FOCUS: PREMISES LIABILITY

Premises Liability and the Out-Of-Possession Landowner

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"Under the common law, a property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition."[1] As a general proposition, a landowner will be held liable for injuries which occur on its property where it fails to maintain its "property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."[2] However, a landowner's duty to maintain the premises in a reasonably safe condition depends on the extent of his or her control.[3]

Degree of Control

In personal injury actions concerning injuries that occur on real property, an out-of-possession landowner, typically a landlord, is generally not responsible for such injuries.[4] Instead, "'[a]n out-of-possession landlord can be held liable for injuries that occur on its premises *only* if the landlord has retained control over the premises *and* if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct.'"[5]

Naturally, the provisions of the lease to the premises are important to determining liability of the landlord. A landlord who has no obligation under the lease to perform repairs to the premises but "reserved a right in the lease to enter the premises to make repairs," a common lease provision, can "only be found liable for failing to do so if the nature of the defect that caused the injuries was a significant structural or design defect that was contrary to a specific statutory provision."[6]

Thus, an out-of-possession owner who retained a right of re-entry to maintain and repair the premises, but was not involved in the repairs being made by its tenant to the premises, was not be liable for claims brought under Labor Law §200, which imposes a duty only on employers at a construction site,[7] nor was the owner liable under a theory of common-law negligence.[8] In other words, a theory of constructive notice is not available against an out-of-possession landlord where the alleged dangerous conditions do not constitute significant structural or design defects that violated specific safety statutes.[9] Conversely, an out-of-possession landowner, with limited statutory exceptions, will be held liable under a claim under Labor Law §240, commonly known as the "Scaffold Law"[10] because that statute specifically imposes the statutory obligation with respect to elevated worksites on the "owner" as well as the "contractor."[11]

However, as noted above, because the liability of a property owner or landlord revolves around the level of control exercised over the property, considerations other than the provisions of the lease and/or the nature of the condition of the property are relevant to determining liability as is evident from the cases discussed below.

Cases

A recent Appellate Division, Second Department case, *Taliana v. Hines REIT Three Huntington Quadrangle, LLC*,[12] demonstrates what a landlord must prove to meet its prima facie burden for summary judgment. In that case, the Appellate Division reversed the grant of summary judgment to the landlord in a slip and fall case commenced by an employee of the tenant based upon the landlord's out-of-possession status. The court found issues of fact with respect to whether the landlord had relinquished control over the property to its tenant because the landlord had, among other things, contracted for and approved the HVAC system, which was the alleged cause of the accident. The landlord also employed an on-premises agent who visited the tenant's space daily as well as a cleaning service. The Court found that under these circumstances the landlord failed to demonstrate that it did not have constructive notice of the defective condition.[13]

In contrast to the decision in *Taliana*, the Second Department reversed the denial of summary judgment to the defendant property owner in *Richardson v. Yasuda Bank and Trust Company.*[14] In that case the defendant, a bank, had taken title to the property through a foreclosure sale a few months before the gas

explosion. The bank demonstrated that although it had commenced eviction proceedings, it had no contractual obligations with respect to the property, had no access to the property and the former owner of the property remained in possession and control of the property at the time of the accident. Thus, the bank was entitled to summary judgment based on its status as an out-of-possession property owner.[15]

"Premises liability, as with liability for negligence generally, begins with duty" and the duty of the property owner depends on the extent of its control.[16] In sum, a property owner which does not control the property, with certain exceptions for obligations imposed by statute, will not be liable for injuries that occur on the property.

1. *Mermelstein v. Campbell Fitness NC, LLC*, 201 A.D.3d 923, 923 (2d Dep't 2022).
2. *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976) (internal citations and quotations omitted); *Galindo v. Town of Clarkstown*, 2 N.Y.3d 633, 636 (2004).
3. *Alnashmi v. Certified Analytical Grp., Inc.*, 89 A.D.3d 10, 16 (2d Dep't 2011).
4. Property owners who are not typical landlords, such as a bank which has taken ownership of the property through a foreclosure sale are also entitled to the protection based on its out of possession status. See *Richardson v. Yasuda Bank and Trust Company*, 5 A.D.3d 458 (2d Dep't 2004).
5. *Mendoza v. Manila Bar & Rest. Corp.*, 140 A.D.3d 934, 935 (2d Dep't 2016) (emphasis added), quoting *Duggan v. Cronos Enters., Inc.*, 133 A.D.3d 564, 564 (2d Dep't 2015); see *also Chery v. Exotic Realty, Inc.*, 34 A.D.3d 412, 413 (2d Dep't 2006)("[A]n out-of-possession owner … is not liable for injuries that occur on the premises unless the owner … has retained control over the premises or is contractually obligated to repair or maintain the premises.")(internal citations and quotations omitted); see *also Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325, 326 (1st Dep't 1996)("A landlord is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision.").
6. *Devlin v. Blaggards III Rest. Corp.*, 80 A.D.3d 497, 497 (1st Dep't 2011); *c.f. Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559, 569 (1987) ("Village East is held responsible for failure to perform a duty owed directly by it to plaintiff -- a duty to remedy the defect, something it was permitted to do under the lease and obliged to do under the Administrative Code. Indeed, it is only because of the existence of this direct duty that Village East, as owner out of possession, is responsible.").
7. NYS Labor Law §200 imposes a duty specifically in favor of employees which requires, among other things, that all construction worksites be, "constructed, equipped, arranged, operated, and conducted as to provide reasonable and adequate protection to the lives, health, and safety of all persons employed therein or lawfully frequenting such places."
8. *Dirschneider v. Rolex Realty Co. LLC*, 157 A.D.3d 538, 539 (1st Dep't 2018).
9. *Id.*
10. *Misseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487 (1995).
11. Labor Law §240; *Moreno v. VS 125, LLC*, 2022 N.Y. Slip. Op. 31950(U), at *49 (Sup. Ct., Kings Cty. 2022).
12. 197 A.D.3d 1349, 1351 (2d Dep't 2021).
13. *Id.* ("The evidence submitted by the Hines defendants showed that their general manager maintained an office in the premises and was present in Travelers' office space at least once a day. In addition, the general manager testified at his deposition that the Hines defendants contracted for the installation of the HVAC system at issue, oversaw its installation, and approved the construction work. The general manager also testified that it was his practice, upon learning of a problem with the air conditioning system in the building, to address the problem by contacting the chief engineer.").
14. *Richardson v. Yasuda Bank and Trust Company*, 5 A.D.3d 458 (2d Dep't 2004).
15. *Id.* at 459.
16. *Alnashmi*, 89 A.D.3d at 13, 14-18.

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