

Eldin v Port Auth. of N.Y. & N.J.
2018 NY Slip Op 32584(U)
October 12, 2018
Supreme Court, Kings County
Docket Number: 501548/15
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

AMR GAMAL ELDIN,

Plaintiff,

-against-

**THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, AERO SNOW REMOVAL CORP., and
SNOWLIFT, LLC,**

Defendants.

DECISION / ORDER

Index No. 501548/15

Motion Seq. No. 8

Date Submitted: 9/13/18

Cal No. 14

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant The Port Authority of New York and New Jersey's motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed, Memo of Law.	<u>103-132</u>
Answering Affirmation and Exhibits Annexed.....	<u>158-164</u>
Reply Affirmation and Memo of Law.....	<u>168-169</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This is a personal injury action for negligence, which arises from a slip and fall accident. On the morning of the accident, February 19, 2014, at about 6:30 A.M. while in the course of his employment as a plane maintenance worker for Southwest Airlines, plaintiff slipped and fell on a patch of ice at LaGuardia Airport.

Plaintiff testified at his EBT that he slipped on a patch of ice as he was backing away from the plane he was working on, in a crouched position, keeping his eyes on the landing gear so he didn't hit his head on it. He also testified that it was very cold

that morning but it had not snowed since a few days earlier. The place where plaintiff slipped and fell was an overnight airplane parking space provided to Southwest pursuant to a "Space Permit – Aircraft Parking" agreement between plaintiff's employer and defendant Port Authority.

The Port Authority of New York and New Jersey ("Port Authority"), the sole remaining defendant, moves for summary judgment dismissing the complaint. It contends that it is entitled to summary judgment as an out-of-possession landlord with no duty to remove snow and ice—that its limited right of re-entry to inspect and make repairs does not give rise to any liability for transitory snow and ice conditions. Plaintiff counters that the Port Authority fails to make a *prima facie* showing of its entitlement to summary judgment, as the Port Authority is not a true out-of-possession landlord, because the written agreement with Southwest does not transfer possession and control of the area to Southwest, but instead grants permission to the airline to use an "undesignated airplane parking position" in the hours between 11:00 P.M. and 7:00 A.M.

Defendant supports its motion with copies of the pleadings, plaintiff's EBT transcript, a copy of an accident report (Exhibit U) which is not in admissible form, blurry photos, a copy of the defendant's "Space Permit" in effect on the date of the accident, the EBT transcript of defendant's witness, Debbie Kadir, senior property representative for defendant (who did not work for defendant on the date of plaintiff's accident), the EBT transcript of defendant's second witness, Reginald Leonard, a property representative who did work for defendant on the date of the plaintiff's accident, and an affidavit from plaintiff's employer which authenticates the "Space Permit."

The court finds the Port Authority has not made a *prima facie* showing that it was

an out-of-possession landlord with no duty to clear snow and ice at the location of plaintiff's accident. Pursuant to the terms of the "Space Permit," Southwest's "possession" was anything but exclusive. It was limited to the period from 11:00 P.M. to 7:00 A.M., at an undesignated aircraft parking spot to be assigned to Southwest as needed, upon request. Further, the Port Authority's witnesses were unable to answer most of the questions asked of them when counsel tried to clarify this issue. For example, they did not know how the area was used outside of the time it was assigned as an overnight aircraft parking spot, or whether Southwest was routinely assigned to that particular spot.

Defendant's first EBT witness, Ms. Kadir, knew almost nothing about the overnight airplane parking at LaGuardia. Their second witness, Mr. Leonard, testified that there were several locations at LaGuardia Airport with overnight airplane parking spaces. He testified that the Port Authority had a snow removal contractor who removed snow in the "common areas," which he said meant runways, taxiways and the non-exclusive areas [Page 12], but not areas leased to an airline for their exclusive use. He agreed that the Space Permit was for an undesignated parking space in one of the overnight parking areas. He did not know how many such spaces there were, or how many Space Permits were issued. He did not know if the parking spaces were "designated" for a plane five minutes before one was needed or five hours before. He opined that the overnight parking space became "exclusive" to the airline at 11:00 P.M. once it was assigned. This is not the legal definition of "exclusive" which must be used in determining whether a property owner is an out-of-possession landlord.

The Space Permit, combined with the EBT testimony of defendant's witnesses,

does not support movant's claim that it is an out-of-possession landlord that relinquished control of the area -- and that Southwest had exclusive possession and control of the subject area -- so as to eliminate any duty the Port Authority had to maintain it (see *Fernandez v Town of Babylon*, 72 AD3d 636, 639 [2d Dept 2010] ["the terms of the Agreement, which the Town submitted in support of its motion, did not establish that the Town was a mere out-of-possession landlord which had relinquished control over the premises"]). Indeed, this is not a typical landlord/tenant situation where exclusive possession and control is given to a tenant (see e.g. *Seawright v Port Auth. of New York & New Jersey*, 90 AD3d 1017, 1017-18 [2d Dept 2011] ["lease provided that US Airways had exclusive possession and control of the premises and was responsible for maintenance and repairs" . . . "the defendant established, prima facie, that it was an out-of-possession landlord which had no duty to remove snow and ice from the subject premises"]; *Carvano v Morgan*, 270 AD2d 222, 223 [2d Dept 2000] [out-of- possession landlord was not liable for injuries sustained by employee of tenant in fall on accumulation of ice in parking lot of premises; no showing was made that landlord was contractually obligated to remove snow or ice, and landlord's right to enter building to repair or inspect did not create situation where landlord retained control over parking lot]; *D'Orlando v Port Authority of New York & New Jersey*, 250 AD2d 805 [2d Dept 1998] ["the lease between the (Port Authority) and Trans World Airlines, Inc. (hereinafter TWA), expressly relieves the appellant of any obligation to maintain and repair the area in question, where the plaintiff slipped on ice and snow, and which TWA admits was under its exclusive control"]).

The plaintiff's employer here, Southwest Airlines, did not have a lease, but had a

non-exclusive license for an un-designated overnight airplane parking spot. Therefore, the defendant clearly retained control over the premises, and as such, does not qualify as an "out-of-possession" landlord, regardless of their attempt to relieve themselves from any responsibility for snow removal in their Space Permit document.

While the Space Permit specifically states that the Port Authority is not required to clear snow or ice in the overnight parking space,¹ plaintiff is not a party to this contract, and as the "landlord," (technically the over tenant, as the Port Authority leases the land from the City of New York) the Port Authority has a duty to people working in the non-exclusive common areas of the airport to provide them with a safe place to work. The clause in the Space Permit which provides that the Port Authority has no responsibility for removing snow and ice cannot bar plaintiff's action. Whether the Port Authority could prevail on a claim for contractual indemnification against its snow removal contractor or against Southwest must be left for another day, as the information provided by the Port Authority's witnesses in this record is completely unavailing on this issue.

Accordingly, it is

ORDERED that the motion is denied.

Dated: October 12, 2018

ENTER :



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**

¹ Paragraph 7 of the Special Endorsement (Rider) states: "The Port Authority shall not be obligated to keep the Space or the means of ingress thereto and egress therefrom free from snow or ice or otherwise unobstructed for use by the Permittee, or to police the use of the Space or to provide any other service whatsoever in connection therewith."