SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0128-16T3

JORGE DA SILVA,

Plaintiff-Appellant,

v.

110-112 FERRY STREET,

Defendant,

and

XTRT, LLC and TTG MANAGEMENT COMPANY,

Defendants/Third-Party Plaintiffs-Respondents,

v.

PORTUGUESE BAKING COMPANY, L.P. and HANOVER INSURANCE GROUP,

Third-Party Defendants.

Argued October 31, 2017 – Decided January 9, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-4467-13.

Bruce S. Gates argued the cause for appellant.

David J. Dering argued the cause for respondents (Leary, Bride, Tinker & Moran, attorneys; David J. Dering, of counsel and on the brief).

PER CURIAM

Plaintiff Jorge Da Silva appeals from an order entered by the Law Division on July 26, 2016, which granted summary judgment in favor of defendants, XTRT, LLC (XTRT), and TTG Management Company (TTG) for summary judgment. We affirm.

I.

This appeal arises from the following facts. On December 20, 2011, plaintiff was employed as a driver for Portuguese Baking Company, L.P. (Portuguese Baking). On that date, plaintiff parked a delivery truck at a loading dock of a facility located at 113-129 Kossuth Street in Newark, New Jersey (the Newark facility), which Portuguese Baking leased from either XTRT or XTRT's predecessor-in-interest, the owner of the premises.

After parking the delivery truck, plaintiff unloaded certain materials from the truck. He then attempted to close the back door of the truck container. While doing so, the truck allegedly rolled backward in the direction of the loading dock, causing plaintiff's

hand to be pressed between the truck's loading plate and the loading dock. Solely for purposes of the summary judgment motion, XTRT and TTG did not dispute plaintiff's claim that the accident occurred because the front wheels of the truck rolled into a depressed area of the macadam of the loading dock, which had eroded to a level lower than the adjacent sidewalk.

Manuel Teixeira (Teixeira) and his family were the original owners of Portuguese Baking, but in 2000, they sold the company to Sankaty or Bradford Specialty Foods, which was the owner of the company at the time of the accident. When the business was sold in 2000, Kossuth Street Urban Renewal (KSUB) owned the Newark facility and entered into a lease agreement with Portuguese Baking.

The lease agreement demised the "[t]he property commonly known as 113-129 Kossuth Street, Newark, New Jersey," to Portuguese Baking. The premises consisted of the land, as described in an attached exhibit, and "the entire building and improvements on the land." The exhibit is a description of the plot of land located at 113-129 Kossuth Street.

Section 4 of the lease states that "[d]uring the Term, Lessee agrees to pay, as 'Additional Rent' all Expenses[,]" which are defined in Section 4(a) as:

> all expenses and costs of any nature whatsoever relating to the Premises (except for those items expressly excluded herein),

> whether general or special, ordinary or capital in nature, including:
>
> (i) all real estate taxes and general and special assessments[;] . . .
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> (iii) all insurance premiums[;] . . .
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> (iv) water and sewer charges . . .
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> (v) license, permit and inspection fees;
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> (vi) other than Structural Changes (as defined in Section 12(b) hereof), repairs to, maintenance of and replacements to the Premises, including cost of materials, supplies, tools and equipment used in connection therewith;
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> (vii) other than Structural Changes, costs incurred in connection with the operation, inspection and servicing . . . of electrical, plumbing, heating, air-conditioning and mechanical equipment[;] . . .
>
> (ix) cost of other services . . . for operation and maintenance of the Premises and all such other expenses and costs reasonably necessary or desirable to be incurred for the purpose of operating and maintaining the Building in good and workmanlike condition; . . .

Section 6 of the lease states that by taking possession of the property, "Lessee will be deemed to have accepted the Premises in 'as is' condition, without any representation or warranties on the part of Lessor as to the title, status, or condition of the Premises, except as otherwise set forth herein." Section 7(c)(vii) further stated, "Lessee shall perform all maintenance, repairs and replacements to and of the Premises as may be appropriate or as

may be provided in this Lease." Section 8, entitled "Alterations," provides that:

> Lessee shall not make or suffer to be made, any additions, alterations, improvements or changes in or to the Premises, without prior written consent of Lessor . . . The cost of any Alterations shall be paid in full by Lessee . . . Any and all such Alterations shall be considered part of the Premises and shall belong to the Lessor.

