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IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

MICHAEL VASILIK, Plaintiff	:	
	:	
v.	:	Case No. 2015-C-904
	:	
VOIPOCH, LLC, Defendant	:	

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APPEARANCES:

Stephen W. Zakos, Esquire
For Plaintiff

Graeme E. Hogan, Esquire
For Defendant

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O P I N I O N

CAROL K. McGINLEY, J.

On January 1, 2012, Voipoch, LLC, (Voipoch or Defendant) and Infradapt, Inc., (Infradapt) entered into a five-year lease agreement wherein Infradapt would exclusively occupy the property located at 1126 Trexlertown Road, Breinigsville, Lehigh County, Pennsylvania (the property) as a tenant in exchange for the payment of rent to Voipoch at a rate of $5,000 per month. On March 23, 2015, Plaintiff, Michael Vasilik (Plaintiff) filed a Complaint against

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Voipoch and Upper Macungie Township[1] seeking damages as a result of an alleged slip and fall that occurred on June 4, 2013, in a stairwell without a handrail between the second and third floors of the property. The Complaint sounds in premises liability and alleges that Plaintiff suffered injuries as a result of the carelessness and negligence of Voipoch. The Complaint further alleges that Plaintiff was at the property in order to perform his ordinary and customary work for Voipoch's tenant, Infradapt.

Voipoch's Motion for Summary Judgment is before the court for disposition. A motion for summary judgment may only be entered if the pleadings, depositions, affidavits and all other materials together show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Swartley v. Hoffner*, 734 A.2d 915, 918 (Pa. Super. 1999). In considering a motion for summary judgment, the court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party when determining if there is a genuine issue of material fact. *Chada v. Chada*, 756 A.2d 39 (Pa. Super. 2000). However, the non-moving party may not rest upon the mere allegations or denials of the pleadings to demonstrate that there is a genuine issue of material fact. Pa.R.C.P. 1035.3(a). Finally, a motion for summary judgment may only be granted in cases where it is free and clear from doubt that the moving party is entitled to judgment as a matter of law. *Ducjai v. Dennis*, 540 Pa. 103, 656 A.2d 102 (1995).

Defendant argues that it is entitled to judgment as a matter of law because as an out-of-possession landlord it did not owe a duty to Plaintiff. Plaintiff disagrees and contends that Defendant was responsible for the lack of handrail in the stairwell between the second and third

[1] Upper Macungie Township was dismissed from the case by court order dated May 19, 2015.

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floors because that defect existed at the time the lease was entered into and Plaintiff was a foreseeable user of the premises. Plaintiff asserts a landlord has a duty to make the property reasonably safe for business invitees.

To prevail in a negligence lawsuit, the plaintiff must prove four elements: a) a duty or obligation recognized by law; b) a breach of duty; c) a causal connection between the breach of duty and the resulting injury; and d) actual loss or damage suffered by the plaintiff. *Jones v. Levin*, 940 A.2d 451, 454 (Pa. Super. 2007)(citations omitted). As a general rule, a landlord out of possession is not liable for injuries incurred by third parties on the leased premises because the landlord has no duty to such persons. *Id*.

In the case of *Kobylinski v. Hipps*, 359 Pa. Super. 549, 519 A.2d 488 (1986), Joseph A. Kobylinski, Sr., (Kobylinski) exited his car to visit Dr. John G. Hipps who rented the property from Dr. William Schmidt. Upon stepping out of the car, Kobylinski fell down an unguarded exterior stairwell attached to the home and plunged to his death. The *Kobylinski* court reiterated the general rule in Pennsylvania that "a landlord out of possession, in most instances, is *not* responsible for injuries suffered by third parties on leased premises." *Id*. at 554, 519 A.2d 491. Further, the court relied on the case of *Parquet v. Blahunka*, 368 Pa. 626, 84 A.2d 187 (1951), in which the Supreme Court held "a landlord out of possession [is] not liable for bodily harm caused to his/her lessee, or others on the property with the consent of the lessee, by any dangerous condition, whether natural or artificial, which existed at the time lessee took possession and which the lessee knew, or should have known, to exist." *Id.* citing *Parquet* at 84 A.2d 188.

