

**Posada v 572 W. 173rd St. Realty Corp.**

2013 NY Slip Op 30704(U)

April 8, 2013

Sup Ct, New York County

Docket Number: 114283/08

Judge: Cynthia S. Kern

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SCANNED ON 4/9/2013

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

**PRESENT:** \_\_\_\_\_  
*Justice*

**PART** \_\_\_\_\_

- Index Number : 114283/2008  
POSADA, MARIO  
vs.  
572 WEST 173RD STREET REALTY  
SEQUENCE NUMBER : 004  
DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

**RECEIVED**  
APR - 9 2013  
MOTION SUPPORT OFFICE  
SUPREME COURT-CIVIL

**FILED**  
APR 09 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/8/13

\_\_\_\_\_  
pjk, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
MARIO POSADA,

Plaintiff,

Index No. 114283/08

-against-

**DECISION/ORDER**

572 W. 173<sup>RD</sup> STREET REALTY CORP., KIMBERLY  
NAILS, INC., GABRIEL PIZHA and MARIA C.  
PIZHA,

**FILED**

APR 09 2013

Defendants.  
-----X

HON. CYNTHIA S. KERN, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition to the Motion .....	<u>2, 3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

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Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained when he tripped and fell down a stairway leading from the sidewalk to the basement-level of a building on St. Nicholas Avenue in Manhattan on February 22, 2008. Defendant 572 W. 173<sup>rd</sup> Street Realty Corp. ("572") now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint and any cross-claims asserted against it. For the reasons set forth below, 572's motion is denied.

The relevant facts are as follows. Defendant 572 owns the building located at 1252 St. Nicholas Avenue, New York, New York, also known as 572 West 173<sup>rd</sup> Street, New York, New York (the "building"). Defendant Kimberly Nails, Inc. ("Kimberly Nails") is a nail salon that

leases a portion of the building from 572 known as Store #2, a street-level storefront which includes the basement-level storefront. Defendants Gabriel Pizha and Maria C. Pizha ("Mr. and Mrs. Pizha") own Kimberly Nails. Shortly before plaintiff's accident, Kimberly Nails and Mr. and Mrs. Pizha leased the basement-level storefront to an entity known as Jacqueline Hair Salon.

Plaintiff testified that on February 22, 2008, he was on his way to meet a real estate agent to see about renting a room. He had arranged to meet said agent at the agent's office which, plaintiff thought, was located in the basement of the building. At plaintiff's deposition, he could not recall the address of the real estate office but testified that the address was printed on a business card given to him by the real estate agent. The address printed on the card was not that of the building, but rather 1228 St. Nicholas Avenue, New York, New York (the "1228 premises"). When plaintiff was shown the business card at his deposition, he could not be sure that it was the card he was given by the real estate agent. However, plaintiff testified that on the date of his accident, he did not look at the address on the business card but that he walked in the direction of the office that rents rooms to which he was directed by his friend selling flowers on the street. He said that when he saw a sign for a "multi-service...apartments & rooms for rent," he erroneously thought this was the office of the agent with whom he was supposed to meet and attempted to enter the premises. However, Mr. Pizha testified that at no time on or before the date of the accident did a real estate office ever exist in the basement while the property was leased by Kimberly Nails.

In his bill of particulars, plaintiff alleges that he slipped and fell on the stairway leading from the sidewalk to the basement-level of the building. Plaintiff alleges that the stairway was slippery from precipitation, that its treads, risers, banisters and/or railings were defective and that

he fell due to the height differential of the stairs. Finally, plaintiff testified that after his accident, he sat in the real estate office and waited for medical help.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant case, 572 has failed to establish its prima facie right to summary judgment. As an initial matter, that part of 572's motion for summary judgment dismissing the complaint on the ground that it does not own, maintain or control the 1228 premises must be denied. Although 572 alleges that plaintiff's accident occurred on the stairs of the 1228 premises, there exists an issue of fact as to whether plaintiff's accident occurred there or on the stairway of the building owned by 572. Plaintiff testified that he fell on a stairway leading from the sidewalk to a basement-level storefront where a hair salon and real estate office were located. Mr. Pizha testified that no real estate office existed in the basement-level of the building on the date of plaintiff's accident and that the only business located in the basement-level of the building was Jacqueline Hair Salon. Moreover, the business card of the real estate agent with whom plaintiff was on his way to meet, had the 1228 premises address printed on it. However, plaintiff provided photographs of a sign in front of the building indicating the presence of a real estate

\* 5]

office in the basement of the building. Thus, as an issue of fact exists as to whether plaintiff's accident occurred on the stairway of the 1228 premises, 572's motion for summary judgment must be denied.

Additionally, that portion of 572's motion for summary judgment dismissing the complaint on the ground that it, as the owner of the building, does not have a duty to maintain or repair the staircase in the building must be denied as 572 has failed to establish that it is an out-of-possession landlord that has completely parted with possession and control of the building. As the building is located in Manhattan, the Administrative Code of the City of New York (the "Admin. Code") regulates the duties of the landlord and tenant. The Admin. Code charges the owner of a building with responsibility "at all times for the safe maintenance of the building and its facilities." Admin. Code § 27-128. The owner must maintain "[a]ll buildings and all parts thereof," including "[a]ll service equipment, means of egress, devices and safeguards that are required in the building by the provisions of this code or other applicable laws or regulations or that were required by law when the building was erected, altered or repaired" in good working order. Admin. Code § 27-127. While a lease between the owner and a tenant may provide that the tenant must maintain and repair certain areas of the building, if the lease gives the landlord a right at any time to enter and examine the premises and make any repairs it deems necessary, such right of reentry provides a sufficient basis to sustain liability on behalf of the landlord. *See Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559 (1987)(holding that the owner of a leased commercial building which has no obligation for repairing or maintaining the premises but retains the right to reenter and inspect and to make needed repairs at tenant's expense may be held responsible for injuries due to a defect in the premises.)

In the instant case, the lease that 572 maintains with Kimberly Nails provides that

Tenants shall be responsible for all non-structural and structural and repairs to the demised premises including roof, plumbing and sidewalk if damaged through tenant use. Tenant acknowledges Landlord shall have no duty to maintain and repair the demised premises, all repairs including interior and exterior portions of the building shall be at tenants sole cost and expense.

Although 572 is not obligated to make any repairs in the space leased by Kimberly Nails, the portion of the lease titled "Access to Premises" states:

Owner or Owner's agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under the lease, or for the purpose of complying with laws, regulations and other direction of governmental authorities...

As 572 maintained a right to reenter the premises to inspect or make any necessary repairs, it has not established its prima facie right to summary judgment on the ground that it had no duty to maintain or repair the leased premises, as it is not an out-of-possession owner under the law.

Although 572 asserts that it is entitled to summary judgment because the accident was caused by precipitation on the stairs and an out-of-possession landlord is not responsible for remediating non-structural hazards, such assertion is without merit. First, although plaintiff has alleged that his accident was partially caused by precipitation on the stairs, he has also alleged that the stairway was defective and that his accident was partially caused by such defect. Second, 572 has not established that it is an out-of-possession owner. Thus, 572's motion for summary judgment must be denied.

