

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

WILLIAM COTTER,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
v.	:	
TANDY CORPORATION d/b/a RADIO	:	
SHACK AND K-MART CORPORATION,	:	
v.	:	
MILLCREEK REALTY ASSOCIATES, LTD,	:	
v.	:	
SHAWN R. THOMPSON AND S.R.	:	
THOMPSON ENTERPRISES, INC.,	:	
Appellees	:	No. 1524 WDA 2013

Appeal from the Order entered on September 13, 2013
in the Court of Common Pleas of Erie County,
Civil Division, No. 10299-2011

WILLIAM COTTER,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
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TANDY CORPORATION d/b/a RADIO	:	
SHACK AND K-MART CORPORATION,	:	
v.	:	
MILLCREEK REALTY ASSOCIATES, LTD,	:	
v.	:	
SHAWN R. THOMPSON AND S.R.	:	

THOMPSON ENTERPRISES, INC.,	:	
	:	
APPEAL OF: RADIO SHACK	:	
CORPORATION	:	
	:	
Appellee	:	No. 1568 WDA 2013

Appeal from the Order entered on September 13, 2013
in the Court of Common Pleas of Erie County,
Civil Division, No. 10299-2011

BEFORE: DONOHUE, OTT and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: FILED JUNE 20, 2014

William Cotter ("Cotter") appeals from the Order entering summary judgment against him and in favor of Tandy Corporation, d/b/a Radio Shack Corporation ("Radio Shack") and K-Mart Corporation ("K-Mart") (collectively, "the Defendants"), additional defendant Millcreek Realty Associates, Ltd. ("Millcreek"), and additional defendants Shawn R. Thompson and S.R. Thompson Enterprises, Inc. (collectively, "Thompson"). Radio Shack has filed a cross-appeal, challenging the trial court's entry of summary judgment against Radio Shack on its breach of contract, contribution and indemnification actions against Millcreek. We affirm.

In its Opinion, the trial court summarized the relevant history underlying the instant appeal as follows:

[Cotter] alleges that on February 3, 2009, he sustained injuries arising from a fall on a sidewalk adjacent to the Radio Shack store in the K-Mart West Plaza shopping center in Erie County, Pennsylvania. ... On April 4, 2011, [Cotter] filed his [C]omplaint alleging [that] he slipped and fell on the sidewalk of the shopping center as he was exiting Radio[] Shack. On May 2, 2011, [Cotter] filed an [A]mended [C]omplaint, claiming that he

slipped and fell on an isolated patch of black ice located on the sidewalk adjacent to Radio Shack before entering the Store. [Cotter] assert[ed] that both Radio Shack and K-Mart were responsible for the care and maintenance of the sidewalk. In their respective answers and new matter, Radio Shack and K-Mart denied responsibility for the sidewalk's care and maintenance.

Radio[Shack] claimed that Millcreek [] was responsible for, cared for, supervised and maintained the sidewalk. On June 27, 2011, it filed a [Joinder C]omplaint joining Millcreek and asserted claims for breach of contract and contribution and indemnity. Radio Shack assert[ed] that it leased its store premises from Millcreek, and that Millcreek was responsible for the maintenance of the common areas of the shopping center.

On September 8, 2011, Millcreek filed an [A]nswer, [N]ew [M]atter and [C]ross-[C]laim to Radio Shack's [J]oinder [C]omplaint. Millcreek admitted it was the landlord of the shopping center at the time of [Cotter's] fall and was responsible for the maintenance of common areas. However, it further asserted that pursuant to contract, [Thompson] was responsible.

...

On September 15, 2011, Millcreek filed a [C]omplaint to join Thompson, alleging Thompson's liability under an October 24, 2006 contract for snow plowing and removal at the K-Mart Plaza West.

On January 9, 2012, [Cotter] filed a [S]econd [A]mended [C]omplaint. Generally, it contained the same factual averments and causes of action as the [A]mended [C]omplaint except for references to particular injuries. Radio Shack and K-Mart filed their respective [A]nswers and [N]ew [M]atter, denying that they were responsible for the care and maintenance of the sidewalk.

