In the Court of Common Pleas
Cuyahoga County, Ohio

JENNIFER DAWSON, Plaintiff, v. RONDA & MIKE'S PLACE, *et al.*, Defendants.	CASE NO. 10 CV 741496 JUDGE PAMELA A. BARKER **Journal Entry:** Opinion & Order on KenMar Holdings, LLC's Motion for Summary Judgment

OPINION

Defendant KenMar Holdings, LLC, the owner and lessor of the commercial property at issue, asks this Court to grant summary judgment in its favor on Plaintiff Jennifer Dawson's claim for injuries she sustained while a patron of Defendant Cody1, Inc. (doing business as Defendant Ronda & Mike's Place). Dawson lost the tips of two fingers when the exterior steel door slammed shut as she re-entered the rear of the premises after moving her car. Defendant Cody1, Inc. is the sublessee of Third-Party Defendant 13560 Lorain, Inc., which was KenMar's lessee.

For the reasons that follow, KenMar's motion for summary judgment is granted.

I. Undisputed Facts

A. *Dawson's injury*

Dawson alleges in her first amended complaint that, on the evening of her injury, she parked in the rear parking lot of Ronda & Mike's Place, a tavern located at 13560 Lorain Avenue in a commercial premises owned by KenMar. (Am. Comp. (5/16/11), ¶¶1-2 & 4; Dawson Dep., p. 50.) She described the weather that evening as "[n]ot particularly windy. Windy for Cleveland." (Dawson Dep., p. 82.) A patron held the back door for her as she walked in and, after purchasing a beer at the bar, Dawson joined friends she previously had arranged to meet. (Dawson Dep., pp. 62-63 & 66-68.)

About halfway through that single beer, a tavern employee asked Dawson to move her car because it blocked another car, preventing that car's owner from leaving. (Dawson Dep., pp.69-70.) The car owner held the back door open as Dawson exited the premises, and she moved her car. (Dawson Dep., pp. 69-70.) After she parked in her original spot, she pulled open the back door and proceeded into the premises. (Dawson Dep., p. 70.)

The door, however, began to quickly close behind her. (Dawson Dep., p. 70.) Dawson "didn't want it to hit" her, so she reacted by reaching back with her left hand, fingers spread. (Dawson Dep., p. 70, 79-80.) The door slammed shut, and she lost the tips of two fingers between the door and the jamb. (Dawson Dep., pp. 71, 81.) She obtained treatment at a local hospital. (Dawson Dep., p. 87-88.)

B. *Defendants' relationship to the door*

In its answer, KenMar admitted that it is, in fact, the owner of the premises and that Ronda & Mike's Place is a "commercial tenant." (Am. Ans. to First Am. Comp., Crossclaim & 3d Party Comp. (7/1/11), ¶1; *see* First Am. Comp. at ¶¶1-2;) KenMar has owned the premises since 2000, and the space Ronda & Mike's Place occupied since 2008 had been a tavern long before KenMar purchased the building. (Deposition of Michael Stern (4/26/11), pp. 11-12.) Ronda & Mike's Place sublet the premises from the original lessee, 13560 Lorain, Inc., which held the liquor license. (Stern Dep., pp. 14-15; *id.* at 21 (Exhibit A (Commercial Lease)).) Ronda & Mike's Place had purchased the liquor license from 13560 Lorain, Inc. but paid KenMar directly for the rent. (Deposition of W. Michael Aiello ((4/26/12), pp. 6-8.) The sublease between 13560 Lorain, Inc. and Cody1 (dba Ronda & Mike's Place) is not in the record.