Moreover, Section 11 provides that the lease was "an absolutely 'net' lease." This section of the lease states:

> Lessee shall pay all taxes, insurance premiums, maintenance and repair costs and expenses, utility charges and expenses, impositions and all other costs and expenses, of whatever nature, allocable to or relating in any way to the Premises or the operation thereof, during the Term, under the terms and conditions of this Lease . . . .

Finally, Section 12 of the lease, entitled "Maintenance; Repairs" states:

> (a) Lessee shall, at its sole cost and expense:
>
> > (i) keep the Premises clean, neat and safe and maintain the same in good order, repair and condition;
> >
> > (ii) other than Structural Changes, make all necessary or appropriate repairs, alterations, additions and replacements to the Premises;
>
> (b) Lessor shall be responsible for any and all replacements, repairs, modifications, alterations or other changes necessary or

> required to be made to the structural elements of the Building (collectively the "Structural Changes"). As used herein, the term "structural elements" shall mean the roofs, the foundations, exterior walls, and load bearing walls and columns. Each of Lessor and Lessee shall be responsible to pay one-half (1/2) of all of the costs . . . .

In November 2005, KSUB assigned its interest in the lease to TRT, LLC (TRT), which was previously known as Teixeira Realty Associates, LLC. Subsequently, Portuguese Baking hired Mr. Teixeira as an employee on a five-year contract. About a year and a half later, Mr. Teixeira resigned from his position. Thereafter, Portuguese Baking maintained an office for Mr. Teixeira in the Newark facility, apparently because the company wanted him to be there as an advisor.

Mr. Teixeira is the full or partial owner of XTRT and TTG. He is also one of TTG's employees. XTRT hired TTG to act as its invoice and payment agent. TTG was responsible for billing tenants, collecting rents, receiving requests for reimbursements from tenants, and sending payments on XTRT's behalf.

At his deposition, Mr. Teixeira testified that TTG managed the Newark facility "in the sense . . . [that] [i]t was billing the tenant and collecting the rents, [but] nothing else." At the time relevant to this matter, XTRT and TTG were operated out of an office in Summit, New Jersey.

In December 2013, plaintiff filed a complaint in the Law Division, and filed two amended complaints in February 2014. He asserted claims against 110-112 Ferry Street, XTRT, and TTG.[1] He alleged that defendants had a duty to make the Newark facility reasonably safe for him, and at the time of the accident, they did not fulfill that duty.

Among other things, plaintiff claimed defendants negligently and carelessly designed, inspected, constructed, and supervised and/or maintained the premises, and allowed unsafe conditions to exist. Plaintiff further alleged that due to such negligence he was injured, causing him to sustain severe and permanent injuries, great pain and suffering, mental distress, and other injuries.

After discovery was completed, XTRT and TTG filed a motion for summary judgment, arguing that they did not owe plaintiff a duty of care to protect against the condition of the asphalt located immediately near the loading dock. In particular, XTRT and TTG argued that, under applicable case law, commercial landowners do not owe third-party business invitees a duty of care with respect to conditions of portions of a premises that have been

[1] We note that plaintiff's claims against 110-112 Ferry Street were dismissed without prejudice on July 11, 2014, pursuant to Rule 1:13-7. We also note that XTRT and TTG asserted third-party claims against Portuguese Baking and its insurer, Hanover Insurance Group. The third-party complaint was dismissed without prejudice in September 2016.

demised to a tenant. They argued that the paved area next to the loading dock was part of the premises demised to Portuguese Baking, that plaintiff was a business invitee, and that XTRT and TTG did not have a contractual duty to maintain such area. Plaintiff opposed the motion.

The motion judge heard oral argument on the motion on July 21, 2016, and on July 26, 2016, filed an order granting XTRT and TTG's motion, along with a statement of reasons. The judge determined that under the lease, Portuguese Baking had responsibility for keeping and maintaining the premises in "good order repair and condition."

The judge stated that under the lease, the demised premises encompass the entire plot of land at 113-129 Kossuth Street, including the parking area where plaintiff was injured. The landowner's only obligations to repair pertained to the structural elements of the building, such as the roof, foundation, walls, and load-bearing structures. The judge wrote that under the lease Portuguese Baking had sole responsibility for the ordinary maintenance and physical condition of the premises.