On March 22, 2013 and April 10, 2013, Radio[Shack] and K-Mart respectively filed summary judgment motions/supporting briefs. [Cotter] filed responsive briefs to each [M]otion.

Trial Court Opinion, 5/20/13, at 1-3 (emphasis in original, citations omitted). Millcreek and Thompson also filed summary judgment motions. The trial court entered summary judgment in favor of the Defendants as to Cotter's negligence claims. The trial court additionally granted summary judgment in favor of Millcreek and against Cotter as to Cotter's negligence claim against Millcreek.¹ The trial court further entered summary judgment against Radio Shack on its breach of contract, indemnity and contribution cross-claims against Millcreek. Finally, the trial court entered summary judgment in favor of Thompson on all claims.

Cotter timely appealed the trial court's Orders entering summary judgment against him and in favor of K-Mart, Radio Shack and Millcreek.² Thereafter, Cotter timely filed a Pa.R.A.P. 1925(b) Concise Statement of Matters Complained of on Appeal.

In this appeal, Cotter presents the following claim for our review:

Whether the trial court erred in concluding as a matter of law that [Cotter] failed to adduce sufficient evidence, direct and/or circumstantial, that either Radio Shack or K-Mart were liable to him, that there was no evidence that Radio Shack or K-Mart were under a duty to maintain the sidewalk where [Cotter] fell[,] and that there was no duty on the part of Radio Shack or K-Mart to clear the sidewalk where [Cotter] fell on ice or snow or warn him of any danger[ous] conditions?

¹ In granting summary judgment, the trial court concluded that Cotter's negligence claim against Millcreek was derivative of Cotter's negligence claim against Radio Shack.

² No party appealed the entry of summary judgment in favor of Thompson.

Brief for Appellant at 4. In its cross-appeal, Radio Shack presents the following claims for our review:

[A.] Whether the [t]rial [c]ourt erred in concluding as a matter of law that [Radio Shack's] claims against Millcreek ... for breach of contract and contribution and indemnification[,] arising out of a lease agreement, are conditional upon an actual finding of negligence by [the Defendants] in the underlying action [where] Radio[]Shack's claims are not derivative claims?

[B.] Whether the [t]rial [c]ourt erred in concluding as a matter of law that the lease agreement entered into between Radio[]Shack and Millcreek does not require Millcreek to contribute, indemnify, or pay attorneys' fees to Radio[]Shack under any circumstances?

Brief of Radio Shack at 4. We will first address the issue raised in Cotter's appeal.

Cotter claims that the trial court erred in granting summary judgment against him and in favor of the Defendants. Brief for Appellant at 9. Cotter asserts that he presented circumstantial evidence of the liability of Radio Shack and/or K-Mart to him as a business/public invitee. *Id.* at 11. In support, Cotter directs this Court to his deposition testimony, which explained the incident as follows:

I walked toward Radio Shack; I got on the sidewalk. I was coming to their door. I slipped, caught myself with my right arm so I wouldn't crack my head open, and I got up, went in the store and told the manager that I had fallen and that he should do something about the black ice.

Id. at 14 (citation omitted). Cotter additionally points out his testimony that he saw black ice on the sidewalk after his fall, although it was invisible to him preceding the accident. *Id.* According to Cotter, he presented evidence

that both Radio Shack and K-Mart (1) possessed the land on which he fell; (2) knew or should have known, with the exercise of reasonable care, of the ice on the sidewalk; and (3) failed to exercise reasonable care to protect Cotter from the danger created by the isolated patch of black ice. **Id.** at 16.

