KIMBERLY ENTZ and KENNETH ENTZ, her husband,	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	
	:	JURY TRIAL DEMANDED
vs.	:	NO. 98-00,569
	:	
K-MART CORPORATION,	:	
Defendant	:	CIVIL ACTION
	:	
vs.	:	
	:	
GLIMCHER HOLDINGS LIMITED PARTNERSHIP,	:	
Additional Defendant	:	MOTION FOR SUMMARY JUDGMENT

OPINION and ORDER

Presently before this Court is the Motion for Summary Judgment filed by Additional Defendant Glimcher Holdings Limited Partnership (hereinafter "Glimcher") November 1, 1999.[1] This case concerns a personal injury action resulting from an incident, which occurred at K-Mart in the Loyal Plaza in Loyalsock Township, Lycoming County on July 19, 1996. K-Mart leases the building from Glimcher. Plaintiff Kimberly Entz alleges she was injured while entering K-Mart when another customer opening a manual entrance door to the store struck her foot with the door. Plaintiffs filed a Complaint against K-Mart April 15, 1998. K-Mart filed its Answer and New Matter November 25, 1998. However, on January 21, 1999, K-Mart filed a Motion requesting leave to amend its New Matter so as to join Glimcher as Additional Defendant. In its Motion, K-Mart averred the lease agreement between K-Mart and Glimcher established Glimcher's liability as recent discovery had revealed the injury

[1]Briefs have been submitted by Glimcher and Defendant K-Mart Corporation (hereinafter "K-Mart") and argument was held December 9, 1999.

occurred in an area designated a "common area" under the lease. The motion to join Glimcher was granted by Order dated February 9, 1999 and K-Mart filed its Additional Defendant Complaint that same date.

Glimcher in reply denies the location of the injury is a common area and also avers it had no notice of any defective condition. Glimcher further asserts that any injuries caused to Plaintiff resulted from actions of K-Mart. *See* Additional Defendant's Second Amended Answer and New Matter. Glimcher now relies on these arguments for its Motion for Summary Judgment.

It is undisputed that Glimcher is a landlord out of possession and that Plaintiff Kimberly Entz suffered injuries while a business invitee of K-Mart. It is also undisputed that Plaintiff's foot was impacted by a door adjacent to the sidewalk outside the store, leading into the store's entranceway and that the entranceway is solely possessed by K-Mart. Further, it is undisputed that the door was opened outwardly by a patron exiting the store and as it opened Plaintiff's foot was caught between the bottom of the door and the sidewalk.

In Pennsylvania, "[a] landlord out of possession is generally not responsible for injuries suffered by a business invitee on the leased premises." ***Henze v. Texaco, Inc***., 508 A.2d 1200, 1202 (Pa.Super. 1986). This rule is subject to several exceptions: (1) if the landlord reserved control over a defective portion of the demises premises; (2) if the demised premises are so dangerously constructed that the premises are a nuisance *per se*; (3) if the lessor has knowledge of a dangerous condition 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 admission of the public and he neglects to inspect or repair dangerous conditions

existing on the premises before possession is transferred to the lessee; (5) if the landlord undertakes to repair the premises and negligently makes the repairs; (6) if the lessor fails to make repairs after having been given notice of a dangerous condition and reasonable opportunity to remedy it. ***Ibid.***

In the instant case, K-Mart argues that Plaintiff Kimberly Entz was injured in a "common area" as designated under Article 9B of the lease agreement (Exception 1, *supra*). Article 9B states:

> B. Landlord shall keep and maintain the Common Area in good condition and repair, including but not limited to repairing and replacing paving; keeping the Common Area properly drained, free of snow, ice, water, rubbish and other obstructions, and in a neat, clean, orderly and sanitary condition; keeping the Common Area and such other areas suitably lighted during, and for one half (1/2) hour after Tenant's business hours; maintaining signs, markers, painted lines (painting lines when the become faint, but not more often than once in each Lease Year) and other means and methods of pedestrian and vehicular traffic control; maintaining adequate roadways, entrances and exits; and maintaining any paintings and landscaped areas, if any.

Although utilized here and throughout the lease, the term "common area" is not defined by the lease agreement itself. Black's Law Dictionary (5th edition) defines the term as follows:

> *Common area.* In the law of landlord-tenant, the portion of demised premises over which the landlord retains control (*e.g.* stairs) and hence for whose condition he is liable, as contrasted with areas of which tenant has exclusive possession. Term also refers to areas in common use by residents of condominium.

When a landlord of a multi-tenanted building reserves control of the common approaches, the landlord is bound to keep such approaches reasonably safe for the use of tenants and their invitees; a landlord becomes liable where it has either actual or constructive notice of a defective condition therein. ***Schultz by Schultz v. DeVaux***. 715 A.2d 479

(Pa.Super. 1998). The issue here is whether Plaintiff's injuries occurred due to a condition of a common area, for which Glimcher is responsible, or due to a condition of an area of which K-Mart had exclusive possession.

Plaintiff's injuries were caused by the door. We find nothing in Article 9B by which Glimcher reserves control of K-Mart's door. Rather, the language of 9B concerns repairing and replacing paving, keeping the "Common Area" properly drained, free of snow, ice, water, rubbish or other obstruction, maintaining signs, markers and painted lines and other means and methods of pedestrian and vehicular traffic control. It is clear this section refers to such areas as the parking lot, sidewalks and traffic ways. Although Plaintiff Kimberly Entz was injured as she stood on the sidewalk, the defective condition as set forth in the Complaint concerns the door, not the sidewalk. Nothing in the lease agreement designates the door as a common area. There is no claim that the sidewalk was improperly designed, constructed or maintained. K-Mart cannot withstand the Motion for Summary Judgment with this argument.