Michael Stern, who executed the lease with 13560 Lorain, Inc. on behalf of KenMar, testified that he understood that KenMar should maintain the outside of the building, including the exterior doors. (Stern Dep., pp. 16 & 44-45.) He explained that, around 2003 or 2004, he hired someone to replace both the front and rear doors of that space because the previous tenant had asked him to do so after someone had tried to break in. (Stern Dep., pp. 16-18.) As far as Stern knew, the rear exterior steel door was in the same condition as the day it was installed seven or eight years earlier. (Stern Dep., pp. 11 & 27.) Because no one ever had complained about the door, Stern had no concerns about its condition after the incident. (Stern Dep., pp. 47-48, 50.) He thought the injuries must have resulted from a combination of various things and was not a problem solely attributable to the door "breaking down." (Stern Dep., pp. 46-48.)

Stern also testified that he did not do any period walk-through of the tavern portion of the premises; he trusted his tenant to notify him if there was a problem with the building. (Stern Dep., p. 20 & 24.) On one occasion, KenMar and Ronda & Mike's Place did split the cost of a new water heater. (Aiello Dep.,

p. 9-10; *see* Stern Dep., p. 19.) But Stern denied ever having conversations with his tenants about whether patrons or employees could use the back door. (Stern Dep., pp. 27-28.)

Mike Aiello (the "Mike" in Ronda & Mike's Place) purchased the bar business from 13650 Lorain, Inc. and assumed the rent obligation. (Aiello Dep., pp. 6-8.) Mike never heard any complaints about the back door and, other than a minor issue with freezing hinges the first winter, he never had any issue with it. (Aiello Dep., pp. 10-13.) Nor did he have any issue with the wind affecting how the door opened or closed. (Aiello Dep., p. 48.) But because the door automatically would close behind anyone coming in or out, he would prop the door open in the summer with a 50- to 60-pound bucket of gravel. (Aiello Dep., pp. 30-31.)

Like Stern, Mike thought that KenMar would be responsible for the exterior door "because it's part of the outside of the building." (Aiello Dep., p. 27.) Mike eventually decided to replace the door closure mechanism, which apparently had consisted of a tension spring, after the incident "so nobody else would get hurt." (Aiello Dep., p. 27; *see* Stern Dep., p. 11; Opp. Brief, Ex. F.)) Mike was "pretty sure" he had told Stern about the new mechanism. (Aiello Dep., p. 29.)

Dawson's proposed expert, architect Ronald Kluchin, stated in his affidavit that, in his professional opinion, "the attachment of an exterior-mounted large spring closer on the rear exterior door created an unsafe and hazardous condition, for it caused the door to close at an extremely swift pace and slam shut." (Opp. Brief, Ex. F.)

II. Parties' Arguments

A. *KenMar's arguments*

Against this basic background, KenMar identifies two reasons why this Court should grant summary judgment in its favor: (1) as a commercial landlord, KenMar has no duty to a third-party for the condition of the premises; and (2) the danger presented by the steel door was open and obvious. Because the answer to the question whether KenMar owed a duty of care is dispositive of the issues here, this Court will not address the question whether the steel door presented an open and obvious danger such that KenMar would be excused from liability.

KenMar argues that, as a commercial lessor, it has no duty to Dawson because it did not possess or control the premises "in any way." (MSJ Brief, p. 9.) Rather, the tenant possessed and controlled the premises. And although KenMar and Ronda & Mike's Place split the costs of repairs on occasion, KenMar relied on the tenant to advise it when repairs were needed. Moreover, KenMar contemplated the situation where someone might be injured on the

premises and specifically included an indemnification clause in the lease agreement. Therefore, KenMar cannot be liable to Dawson for her injuries.

B. *Dawson's arguments*

Dawson contends, however, that a genuine issue of material fact exists "as to whether the Lease apportioned sufficient control of the Premises to [KenMar] to permit liability." (Brief in Opp., p. 7.) According to Dawson, KenMar contractually retained control over the rear exterior door despite the transfer of possession to Mike & Ronda's place. Moreover, she argues, both Stern and Mike understood that KenMar remained responsible for maintaining the exterior door.

In the alternative, Dawson argues that "Stern should have discovered the unreasonable risk of harm posed by the spring mounted on the rear door" as he periodically examined the building. (*Id.* at pp. 9-10.) She points to the affidavit of a registered architect who opines that the original spring created a tension that caused the door to close quickly which, in turn, created an unsafe and hazardous condition. (*Id.* at pp. 9-10.) And evidence that KenMar replaced the door and added the spring before 13560 Lorain, Inc. took possession demonstrates that KenMar had knowledge of the defect. KenMar's transfer of the property with a preexisting hazardous condition constitutes a "special circumstance" that warrants a finding of liability on KenMar and precludes the grant of summary judgment.

III. Applicable Law

A. *Commercial lessors: general non-liability for conditions of a premises*

"[T]he existence of a duty is fundamental to establishing actionable negligence." *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614 (1989); *see Cooper v. Roose*, 151 Ohio St. 316, 321, 85 N.E.2d 545 (1949) ("[A] failure to act cannot be actionable negligence if there is no legal duty to act."). Under the common law, a lessor "having neither possession nor control of the premises is ordinarily not liable for damages resulting from the condition of the premises." *Hendrix v. Eighth and Walnut Corp.*, 1 Ohio St.3d 205, 207, 438 N.E.2d 1149 (1982). While the landlord-tenant statutes abrogate this rule as it applies to residential property, the rule still applies to commercial lessors. *Kirchner v. Shooters on the Water, Inc.*, 167 Ohio App.3d 708, 2006-Ohio-3583, 856 N.E.2d 1026 (8th Dist.), ¶32. Ohio courts have found commercial lessors who lack possession and control of the premises not liable to a tenant's employees or a tenant's patrons who have sustained an injury caused by a condition of the premises. *Hendrix, supra* (employee); *Berkowitz v. Winston,* 128 Ohio St. 611, 193 N.E. 343 (1934), paragraph one of the syllabus (same); *Currier v. Penn-Ohio Logistics*, 187 Ohio App.3d 32, 2010-Ohio-198, 931 N.E.2d 129 (11th Dist.), ¶2 &

19-24 (same); *Sabitov v. Graines*, 177 Ohio App.3d 451, 2008-Ohio-3795, 894 N.E.2d 1310 (8th Dist.), ¶16 (patron); *Kirchner, supra* at ¶¶4-7 (same).

The common law equates "possession and control" with the "right to admit or exclude others." As the Supreme Court of Ohio held in *Hendrix,* "a lessor who does not retain the right to admit or exclude others from the premises has generally not reserved the degree of possession or control necessary to impose liability for the condition of the premises." *Hendrix,* 1 Ohio St.3d at 207. As such, a lessor who has reserved the right to enter the premises upon notice for the purpose of inspecting the premises does not retain the control necessary to impose tort liability for the condition of the premises. *Id.*; *accord Davis v. Eastwood Mall, Inc.*, 11th Dist. No. 90-T-4384 (Dec. 14, 1990), 1990 WL 208846 at *2; *see Monahan v. Duke Realty Corp.*, 1st Dis. No. C-070318, 2008-Ohio-1113, ¶24 ([T]there is no common-law duty imposed on a commercial landlord to inspect premises that are out of the landlord's possession and control.").

Nor is a commercial lessor who is out of possession and control liable for damages resulting from a condition of the premises where the lessor agreed to make repairs. *Berkowitz,* 128 Ohio St. 611, paragraph three of the syllabus; *Hendrix,* 1 Ohio St.3d at 207. Where the commercial lessor agrees "to make repairs, his liability for failure to do so is merely a contractual liability similar to the contractual liability of any other party who has agreed to make like repairs." *Cooper*, 151 Ohio St. at 324; *see Berkowitz, supra* at paragraph one of the syllabus ("Promise by the lessor to make repairs of premises leased does not impose upon the lessor liability in tort to persons entering thereon at the invitation of the lessee.").

B. *Special circumstances: an exception to non-liability*

As noted above, Dawson argues that a "special circumstance" exists here that acts as an exception to the general rule of a commercial landlord's non-liability to third parties. Initially, Dawson cites *Schump v. First Continental-Robinwood Associates,* 71 Ohio St.3d 414, 418, 644 N.E.2d 291 (1994), for the proposition that exceptions "nearly have swallowed up the general rule of landlord immunity":

> Some of the commonly accepted exceptions that give rise to landlord liability include the following: concealment or failure to disclose known, nonobvious latent defects; defective premises held open for public use; defective areas under the landlord's control; failure to perform a covenant to repair; breach of a statutory duty; and negligent performance of a contractual or statutory duty to repair.

Dawson specifically identifies "defective areas under the landlord's control" (i.e., the rear exterior door) as the "special circumstance" that applies here. But *Shump*, which specifically held that "[a] landlord owes the same duties

to persons lawfully upon the leased premises as the landlord owes to the tenant," did not abrogate the common-law rule discussed in *Hendrix* or create a commercial landlord's duty to third parties. *Id.* at syllabus. Rather, it simply identifies some exceptions to the common-law rule of a residential landlord's non-liability – including the breach of a statutorily imposed duty, like those falling under the Landlord-Tenant Act, R.C. Ch. 5321 or the duty to keep common areas in a reasonably safe condition. *See id.* at fn. 3, citing *Davis v. Kelley*, 112 Ohio St. 122, 146 N.E. 88 (1925), paragraph one of the syllabus (holding that a landlord owes a duty to keep common areas in reasonably safe condition).

III. Disposition

A. *No contractual obligation*

Contrary to Dawson's position, no genuine issue of material fact exists "as to whether the Lease apportioned sufficient control of the Premises to [KenMar] to permit liability." (Brief in Opp., p. 7.) It did not. The plain language of the lease places responsibility on the lessee to "maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating systems and any other fixtures or equipment upon the premises." (Lease, ¶3.) The lessee also assumes reasonability "for all repairs required, excepting the roof, exterior walls and structural foundations that shall be maintained by Lessor." (Lease, ¶3.) In short, 13560 Lorain, Inc. agreed to *maintain* and *repair* all parts of the premises, except for its shell which KenMar agreed to *repair*. As the Supreme Court of Ohio held in *Berkowitz,* 128 Ohio St. 611, at paragraph one of the syllabus, a "[p]romise by the lessor to make repairs of premises leased does not impose upon the lessor liability in tort to persons entering thereon at the invitation of the lessee." Therefore, KenMar has no liability in tort to third persons who enter the premises of 13560 Lorain, Inc. at its invitation. *See Cooper*, 151 Ohio St. at 324 (noting that the failure to make repairs after agreeing to do so is the breach of a contractual obligation).

And if the lease can be read to require the landlord to maintain and repair the door, that contractual obligation would inure to the benefit of 13560 Lorain, Inc. – not Ronda & Mike's Place or its patrons. *See Hooper v. Seventh Urban, Inc.*, 70 Ohio App.2d 101, 109, 434 N.E.2d 1367 (8th Dist. 1980) (recognizing rule that lessor and subtenant are not in privity of contract); *Monahan*, 2008-Ohio-1113, ¶26 (concluding that commercial landlord had no contractual duty to tenant to inspect cabinets and, therefore, tenant's employee who sustained injury from falling cabinet could not recover on contractual-duty theory). Stern's and Mike's "understanding" of KenMar's obligations cannot change contractual obligations between KenMar and 13650 Lorain, Inc. *Hooper, supra.* Thus, based on the evidence before it, this Court cannot conclude that the lease contractually obligated KenMar to maintain and repair the door for the benefit of Ronda & Mike's Place.

B. *Knowledge of a preexisting defect is not a special circumstance*

1. The Tenth District's 1980 decision is not persuasive

And the fact that KenMar had the old, rear exterior door replaced with a new, purportedly defective steel door upon the previous tenant's request does not create a situation where a "special circumstance" arises that would create liability for injuries a sublessee's patron sustained due to the condition of the premises. Dawson cites *McNichols v. Central Ohio Diabetes Association,* 10th Dist. No.80AP-292 (Oct. 30, 1980), 1980 WL 353722, which pre-dates *Hendrix*, for the proposition that a commercial landlord may be held liable to a tenant's patron where the landlord transfers control of the premises to the tenant in a defective condition. In *McNichols,* the plurality of the Tenth District panel reversed the grant of summary judgment in favor of the commercial lessor for injuries a patron suffered after falling down a flight of stairs that led to the basement.

Relying on dicta contained in *Shindelbeck v. Moon*, 32 Ohio St. 264, 267-268 (1877), the plurality suggested that a defectively constructed stairway could establish the commercial landlord's liability if the stairway existed at the time the tenant assumed possession of the premises. *McNichols, supra* at *3. The plurality noted, however, that "the complaint alleges that the stairway in question was a temporary stairway constructed by the contractor [to effectuate the tenant's remodeling], thus tending to negate plaintiff's contention of a preexisting nuisance." *Id.* Ultimately, the plurality concluded that, because the lease was not in the record, a genuine issue of material fact existed as to whether the commercial lessor "relinquished all right of possession and control of the premises" and whether the lease allocated maintenance responsibility to the landlord. *Id.*

McNichols is a Tenth District, plurality decision that pre-dates *Hendrix* and is founded on dicta contained in a much earlier Supreme Court of Ohio decision. For these reasons, *McNichols* lacks persuasive value.

2. Eighth District precedent requires the entry of summary judgment

Moreover, the Eighth District has rejected the contention that a commercial lessor could be held responsible to a tenant's patron for a hazardous condition that existed before the tenant took possession. In *Sabitov*, a patron sustained fatal injuries after falling through a trap door located near the restroom facilities in a shopping center deli. 177 Ohio App.3d 451 at ¶1 & 17. Noting that record evidence demonstrated that the commercial landlord had prior knowledge of the trap door, the court relied on the specific language of *Hendrix* to conclude that the landlord could not be liable:

> '[W]e are not persuaded that the allegations regarding the lessor's knowledge of defects, even if established, would amount to special circumstances * * * in the context of a commercial lease. In a commercial setting, the lessee is in a position to bargain with the lessor over the division of repair responsibilities, and the terms in a commercial lease are left to the parties to negotiate between themselves. Thus, the relationship between the commercial lessor and lessee is not regulated by any statutory regulations, such as the Landlords and Tenants Act; rather, the common law maxim *caveat emptor* applies, and "the tenant takes them [the premises] as he finds them with all existing defects of which he knows or can ascertain by reasonable inspection."' [*Id.* at ¶44, quoting *Hendrix*, 1 Ohio St.3d at 208-209, quoting *Ripple v. Mahoning Nat'l Bank*, 143 Ohio St. 614, 621, 56 N.E.2d 289 (1944).]

Thus, a commercial landlord's knowledge that a defective condition exists on the premises at the time the tenant takes possession does not amount to special circumstances giving rise to the landlord's liability to third parties who sustain injuries caused by that defective condition. This same rule must apply between a commercial landlord and a sublessee's patron.

ORDER

Construing the facts in a light most favorable to Plaintiff Jennifer Dawson, Defendant KenMar Holding, Inc. cannot be held liable as a matter of law for the injuries that Dawson attributes to the purportedly defective rear exterior door to Defendant Ronda & Mike's Place. Neither the lease nor the deposition testimony demonstrates that KenMar, in its capacity as a commercial lessor, reserved the right to admit or exclude others from Ronda & Mike's Place, in its capacity as a sublessee. Therefore, Defendant KenMar Holding, Inc.'s motion for summary judgment is granted.

SO ORDERED:

Pamela A. Barker

Judge Pamela A. Barker

Date: 3-26-12

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BY _____ DEP.