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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION - FIRST DEPARTMENT

-----X

MANUEL JONES,

*Plaintiff, Appellant,*

-against-

N.Y. County Index No.  
xxxxxx/xx

ABCD CORPORATION,

*Defendant, Respondent.*

-----X

*Brief of Respondent ABCD Corporation*

**PRELIMINARY STATEMENT**

Respondent ABCD Corporation (“ABCD”) files this brief in support of affirmance of the Order entered in the Supreme Court, New York County (Jane Johnson, J.), granting summary judgment dismissing Appellant Manuel Jones’s (“Jones”) negligence claim against it. Jones allegedly slipped and fell on a stairwell while working at a ABCD restaurant, owned and operated by Robert Smith (“Smith”). Barred from filing a negligence action against his employer after collecting worker’s compensation benefits, Jones, instead, filed a negligence claim against ABCD, even though it did not participate in the building of the staircase and had no notice of the alleged defects. It is undisputed by either party that: (1) ABCD did not have a contractual duty to repair; (2) ABCD did not have possession or

control of the restaurant at the time of the accident; (3) Smith designed and built the stairwell after assuming possession; (4) ABCD did not participate, nor was consulted, in the building of the staircase; (5) ABCD agents never inspected or used the staircase; and (6) ABCD bi-annual “consumer experience” inspections were limited to food quality, service delivery, and cleanliness of public areas.

Jones tries to overcome ABCD lack of notice of the alleged defect – a necessary element of a negligence claim – by arguing that the absence of handrails on the stairwell violated ABCD duty as an owner under the Administrative Code. But it is well-established that a franchisor, such as ABCD, cannot be held liable unless it retained a right of entry for inspection and maintenance or repair. Below, Jones relied exclusively upon the lease’s default provisions in arguing that ABCD retained a right of re-entry for maintenance and repair. This argument fails because any rights that ABCD possessed under the provisions would only arise after a default occurred and was left unremedied ten days after written notice to cure – neither of which had occurred at the time of the accident. Now, Jones improperly argues, for the first time on appeal, that an additional lease provision – section 7.09 – also provided for a right of re-entry for repair purposes. But Jones cannot challenge the lower court’s decision based upon an argument it did not even make before the lower court. In any event, this vague conditional provision outlining ABCD right of performance if Smith does not perform, does not negate the lease’s other provisions which made Smith, and not ABCD, responsible for all repairs, even structural repairs. Accordingly, the lower

court correctly concluded that ABCD cannot be held liable as a matter of law, notwithstanding its right of re-entry for inspection for a different purpose, because it did not retain a right of repair and had no actual or constructive notice of the alleged defect.

## **QUESTION PRESENTED FOR REVIEW**

ABCD leased a restaurant to its tenant/franchisee Robert Smith, relinquishing all control over the premises other than a right of inspection to perform quality checks to protect its trademarks. After Smith assumed possession of the building, one of his employees allegedly fell and was injured on a stairwell that Smith built, without ABCD knowledge. Did the lower court properly grant summary judgment in ABCD favor and dismiss Smith's employee's negligence claim because ABCD, an out-of-possession landlord/owner did not have a contractual duty to repair or a right of re-entry for repair purposes?

ABCD respectfully submits that the answer is in the affirmative.

## **COUNTER-STATEMENT OF THE CASE AND THE FACTS**

### **Nature of the Case**

On June 24, 1996, Manuel Jones filed a complaint in the Supreme Court of the State of New York, New York County, alleging that he suffered injuries as a result of ABCD negligence in maintaining its property located at 37-19 Junction Blvd., Corona, New York. (R. 17-21). ABCD filed an answer, dated September 5, 1996, denying that it or its employees, servants, and agents controlled or maintained the premises at issue and asserting numerous affirmative defenses such as failure to state a cause of action, negligence by Jones, and preclusion under the New York State Worker's Compensation Law. (R. 22-23). After conducting discovery, ABCD filed a motion for summary judgment. (R. 6-128). In response, Jones filed an affirmation in opposition and a cross-motion for summary judgment, which ABCD opposed. (R. 129-141, 142-158).

On February 1, 2000, the Supreme Court of the State of New York, New York County, (Jane Johnson, J.), denied Jones's cross-motion for summary judgment, granted ABCD motion for summary judgment, and dismissed the complaint. (R. 5). The court concluded that ABCD was not liable as a matter of law because "defendant was and is an out of possession landlord and franchisor to plaintiff's employer, the tenant and franchisee, and the employer caused the staircase at issue to be built." (R. 5). Jones filed a notice of appeal from this order. (R. 3-4).