In its Opinion, after setting forth the appropriate scope and standard of review and relevant law, the trial court addressed Cotter's claim and concluded that it lacks merit. Trial Court Opinion, 5/20/13, at 3-7. We agree with the sound reasoning of the trial court and affirm its entry of summary judgment in favor of the Defendants on this basis. **See id.**

In its cross-appeal, Radio Shack claims that the trial court improperly entered summary judgment against it and in favor of additional defendant Millcreek as to Radio Shack's cross-claims. Brief of Radio Shack at 18. Radio Shack argues that the trial court improperly concluded that Radio Shack's cross-claims against Millcreek were "derivative," and conditioned upon a finding of negligence by the Defendants. **Id.** at 19. According to Radio Shack, its breach of contract and contribution and indemnification claims are not derivative, "as they are not conditional on [Cotter] prevailing on his underlying claim." **Id.** Upon our review of the record, we disagree.

Radio Shack's Joinder Complaint asserted causes of action for breach of contract and contribution and indemnity. By its terms, Radio Shack's breach of contract action was conditioned upon Cotter's claim of negligence against Radio Shack:

15. [Cotter] claims to have slipped and fallen on ice that was allowed to accumulate on the sidewalk of the shopping center located at 2895 West 26th Street, Erie, Pennsylvania[,] on February 3, 2009.

16. [] Radio Shack[] denies such allegations constitute negligence on the part of anyone other than [Cotter;] **however, if such allegations are proven true and negligence is found**, such negligence was a result of the breach of the terms of the lease agreement between Radio[]Shack [] and [] Millcreek

Joinder Complaint of Radio Shack at ¶¶ 15-16 (emphasis added). By its express terms, Radio Shack's breach of contract action against Millcreek was conditioned upon a finding of negligence against Radio Shack. Because the trial court entered summary judgment in favor of Radio Shack as to Cotter's negligence claim, Radio Shack's cause of action for breach of contract fails as a matter of law.

In Count II of its Joinder Complaint, Radio Shack averred a cause of action against Millcreek for contribution and indemnity. Count II provided, in relevant part, as follows:

18. [Radio Shack] avers that **if the allegations contained in [Cotter's] Complaint are proven to be true**, said allegations having been specifically denied, then [Millcreek] is solely and/or jointly and severally liable and/or liable over to [Radio Shack] for the claims of [Cotter], since such injuries and/or losses were the result of actions or omissions of [Millcreek] and not the result of any acts or omissions of [Radio Shack].

19. [Radio Shack] hereby asserts a right of indemnification or contribution against [Millcreek], pursuant to the terms of [T]he Uniform Contribution Among Tortfeasors Act, 42 Pa.C.S.A. § 8321 ["the Act"], pursuant to the terms and conditions of the lease agreement and its amendments, and common law, **for the amount of any judgment entered in favor of [Cotter]**.

Joinder Complaint of Radio Shack at ¶¶ 18-19 (emphasis added). Radio Shack claims that it established a common law and statutory cause of action for indemnification and contribution against Millcreek. Therefore, Radio Shack claims, the trial court erred in entering summary judgment against it as to its cross-claim against Millcreek.

Under common law, indemnity is a remedy “which shifts the entire loss from one who has been compelled, by reason of some legal obligation, to pay a judgment occasioned by the initial negligence of another who should bear it.” ***Willet v. Pa. Med. Catastrophe Loss Fund***, 702 A.2d 850, 854 (Pa. 1997) (citation omitted). “It is not a fault sharing mechanism . . . it is a fault shifting mechanism [where a defendant] seeks to recover his loss from a defendant who was actually responsible for the accident which occasioned the loss.” ***Id.*** (citation omitted).

Radio Shack claimed indemnification and contribution from Millcreek in Count II of its Joinder Complaint. However, Radio Shack cannot establish common law liability for indemnity and contribution because (a) it was not required to pay a judgment to Cotter, and (b) no party was found liable to Cotter for negligence. ***See id.*** As a matter of law, Radio Shack has not established a common law cause of action for indemnity and contribution.

Radio Shack also claims that it averred a statutory cause of action for indemnification and contribution. The Act recognizes that “[t]he right of contribution exists among joint tort-feasors.” 42 Pa.C.S.A. § 8324(a).