Citing Geringer v. Hartz Mountain Dev. Corp., 388 N.J. Super. 392, 400 (App. Div. 2006), and McBride v. Port Auth. of N.Y. & N.J., 295 N.J. Super. 521, 526-27 (App. Div. 1996), the judge held that XTRT had no liability for the personal injuries sustained by

the employee of a commercial tenant, due to a lack of proper maintenance, when the lease places responsibility for such maintenance and repair solely upon the tenant. The judge found that XTRT did not have a duty to maintain the premises, and TTG's relationship to the Newark facility was no more than that of billing agent for XTRT's predecessor-in-interest. TTG did not have a duty to plaintiff to maintain or repair the portions of the leased premises where plaintiff was injured.

The judge rejected plaintiff's contention that Geringer and McBride only apply if the commercial tenant has exclusive possession or control over the entire premises. The judge also rejected plaintiff's contention that summary judgment should not be granted because there was a genuine issue of material fact as to whether Portuguese Baking had such exclusive possession or control.

II.

On appeal, plaintiff argues that the motion judge erred by finding that XTRT did not owe him a duty of care with regard to the alleged dangerous condition on the premises. In support of his argument, plaintiff cites Monaco v. Hartz Mountain Corp., 178 N.J. 401 (2004), and contends the judge erred by relying upon our decisions in Geringer and McBride in granting summary judgment to XTRT. We disagree.

Initially, we note that when reviewing a grant of summary judgment, we "employ the same standards used by the motion judge under Rule 4:46." Calco Hotel Mgmt. Group, Inc. v. Gike, 420 N.J. Super. 495, 502 (App. Div. 2011) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998)). Rule 4:46-2(c) provides that the court shall grant summary judgment when the evidence before the court shows "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

Thus, in reviewing an order granting summary judgment, we must determine whether, "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Davidovich v. Israel Ice Skating Fed'n, 446 N.J. Super. 127, 158 (App. Div. 2016) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). We also must determine whether the motion judge correctly applied the law. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div. 2006). The motion judge's conclusions on issues of law are, however, reviewed de novo. Davidovich, 446 N.J. Super. at 159 (citing W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

To state a cause of action in negligence under New Jersey common law, a plaintiff must prove four elements: (1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damage. Brunson v. Affinity Fed. Credit Union, 199 N.J. 381, 400 (2009) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 584 (2008)). The threshold inquiry of whether the defendant owed the plaintiff a duty of care is generally a matter of law. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572 (1996) (quoting Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991)).

In Monaco, the Court stated that a commercial landlord owes a duty to its invitees to:

> exercise reasonable care for an invitee's safety. That includes making reasonable inspections of its property and taking such steps as are necessary to correct or give warning of hazardous conditions or defects actually known to the landowner. The landowner is liable to an invitee for failing to correct or warn of defects that, by the exercise of reasonable care, should have been discovered.
>
> [Monaco, 178 N.J. at 414-15 (citing Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)).]

A commercial landlord's liability may extend "to cases in which the landowner had no control over the dangerous condition and the condition was not located on its property." Id. at 415. Indeed, "neither ownership nor control is the sole determinant of commercial landlord liability when obvious danger to an invitee

is implicated." Id. at 417. Instead, "whether [a commercial landlord] owes a duty of reasonable care toward another [individual] turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy." Id. at 418 (quoting Hopkins, 132 N.J. at 439).

In Monaco, a traffic sign situated on the abutting sidewalk of the property of a commercial landlord became dislodged and the landowner's invitee was injured. Id. at 404. We held that the landlord did not have a legal duty to the invitee because the municipality owned and installed the traffic sign. Id. at 411. The Supreme Court found, however, that the landlord owed a duty to the invitee to maintain safe premises, including areas of ingress and egress, and to inspect and give warning of the dangerous condition. Id. at 413.

The Monaco Court noted that the landlord had leased the premises to the municipal board of education, which employed the plaintiff. Ibid. The plaintiff was injured on the landlord's property, when the sign flew out of a sidewalk that the landlord had installed and maintained. Id. at 413-14. The sign had been installed to advance the interests of the landlord and its tenants. Id. at 414.

The Court also noted that under the municipality's ordinance, the sidewalk where it was placed was the landlord's responsibility. Ibid. The plaintiff's expert opined that a minimally competent inspection of the area would have indicated that the sidewalk at the base of the sign was cracked. Ibid.

Monaco does not, however, address the precise issue presented here, which is whether a commercial landlord has a duty of care to invitees of its tenant, when the lease agreement between the landlord and tenant places responsibility for ordinary maintenance and repair of the premises upon the tenant. As the motion judge recognized, that issue was specifically addressed in Geringer and McBride.

In Geringer, we held that "'[t]here is no landlord liability' for personal injuries suffered by a commercial tenant's employee on the leased premises 'due to a lack of proper maintenance or repair, when the lease unquestionably places responsibility for such maintenance or repair solely upon the tenant.'" Geringer, 388 N.J. Super. at 401 (quoting McBride, 295 N.J. Super. at 522). The motion judge did not err by applying this principle in granting summary judgment to XTRT.

III.

Plaintiff contends Geringer and McBride do not apply in this case because there is no evidence that XTRT demised exclusive

possession and control of the leased premises to Portuguese Baking. We disagree.

Here, the motion judge correctly found that the absence of the terms "exclusive possession" or "exclusive control" in the lease was not dispositive. The judge noted that there was nothing in Geringer which suggests that its holding is limited to factual scenarios in which the tenant has exclusive possession over the entire property. The judge correctly pointed out that Geringer only requires that the lease place sole responsibility for maintenance and repair upon the tenant. See Geringer, 388 N.J. Super. at 401.

Nevertheless, the judge determined that the lease does give Portuguese Baking "exclusive possession" of the demised premises, which included the land and building. The judge rejected plaintiff's assertion that Portuguese Baking did not have such "exclusive possession" because Mr. Teixeira had an office in the building.

The judge noted that the only legally competent evidence before the court showed that, at some point, Portuguese Baking had entered a business relationship with Mr. Teixeira in his individual capacity and, in furtherance of that relationship, provided him with an office in the Newark facility. The judge also noted that

there was no evidence that Mr. Teixeira conducted the business of XTRT or TTG while in that office.

The judge also rejected plaintiff's assertion that Portuguese Baking did not have sole responsibility for maintenance and repair of the demised premises. In support of that contention, plaintiff relied upon the provisions of the lease which imposes on the property owner the obligation to repair structural elements of the building, and requires the tenant to obtain consent for "additions, alterations, improvements, or changes in or to the [p]remises."

The judge noted that the lease allocated to the tenant responsibility for "all maintenance, repairs and replacements to and of the [p]remises" and "all necessary or appropriate repairs" other than structural changes. The judge determined that the landowner's "limited responsibility" for structural elements such as the roof, foundation, load-bearing walls, and the like did not raise a genuine issue of material fact as to whether the lease "placed responsibility for maintenance or repair of the premises generally, and of the asphalt specifically, solely upon the tenant."

In addition, the judge correctly noted that the lease distinguishes between maintenance and repair, and "additions, alterations, improvements, or changes" to the demised premises. Thus, under the lease, the tenant is not required to obtain the

owner's consent for maintenance and repair, but would require consent for any "additions, alterations, improvements, or changes" to the demised premises.

We conclude that the motion judge correctly determined that the lease in question "unequivocally placed responsibility for maintenance or repair of the [p]remises solely upon the tenant." As the judge found, under the lease, Portuguese Baking had sole responsibility for maintaining the premises.

IV.

Plaintiff further argues that McBride and Geringer do not apply in this matter because neither of those cases involved a public area. Plaintiff alleges the risk here was created by a crater-like erosion in the asphalt, which dropped off from the public sidewalk. Plaintiff's argument is not persuasive.

The plaintiff in McBride was injured when a vehicle he was operating at a loading dock on the leased premises struck a hole near the loading dock, causing his vehicle to lurch and toss him to the ground. McBride, 295 N.J. Super. at 524. The plaintiff in Geringer was an employee of the landowner's tenant, who was injured after falling on an interior stairway within an office building owned by the defendant. Geringer, 388 N.J. Super. at 394. In both cases, the areas where the plaintiffs were injured were part of the premises leased to the tenants. Furthermore, in both cases,

the tenants had sole responsibility for maintaining the areas where the plaintiffs were injured.

Thus, plaintiff's attempt to distinguish this case from McBride and Geringer is unavailing. Here, the trial court correctly found that plaintiff was injured on the part of the premises demised to Portuguese Baking, and under the lease, Portuguese Baking had sole responsibility to maintain that area of the property.

Accordingly, the court did not err by finding that under the circumstances, XTRT did not owe a duty to plaintiff to exercise reasonable care with regard to the alleged dangerous condition on the premises. The court correctly found that XTRT was entitled to summary judgment.

We note additionally, that in his brief, plaintiff does not argue that the judge erred by granting summary judgment to TTG. Plaintiff's arguments are addressed entirely to his claim that the landowner owed him a duty to exercise reasonable care.

Affirmed.