 223).*

The second concept of control, which generally was applied in cases concerning dangerous conditions within the leased portion of premises, referred to the power to exclude people from the premises; an out-of-possession landlord had no duty of care with respect to the leased portion of premises (*see Putman v Stout, 38 NY2d 607, 613-618, 381 NYS2d 848, 345 NE2d 319 [overruling Cullings v Goetz, 256* NY 287, 176 NE 397]; *Appel v Muller, 262 NY at 281-282, 186 NE 785*). In Cullings, the Court of Appeals had held that even a landlord's covenant in a lease to repair premises did not

give rise to a duty in tort to people on the premises, reasoning that the landlord lacked the power to exclude them:

Liability in torts is an incident to occupation or control ... By preponderant opinion, occupation and control are not reserved through an agreement that the landlord will repair ... The tenant and no one else may keep visitors away till the danger is abated, or adapt the warning to the need. The landlord has at most a privilege to enter for the doing of the work, and at times not even that if the occupants protests. The power of control necessary to raise the duty ... implies something more than the right or liability to repair the premises. *It implies the power and the right to admit people to the premises and to exclude people from them" (Cullings v Goetz, 256 NY at 290, 176 NE 397 [citations and internal quotations omitted' emphasis added]).*

After *Putman v Stout, 38 NY2d at 617, 381 NYS2d 848, 345 NE2d 319* overruled *Cullings* and the Court of Appeals decided *Basso* four months later, this second concept of control was no longer utilized. Now, control refers to the ability of an out-of possession landlord to remedy dangerous conditions, and it pertains to conditions on any portion of the leased premises (*see Lesocovich v 180 Madision Aven. Corp., 81 NY2d 892, 599 NYS2d 526, 615 NE2d 1010; Abdellatif b Khoukas, 21 AD3d 1278, 1279, 801 NYS2d 870; Haner v DeVito, 152 AD2d 896, 897, 544 NYS2d 90),* most commonly in cases where the duty is imposed by status (*see Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51; Worth Distribs. v Latham, 59 NY2d 231, 238, 464 NYS2d 435, 451 NE2d 193; Pellegrino ov Walker Theatre, 127 AD2d 574, 511 NYS2d 372).* Indeed, our colleagues in the First Department utilize the phrase "right to reenter in order to inspect or repair" (*Ross v Betty G. Reader Revocable Trust, 86 AD3d 419, 420, 927 NYS2d 49)* or a similar phraseology (*see Babich v R.G.T. Rest. Corp., 75 AD3d 439, 440, 906 NYS2d 528; Johnson v Urena Serv. Ctr., 227 AD2d 325, 326, 642 NYS2d 897; cf. Helena v 300 Park Ave., 306 AD2d 170, 171-172, 763 NYS2d 542),* where we continue to use the term "control" (*see Salaices v Gar-Gen Assoc., 82 AD3d 740, 741, 918 NYS2d 510).*

Thus, at first blush, it would seem reasonable to find that an out-of-possession landlord that retains a broad right of entry to inspect and repair would be deemed to have retained sufficient control over the demised premises to subject it to liability under the common law. There is a lot to recommend such a holding. For example, at least when the dangerous condition arises from a structural condition (*see e.g. Worth Distribs. v Latham, 59 NY2d 231, 464 NYS2d 435, 451 NE2d 193)* or a design defect (*see e.g. Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51),* the landlord may have the greater incentive to ensure that the condition is remedied, in order to protect its investment. As well, in may instances, the landlord has greater resources than the tenant to deal with expensive repairs. Finally, at least as a lease nears the end of its term, the tenant, whose interest in paying for expensive repairs diminishes, may be less likely to address premises conditions, thereby endangering people on the leased portion of the premises (*cf. Putman v Stout, 38 NY2d at 617-618, 381 NYS2d 848, 345 NE2d 319).*

> But we are not writing on a blank slate. The Court of Appeals has restated several times in recent years the general common-law rule of limited liability for out-of-possession landlords with respect to leased premises; an out-of-possession landlord has a duty imposed by statute or assumed by contract or a course of conduct, and no merely through its "control" as that term is currently used (*see Rivera v Nelson Realty, LLC, 7 NY3d at 534, 825 NYS2d 422, 858 NE2d 1127; Chapman v Silber, 97 NY2d at 19-20, 734 NYS2d 541, 760 NE2d 329; Juarez v Wavecrest Mgt. Team, 88 NY2d at 642, 649 NYS2d 115, 672 NE2d 135).*"
>
> **Alnashmi v Certified Analytical Group Inc., supra**

In regards to the foregoing, paragraph 49 of the lease in issue sets forth:

> "49th. LANDLORD'S REPAIRS, MAINTENANCE AND CLEANING:
>
> During the term of this lease, the Landlord shall make all structural repairs to the demised premises and shall maintain all parking lot lighting, except those repairs or maintenance which shall have been occasioned by the acts of omissions or commission of the Tenant, its agents, employees or invitees. Tenant shall promptly give written notice to Landlord with respect to any damage to the interior or exterior of the demised premises. Structural repairs are hereby defined to be and limited to repairs to the roof deck, to the bearing walls and foundations."

The plaintiff in opposition to the defendants' requested relief offer an expert's affidavit of Nicholas Bellizzi, PE which sets forth that the sheet rock in issue that fell was improperly installed in that it was attached to wall/ceiling by paste rather than nails and/or staples.

Based upon all of the foregoing and in the absence of a submission by the defendants that sets forth that the defendants as owners of the premises did not install the sheet rock there is an issue of fact which precludes the defendants' requested relief. As such, the defendants' application for an Order pursuant to CPLR §3212 granting these defendants summary judgment and dismissing the complaint, is **denied**.

SO ORDERED.

DATED: 10/3/2011

..... J.S.C.

ENTERED
OCT 06 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE