

COMMONWEALTH OF MASSACHUSETTS  
BERKSHIRE, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT  
CIVIL ACTION NO. 94-112

CHARLES TACY, Plaintiff )  
 )  
v. )  
 )  
VAHE SAMOORIAN, et al., )  
Defendant )

MEMORANDUM IN SUPPORT OF DEFENDANT, ALLEN  
DALE ASSOCIATES', MOTION FOR SUMMARY JUDGMENT

I. Statement of the Case

This is a premises liability action arising from the Plaintiff's tumble down stairs at the Chase Ballou store at the Allen Dale shopping center in Pittsfield on April 11, 1991. The Chase Ballou store premises was leased by Samoorian from Allen Dale, under a written lease executed August 25, 1989.

That lease (Ex. A, appended hereto) provided as follows:

REPAIRS AND MAINENANCE

13. [Allen Dale] covenants to keep or cause to be kept the foundations and roof of the demised premises, and the structural soundness of the exterior, non party walls originally constructed by [Allen Dale], except as affected by [Chase Ballou]'s work or [its] negligence or omissions, in good order, repair and condition. [Allen Dale] shall not be required to commence any repair until twenty (2) days after written notice from [Chase Ballou] that same is necessary. The provisions of this Section shall not apply in the case of damage or destruction by fire or other casualty or by Eminent Domain, in which the obligations of [Allen Dale] shall be controlled by Sections 25 and 26. Except as provided in Section 13, [Allen Dale] shall not be obligated to make repairs, replacements, improvements of any kind on the demised premises or any equipment, facilities or fixtures contained therein, which repairs and replacements shall be the responsibility of [Chase Ballou]. Except for the aforesaid repairs to be made by [Allen Dale], [Chase Ballou] shall keep the demised premises, including equipment, facilities and fixtures therein, and the entire store front including store front metal work and doors, interior and exterior, at [Chase Ballou]'s expense, clean, neat and in good order, repair and condition and to replace any glass which may be damaged or broken with glass or the same quality, damage by fire or other casualty covered by [Allen Dale]'s insurance excepted.

In addition, Section 14 of the lease charged Chase Ballou with the responsibility of maintaining signs at the demised premises in good and safe condition and appearance. Ibid.

The Plaintiff's complaint alleges that Allen Dale negligently built and/or maintained demised premises in violation of a duty of care and/or the state building code, and failed to warn Plaintiff of a dangerous condition existing there. Plaintiff's complaint, para. 18, 19. In responding to Allen Dale's interrogatories (Ex. B, appended hereto, no. 18), Plaintiff identified and described the alleged defect on the premises as follows:

The stairway was unlit and was very dark. There was no sign outside the door indicating that this door led to a stairway and there was no railing down the flight of stairs.

Finally, in a deposition Plaintiff was asked if he was aware of anything that the shopping center did wrong which caused his accident. He responded:

Well, I think that the fact that they didn't have a railing, the fact that they had no signs on the door back there, and the fact that [Chase Ballou manager] Kathy [Turner] sent me back there without my knowledge of where the bathroom was.

See Excerpt from Plaintiff's deposition, Ex. C, at 61, appended hereto.

## II. Argument and Authority

### a. Allen Dale owed no duty to maintain or repair

Where a commercial tenant expressly assumes the duty to make repairs within the demised premises, the owner of those premises has no duty to maintain the premises. Agustynowicz v. Bradley, 25 Mass. App. Ct. 405, 407 (1988). In Agustynowicz, a failure to maintain an overhead garage door at premises demised to a car

dealership resulted in plaintiff's injury. In its lease, the dealership covenanted to "make all major and minor repairs to this property, of every nature whatsoever, both structural and otherwise." Id., at 406. Construing this language, the appellate panel observed: "The lease was abundantly clear that the burden of making all repairs lay with the tenant [dealership]." Id., at 408. The dealership/tenant was in full control of the premises. At bottom, the Appeals Court concluded "[w]e think it unreasonable that the defendant owners to undertake responsibility for maintaining the door." Id.

In the present case, it is clear that the basement door and stairway were within that part of the demised premises for which Chase Ballou had covenanted to repair and maintain. A commercial owner of real estate may only be liable for unsafe conditions in premises under its control. Camerlin v. Marshall, 411 Mass. 394, 398-399 (1991). Since Allen Dale did not control the basement door and stairway, and maintenance and repairs were Chase Ballou's responsibility, no liability may attach as a matter of law.

**b. The premises were not in violation of the state building code**

Legislation authorizing the promulgation of the State Building Code was passed in 1972, and the code became effective on January 1, 1975. The code was not retroactive, meaning buildings lawfully constructed before the code's effective date did not have meet the code's requirements. G.L. c. 143, Sec. 92.<sup>1</sup> The Allen Dale shopping center was built in the 1950's, and

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<sup>1</sup> G.L. c. 143, Sec. 92 (as enacted St. 1972, c. 802, Sec. 52, and by virtue of Sec. 77 of that act made effective January 1, 1975) provides

there have not been any improvements or renovations to it which would necessitate compliance with the State Building Code. See Affidavit of Joseph Berman, Ex. A, appended hereto. The law presumes that the Allen Dale shopping center met the legal standards in effect at the time it was erected.<sup>2</sup>

To the extent that the Plaintiff should contend he has a right of action by virtue of Allen Dale's violation of the State Building Code, that action must fail as a matter of law.

**c. The Plaintiff's claim is barred by the statute of repose**

To the extent that the Plaintiff claims improper construction or design of the Allen Dale shopping center were responsible for his injury, that claim was not commenced within six years of the time the shopping center was constructed and/or opened for use. As indicated above, the shopping center was constructed and began being occupied in the 1950's. This case was not commenced until March 1994. As such, it is barred by

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as follows:

**State Building code, rules and regulations and amendments thereof; retroactive effect precluded**

No new state building code, rule or regulation or amendments thereof shall affect any building lawfully issued, or any building or structure lawfully begun in conformance with such permit, before the effective date of the state building code in a city or town, provided, that construction work under such a permit is commenced within six months after its issue, and that such work, whether under such permit or otherwise lawfully begun, proceeds in good faith continuously to completion so far as is reasonably practicable under the circumstances.

<sup>2</sup> Buildings and structures which existed at the time of the code became effective "shall be presumed to meet the applicable laws, codes, rules or regulations, by laws or ordinances in effect at the time such building was erected or substantially altered." 780 C.M.R. 101.0 (4th Ed. 1984).

G.L. c. 260, Sec. 2B, the statute of repose barring claims arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property if such claims are not commenced within six years of the opening of the improvement to use, or its substantial completion and the taking of possession by the owner.

III. Conclusion

For all the foregoing reasons, Allen Dale respectfully requests the Court to enter judgment in its favor on the Plaintiff's claim against it.

ALLEN DALE ASSOCIATES, Defendant

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