Under the Act, “[a] joint tort-feasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.” *Id.* § 8324(b). In the instant case, the trial court entered summary judgment in favor of Radio Shack and Millcreek as to Cotter’s negligence claim. Because Radio Shack and Millcreek are not joint tort-feasors, Section 8324 is inapplicable.

Our review discloses that Radio Shack’s Joinder Complaint averred Millcreek’s joint and several liability for contribution and indemnity “if the allegations contained in [Cotter’s] Complaint are proven to be true.” Joinder Complaint of Radio Shack at ¶ 18. Radio Shack’s Joinder Complaint claimed contribution and indemnity “**for the amount of any judgment entered in favor of [Cotter].**” *Id.* at ¶ 19 (emphasis added). By its express terms, Radio Shack’s Joinder Complaint conditioned Millcreek’s liability upon Cotter’s negligence claim against Radio Shack and, therefore, was derivative of Cotter’s negligence cause of action.

Based upon the express terms of the Joinder Complaint, we agree with the trial court’s determination that, as a matter of law, Radio Shack’s claim for indemnity and contribution against Millcreek was derivative of Cotter’s negligence claim against Radio Shack. Because Cotter’s negligence claim was dismissed, Radio Shack’s indemnification and contribution claim fails as a matter of law.

Finally, we note that in response to Cotter's Second Amended Complaint, Radio Shack filed a New Matter Cross-Claim against Millcreek averring, in relevant part, as follows:

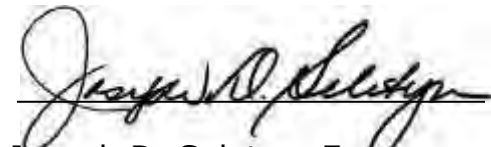
In the event the allegations of [Cotter's] Complaint are proven at trial, such allegations being denied, **and should it be found that [Radio Shack] is liable to [Cotter]**, such liability being specifically denied, any injuries or losses sustained by [Cotter] was caused in whole or in part by the misconduct or negligence on the part of ... [K-Mart], Millcreek [and Thompson], which are solely liable to [Cotter], jointly and severally liable to [Cotter], and/or liable to [Radio Shack] for indemnity and contribution.

New Matter and Cross-Claim of Radio Shack, 3/19/12, at ¶ 2 (emphasis added). By its express terms, Radio Shack's cross-claim was conditioned upon and derivative of Cotter's negligence cause of action. Because Cotter's negligence claim was dismissed, Radio Shack's cross-claim fails as a matter of law.

For the foregoing reasons, we affirm the Orders of the trial court.

Orders affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/20/2014

WILLIAM COTTER,
Plaintiff

: IN THE COURT OF COMMON PLEAS
: OF ERIE COUNTY, PENNSYLVANIA
: CIVIL DIVISION

v.

TANDY CORPORATION, d/b/a
RADIO SHACK and K-MART CORP.
Defendants

v.

MILLCREEK REALTY ASSOCIATES, LTD.
Additional Defendant

v.

SHAWN R. THOMPSON and S.R.
THOMPSON ENTERPRISES, INC.
Additional Defendant

: No. 10299-2011

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OPINION AND ORDER

This matter comes before the Court on motions for summary judgment filed individually by Defendants Radio Shack Corporation ("Radio Shack") and K-Mart Corporation ("K-Mart").

I. BACKGROUND OF THE CASE

Plaintiff, William Cotter, alleges that on February 3, 2009, he sustained injuries arising from a fall on a sidewalk adjacent to the Radio Shack store in the K-Mart West Plaza shopping center in Erie County, Pennsylvania. On January 26, 2011, Plaintiff commenced this action by writ of summons. On April 4, 2011, he filed his complaint alleging he slipped and fell on the sidewalk of the shopping center as he was exiting RadioShack. On May 2, 2011, Plaintiff filed an amended complaint, claiming that he slipped and fell on an isolated patch of black ice located on the sidewalk adjacent to Radio Shack before entering the store. Amended Complaint, at ¶ 12. Plaintiff asserts

that both Radio Shack and K-Mart were responsible for the care and maintenance of the sidewalk. ¶¶ 13-15, 21-23. In their respective answers and new matter, Radio Shack and K-Mart denied responsibility for the sidewalk's care and maintenance.