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Plaintiff misinterprets the *Kobylinski* case and attempts to distinguish it by arguing that the defect in *Kobylinski* was a broken or unilluminated light which constituted a transient defect that came into being after the lease was signed and possession of the property was transferred to the tenant. The *Kobylinski* court describes the scene where Kobylinski fell and states "the stairwell was equipped with an outside light positioned over a basement door; however, it was not illuminated that evening." *Id*. at 551, 519 A.2d 489. The light is never described as broken or defective; just not illuminated. The light was not the defective condition in the *Kobylinski* case. The court repeatedly refers to the "unguarded exterior stairwell" and the "stairwell's unprotected condition." Moreover, in addressing whether the lessee knew or should have known of the defect at the time the lessee took possession, the court examined the state of the stairwell, not the light, determining, "it is patently clear that the unguarded condition of the outside stairwell was conspicuous at the time the lease was executed and that [tenant] never questioned [landlord] about its safety." *Id*. at 555, 519 A.2d 491.

The defective condition in *Kobylinski* was not transient, and, like the defective condition in the instant case, existed prior to the date lessee took possession of the property. In addition, like the unguarded stairwell in *Kobylinski*, the lack of handrail was conspicuous at the time the lease was executed. Therefore, the general rule that the out-of-possession landlord is not liable applies to this matter unless Plaintiff can provide evidence of an exception to the general rule.

The general rule is subject to several exceptions and a landlord out of possession may incur liability:

(1) if he has reserved control over a defective portion of the demised premises;
(2) if the demised premises are so dangerously constructed that the premises are a nuisance per se;

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> (3) if the lessor has knowledge of a dangerous condition existing on the demised premises at the time of transferring possession and fails to disclose the condition to the lessee;
> (4) if the landlord leases the property for a purpose involving the admission of the public and he neglects to inspect for or repair dangerous conditions existing on the property before possession is transferred to the lessee;
> (5) if the lessor undertakes to repair the demised premises and negligently makes the repairs; or
> (6) if the lessor fails to make repairs after having been given the opportunity to remedy a dangerous condition existing on the leased premises.

Dorsey v. Continental Associates, 404 Pa. Super. 525, 591 A.2d 716 (1991)(citations omitted).

Plaintiff first maintains that Defendant is liable for injuries sustained as a result of the lack of handrail because Defendant reserved constructive control over the third floor of the subject property and the stairway between the second and the third floors. Plaintiff asserts Defendant reserved constructive control because Defendant was not legally permitted to rent out the third floor as it failed to obtain a certificate of occupancy for the third floor. The Certificate of Occupancy provides:

> This is to certify that the building or structure has been inspected and found in compliance with Zoning, Plumbing, Electrical and Building Codes of Upper Macungie Township, and the above stated occupancy and use thereof is hereby authorized. Any Changes in the use and occupancy without approval will automatically render this certificate null and void.

Defendant's Exhibit F. Although the Certificate of Occupancy certifies occupation of the building or structure, Plaintiff asserts that the Certificate of Occupancy does not apply to the third floor of the building.[2] We find that even assuming the Certificate of Occupancy does not apply to the third floor, there is no evidence to support the asserted exception of "reserved control of the premises." Plaintiff has provided no case law to support the idea of "constructive

[2] Plaintiff asserts that the plans presented to the Upper Macungie Township for the Certificate of Occupancy only included the first and second floors of the building, and, therefore, we should infer that Upper Macungie Township never approved business occupancy for the third floor. *See* Plaintiff's Exhibit C.

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control" over the defective area. The exception states that liability may result if the landlord reserved *control* over a defective portion of the demised premises.