Further, under the lease agreement and the attached rider, Glimcher is responsible for exterior repair, including walls, while K-Mart is responsible for interior repair, including windows. The Court has considered and rejected the concept that the door might be contrued as part of the front wall for which Glimcher retains responsibility and therefore possession or control. A wall provides a means of isolation of the leased property from other portions of the premises clearly used by the public, while a door provides of means of access into the leased premises. In the Court's view, it is such an item of leased property that its operation and function yield direct benefit to the lessee alone, whereas the walls, parking lots, roof, etc. are things in which the lessor has a much more significant interest. A lessee wishes to

ensure its door is attractive and easy to operate so as to encourage customers to enter. In the instant case, in fact, the evidence demonstrates that K-Mart exercised its control over the door by having Williamsport Mirror and Glass adjust and repair its doors, both interior and exterior, on numerous occasions. It's employee even indicated awareness of what "normal" clearance should be (*see* reference, *infra*, to "Customer Accident Worksheet"). Moreover, K-Mart was authorized under paragraph 6 of the rider to make emergency repairs and then claim reimbursement from Glimcher by deducting up to $1,000.00 from its rental payment. Although K-Mart incurred many charges from Williamsport Mirror and Glass for work done to the doors, there is no evidence that it ever sought reimbursement from Glimcher. This is further evidence that K-Mart understood it had exclusion possession and control of the doors under the lease agreement.

K-Mart also claims that summary judgment is not appropriate as "it remains a genuine issue of material fact as to whether Glimcher Holdings Limited Partnership should have known of the allegedly dangerous condition when it leased the premises to Kmart for obvious 'public use' and had reason to know that the tenant, Kmart Corporation, would not first correct the allegedly defective condition." Brief in Support of K-Mart's Answer to Motion for Summary Judgment, p. 7 (Exception 4, *supra*). K-Mart states that "[s]ince there has been no evidence to establish that Kmart or any entity at its direction altered the height of the door during the Lease, it must be assumed that the door height at the time of the accident on July 19, 1996 was identical to that of the original date of the Lease." Brief in Support of K-Mart's Answer to Motion for Summary Judgment, p. 8. K-Mart claims that if the door was defective,

it was defective when the lease agreement was entered into and Glimcher remains liable. ***Id***. at 9. The Court rejects this argument.

Initially, we note that Glimcher challenges the assumption of the identical door height by submission of copies of invoices showing that, over the years, Williamsport Mirror and Glass made multiple repairs to the building's doors at the request of K-Mart. On several occasions, these services included adjusting the height of the doors. Unfortunately, the invoices do not indicate adjustments were made to the door in question. Therefore, the invoices do not settle the issue.

However, K-Mart's assumption that the door height is the same as at the inception of the lease agreement must be rejected. K-Mart has submitted neither affidavit nor evidence that this assertion can be proved at trial. The Court cannot accept that a finder of fact can "assume" a fact essential to K-Mart's case, which is not in evidence. Pa.R.C.P. No. 1035.2, 42 Pa.C.S. provides any party may move for summary judgment as a matter of law after the relevant pleadings are closed whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or, if after the completion of relevant discovery, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issue be submitted to a jury. The nonmoving party must adduce sufficient evidence on the issue(s) essential to his case and on which he bears the burden of proof, such that a jury could return a verdict in his favor. Failure to do so establishes there is no genuine issue of material fact and entitles the moving party to judgment as a matter of law. ***Washington v. Baxter***, 719 A.2d 733

(Pa. 1998). As K-Mart has failed to produce any evidence as to the height of the door at the inception of the lease, summary judgment is appropriate.

Moreover, Glimcher cannot be charged with constructive notice. In ***Felton, by Felton v. Spratley***, 640 A.2d 1358 (Pa.Super. 1994), the Superior Court found a landlord had no affirmative duty to inspect for the presence of lead paint. The Superior Court, quoting in relevant part from P.L.E. Notice § 3 at 124-125, stated:

> Generally, the application of the doctrine of constructive notice is the result of bad faith on the party of the party charged with notice. A person is charged with having constructive notice when he has knowledge of facts putting him on inquiry. Once the duty to inquire is raised, the party is deemed to have such knowledge as he would have acquired by the exercise of ordinary intelligence and understanding.

In the instant case, K-Mart has introduced no facts which indicate Glimcher had knowledge of facts regarding the door height, which would have put it on inquiry that the door height was defective. To the contrary, K-Mart has failed to produce any evidence whatsoever regarding notice of a defect. In fact, K-Mart argues it had no notice of any problem with the door prior to July 19, 1996, the date of the accident. Brief at p. 7. After the accident, an employee who filled out a "Customer Accident Worksheet" wrote that his inspection showed "Front door is *normal*. Has inch and half gap when fully open." Motion for Summary Judgment, Exhibit B (emphasis supplied).[2] Therefore, until the accident the height of the door was not considered defective. K-Mart has presented no evidence to enable this Court to charge Glimcher with constructive notice.

[2] We note further that K-Mart has not indicated what height the door should have been at in order to be considered *not* defective.

Based upon the foregoing, we enter the following Order:

O R D E R

AND NOW, this 26th day of January, 2000, the Motion for Summary Judgment filed by Glimcher Holdings Limited Partnership November 1, 1999, is HEREBY GRANTED. The caption shall be amended to remove Glimcher Holdings Limited Partnership as Additional Defendant.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
Vanessa Daniele, Esquire
Darryl R. Wishard, Esquire
Neil F. MacDonald, Esquire
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Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)