RadioShack claimed that Millcreek Realty Associates, Ltd. ("Millcreek") was responsible for, cared for, supervised and maintained the sidewalk. RadioShack answer and new matter, 05/31/11, at ¶¶ 6,9. On June 27, 2011, it filed a complaint joining Millcreek and asserted claims for breach of contract and contribution and indemnity. Radio Shack asserts that it leased its store premises from Millcreek, and that Millcreek was responsible for the maintenance of the common areas of the shopping center. Radio Shack joinder complaint, 06/27/11, at ¶¶ 8-11.

On September 8, 2011, Millcreek filed an answer, new matter and cross-claim to Radio Shack's joinder complaint. Millcreek admitted it was the landlord of the shopping center at the time of Plaintiff's fall and was responsible for maintenance of the common areas. However, it further asserted that pursuant to contract, Additional Defendant Shawn R. Thompson and S.R. Thompson Enterprises, Inc. ("Thompson") was responsible. As Millcreek stated:

14. Paragraph 14 of Radio Shack Corporation's Joinder Complaint states a legal conclusion to which no response is required. To the extent that a response is deemed necessary, the language of the subject Lease Agreement and any relevant Extensions is contained in documents that will speak for themselves. By way of further response, **it is admitted that Additional Defendant, Millcreek Realty Associates, Ltd., was the landlord for the shopping center located at 2895 West 26th Street, Erie, Pennsylvania, at the time of Plaintiff's alleged incident on February 3, 2009. Under the Lease, Additional Defendant, Millcreek Realty Associates, Ltd., had the responsibility to maintain the common areas.** However, Additional Defendant, Millcreek Realty Associates, Ltd., contracted with Additional Defendants, Shawn R. Thompson and S.R. Thompson Enterprises, Inc., which had the legal

responsibility to keep the sidewalks in the subject area, clean and free of ice and snow per the attached Exhibit "A".

Millcreek answer, new matter, and cross-claim to Radio Shack's joinder complaint, 09/08/11, at ¶ 14 (emphasis added).

On September 15, 2011, Millcreek filed a complaint to join Thompson, alleging Thompson's liability under an October 24, 2006 contract for snow plowing and removal at the K-Mart Plaza West. Millcreek joinder complaint, 09/15/11, at ¶¶ 9-14, 18.

On January 9, 2012, Plaintiff filed a second amended complaint. Generally, it contained the same factual averments and causes of action as the amended complaint except for references to particular injuries. Radio Shack and K-Mart filed their respective answers and new matter, denying that they were responsible for the care and maintenance of the sidewalk.

On March 22, 2013 and April 10, 2013, RadioShack and K-Mart respectively filed summary judgment motions/supporting briefs. Plaintiff filed responsive briefs to each motion.

II. LEGAL DISCUSSION

A. Summary Judgment Standard

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure provides that after the relevant pleadings are closed, a party may move for summary judgment in the following circumstances:

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion including the production of expert reports, an adverse party who will bear the burden of

proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2.

Summary judgment may be granted where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law. A moving party has the burden of proving that no genuine issue of material fact exists. *Gutteridge v. A.P. Green Services, Inc.*, 804 A.2d 643, 651 (Pa. Super. 2002) (citation omitted). In determining whether a moving party is entitled to relief, this Court “must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party.” *Id.* (citation omitted). Therefore, summary judgment is appropriate when “the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law.” *Id.* (citation omitted). “[A] court may grant summary judgment only where the right to such a judgment is clear and free from doubt.” *Toy v. Metropolitan Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186, 195 (2007)(citation omitted).

Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law.

Shepard v. Temple University, 948 A.2d 852, 856 (Pa. Super. 2008), quoting *Murphy v. Duquesne University*, 565 Pa. 571, 777 A.2d 418, 429 (2001) (citations omitted).