No evidence has been presented to support Defendant's control over the third floor of the building it rented to Infradapt. The lease at issue is for the *building* located at 1126 Trexlertown Rd, Breinigsville, Lehigh County, Pennsylvania. Plaintiff's Exhibit D (emphasis added). The entire building was rented to Intradapt; Voipoch did not reserve any portion of the building for its own use. Further, there is no evidence to suggest that Voipoch reserved any actual control over any portion of the building. Defendant's failure to obtain a certificate of occupancy for the third floor, while perhaps legally significant in another arena, does not establish the control required to assert liability over an out-of-possession landlord.

The second exception asserted by Plaintiff is enumerated at number five above and states that the out-of-possession landlord may be liable if the lessor undertakes to repair the demised premises and negligently makes the repairs. Plaintiff relies on Commercial Lease Sections 6.1 and 7.3 for the proposition that Defendant is "empowered" to make necessary improvements when it knew that the tenant has failed to make them. The Commercial Lease provides:

> 6.1 Operation of Leased Premises. The Tenant shall assume full responsibility for the operation and maintenance of the Leased Premises for the repair or replacement of all fixtures or chattels located therein or thereon. The Landlord shall have no responsibility whatsoever, with respect to maintenance repairs or replacement, except as provided in section 6.2 herein, provided that if the Tenant fails to do so, the Landlord may at its sole option upon 14 days prior written notice and without any obligation to the Tenant elect to perform such maintenance, repairs or replacement as the Landlord may reasonably deem necessary or desirable….
>
> 6.2 Access by Landlord. The Tenant shall permit the Landlord to enter the Leased Premises at any time outside normal business hours in case of an emergency and otherwise during normal business hours where such will not

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> unreasonably disturb or interfere with the Tenant's use of the Leased Premises or Operation of its business, to examine, inspect and show the Leased Premises for purposes, of leasing, sale, or financing, to provide services or make repairs, replacements, changes or alterations as provided for in this Lease and to take such steps as the Landlord may deem necessary for the safety, improvement or preservation of the Leased Premises….
>
> 7.3 The Tenant may install in the Leased Premises its usual fixtures and personal property in a proper manner; provided that no installation or repair shall interfere with or damage the mechanical or electrical systems or the structure of the Leased Premises….

Defendant's Exhibit B.

Reading the language of the Commercial Lease, we find that the Defendant is permitted to make repairs if Infradapt has not done so, but is not required to do so. *See* Section 6.1. In addition, Plaintiff's argument that Defendant undertook to make the repair but did so negligently is simply not true. Plaintiff attempts to argue that Defendant's installation of a handicapped ramp, paving of the parking lot, installation of landscaping, and installation of a handrail between the first and second floors establishes a general undertaking of repair of the property, and the failure to install a handrail between the second and third floors equates to the negligent repair of the handrail. There is no evidence that Defendant attempted to install a handrail between the second and third floors. Because Defendant never undertook the task of installing the handrail between the second and third floors, it cannot be asserted that said installation was done negligently. Accordingly, the second and final exception asserted by Plaintiff does not apply to this matter.

Without evidence to support an exception to the general rule precluding liability to an out-of-possession landlord, no duty exists, and no cause of action for negligence can be maintained. Defendant is entitled to judgment as a matter of law.

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DATE: June 7, 2016 BY THE COURT:

/S/
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CAROL K. McGINLEY, J.

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

MICHAEL VASILIK, :
Plaintiff :
:
v. : Case No. 2015-C-904
:
VOIPOCH, LLC, :
Defendant :

ORDER

AND NOW this 7th day of June, 2016, upon consideration of Defendant's Motion for Summary Judgment filed with the Clerk of Judicial Records – Civil Division on December 31, 2015, Plaintiff's response thereto, briefs thereon, and after argument heard on March 11, 2016, and for the reasons set forth in the attached Opinion, IT IS ORDERED that said Motion for Summary Judgment is GRANTED. Judgment is entered in favor of Defendant Voipoch, LLC, and against Plaintiff Michael Vasilik, as a matter of law.

BY THE COURT:

/S/

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CAROL K. McGINLEY, J.