B. Whether a genuine issue of material fact exists as to whether Radio Shack and/or K-Mart owed a duty of care to Plaintiff?

To recover under a negligence claim, the plaintiff must prove the following elements: (1) the defendant had a duty to conform to a certain standard of conduct; (2) the defendant breached that duty; (3) such breach caused the injury in question; and (4) the plaintiff incurred actual loss or damage. *Krentz v. Conrail*, 589 Pa. 576, 588, 910 A.2d 20 (2006) (citation omitted)(emphasis added).

Whether a duty exists under a particular set of facts is a question of law. It has long been hornbook law that a duty arises only when one engages in conduct which foreseeably creates an unreasonable risk of harm to others. [*Petrongola v. Comcast-Spectacor, L.P.*, 789 A.2d 204, 209-10 (Pa. Super. 2001)].

The determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the [over all] public interest in the proposed solution.

Gutteridge v. A.P. Green Services, Inc., 804 A.2d 643, 655 (Pa. Super. 2002)(quoting *Althaus ex rel Althaus v. Cohen*, 562 Pa. 547, 552, 756 A.2d 1166, 1168 (2000)).

Montagazzi v. Crisci, 994 A.2d 626, 631 (Pa. Super. 2010).

Here, Plaintiff claims he was a business invitee. The Restatement (Second) of Torts § 343 defines the duty that a possessor of property owes to a business invitee as follows:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343.

Normally, a landlord out of possession is not liable for injuries sustained by third parties on leased premises because the landlord has no duty to those persons. *Jones v. Levin*, 940 A.2d 451, 454 (Pa. Super. 2007) (citations omitted). “[L]iability is premised primarily on possession and control, and not merely [on] ownership”. *Id.*, quoting *Deeter v. Dull Corporation, Inc.*, 617 A.2d 336, 339 (Pa. Super. 1992). However, there are several exceptions to this general rule. See, *Dorsey v. Continental Associates*, 591 A.2d 716, 718-719 (Pa. Super. 1991). Particularly,

[i]n Pennsylvania, it has long been established as a principle of landlord-tenant law that where the owner of real estate leases various parts thereof to several tenants, but retains possession and control of the common passage-ways and aisles which are to be used by business invitees of the various tenants, the obligation of keeping the common aisles safe for the business invitees is imposed upon the landlord and not upon the tenants, in the absence of a contrary provision in the lease or leases.

Leary v. Lawrence Sales Corp., 275 A.2d 32, 34 (Pa. 1971)(internal citations omitted).

Viewing the record in the light most favorable to Plaintiff as the non-moving party, this Court concludes as a matter of law that he has failed to adduce sufficient direct and/or circumstantial evidence that either Radio Shack or K-Mark are liable. All Plaintiff has shown is that he fell in an area near Radio Shack. In and of itself, this is not enough to establish a genuine issue of material fact as to liability on the part of the Defendants. There is no evidence that Radio Shack or K-Mart were under any duty to maintain the sidewalk where he allegedly fell, nor was there any duty on their part to clear the sidewalk of snow or ice or warn Plaintiff of any dangerous condition. In fact, Millcreek Realty and/or Thompson had the duty to maintain that area. See, Millcreek answer, new matter, and cross-claim to Radio Shack’s joinder complaint, 09/08/11, at

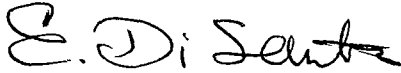
¶ 14; Radio Shack's supporting brief, Exhibits "E" and "H"; K- Mart supporting brief, Exhibit "B". Despite Plaintiff's argument to the contrary, it is his obligation at summary judgment stage to proffer evidence that would establish a genuine issue of material fact as to a duty owed to him by Radio Shack and/or K-Mart. As the record uncontrovertibly indicates the opposite, both Radio Shack and K-Mart are entitled to summary judgment.

III. CONCLUSION

Based upon the above, this Court will issue an Order in accordance with this opinion.

DATED: May 20, 2013

BY THE COURT:


Ernest J. DiSantis, Jr., Judge

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