## **The Evidence Presented Below**

Jones misrepresents the underlying facts of this case by claiming that ABCD retained a right of repair under the lease with its franchisee, Robert Smith. (Appellant’s Brief pp. 1-5). In support of its claim, Jones contends, for the first time on appeal, that section 7.09 of the lease establishes ABCD right of re-entry for repair. (Appellant’s Brief pp. 2-3). Jones never made this argument before the lower court, and his inclusion of this argument in his “statement of facts” is improper. Jones may not attack the lower court’s ruling by raising an argument on appeal that he never presented to the lower court for its consideration.

### **A. ABCD Leases the Premises to Smith, an Independent Contractor, Relinquishes Day-to-Day Control Over the Premises to Smith, and Retains a Right of Inspection to Protect Its Trademark Interests.**

ABCD sold a ten-year franchise to Robert Smith to operate a ABCD restaurant and leased him a building located at 1234 56th Street, Acme, New York. (R. 10, 49, 86, 87). The contract provided that Smith “is, and shall remain, an independent contractor responsible for all obligations and liabilities of, and for all loss or damage to, the Restaurant and its business, including ... all claims or demands based on damage or destruction of property or based on injury, illness or death of any person or persons, directly or indirectly resulting from the operation of the Restaurant.” (R. 79, § 8.01).

ABCD relinquished all day-to-day control over the premises. In support of ABCD motion for summary judgment, James Jackson, ABCD senior corporate counsel, affirmed that ABCD does not own, operate, participate in the management, pay the utilities, or sell

any product at or to the business at 1234 56th Street, nor hire, discharge, or discipline employees of the business. (R. 15). ABCD also does not control the day-to-day activities of the business. (R. 16).

Although ABCD relinquished control over the premises to Smith, it did reserve a right of inspection to ensure that Smith did not damage the ABCD trademark by offering inferior quality food or service. (R. 59, § 12(a) & (k); R. 77, § 7.01). Further, in the event of a breach that remained uncured ten days after notice of default, ABCD reserved the right to re-enter the premises and take control of the operation of the restaurant in order to protect its interests. (R. 62, § 20(a); R. 77, § 7.04). Notwithstanding ABCD right of re-entry for inspection purposes relating to its rights in the trademark, the lease provided that Smith, and not ABCD, was solely responsible for all repairs – both inside and out. Under the franchise agreement, Smith alone was responsible for “the maintenance of the Restaurant and its equipment and furnishing in good repair.” (R. 51). Likewise, the license agreement states that Smith, and not ABCD, is responsible for “mak[ing] repairs or replacements required because of damage, wear and tear, or in order to maintain the Restaurant building and parking area in good condition and in conformity to blueprints and plans.” (R. 59, § 12(e)). The lease agreement required Smith, at his own expense, to “keep the entire Premises, all improvements, utility lines and Lessee’s or Lessor’s fixtures and equipment at all times in good repair.” (R. 74, § 4.02).

**B. After Smith Assumed Possession of the Premises, He Paid For and Hired a Construction Company to Rebuild the Service Stairwell Leading to the Restaurant's Basement.**

All supplies were delivered to the restaurant's basement via the service stairwell. (R. 117, 153). At the time Smith assumed possession of the building, the stairwell had cement steps with rubber lids that slipped off. (R. 99, 103, 116). Smith hired and paid Acme Construction to replace the stairwell with metal steps. (R. 116, 119). Sara Parker, the assistant manager at the 56th Street restaurant in 1995, testified during a deposition that Smith did not consult ABCD prior to replacing the stairwell. (R. 103-04). "It wasn't anything that have [sic] to do with them [ABCD], it was just something that was needed in our store." (R. 104).

Despite the fact that Smith agreed, in its contract with ABCD, to "comply with all federal, state and local laws, ordinances and regulations affecting the operation of the Restaurant," (R. 59, § 12 (k)), evidence was presented alleging that Smith's stairwell design lacked handrails and violated Administrative Code section 27-375(f). (R. 131, 138-140). Engineer Norman Wesler opined in an affidavit presented by the plaintiff that the service stairwell, an "exit stairway" measuring over 44 inches wide, required two handrails under the New York City Building Code. (R. 139).

**C. ABCD Agents Entered Smith’s Restaurant for Bi-Annual “Customer Experience” Inspections that Were Confined to Food Quality, Service Delivery, and Cleanliness of Public Areas.**

Sara Parker, the assistant manager of the store in 1995, testified during a deposition that ABCD conducted bi-annual quality checks at Smith’s restaurant. (R. 85-86). ABCD inspections in 1995 were “customer experiences,” confined solely to the restaurant’s food quality and customer service. (R. 97, 122, 123). During these inspections, the inspector stayed in public areas unless there was a food quality issue requiring a freezer check. (R. 123). According to Parker, the inspectors never used the stairs or observed deliveries. (R. 97-98, 125). “They don’t go into any area unless they feel a need to do something for whatever reason, but they wouldn’t go as far as checking the stairs and stuff like that.” (R. 123).

**D. Manuel Jones, an Employee of Smith’s Restaurant, is Allegedly Injured when He Slips on the Metal Service Stairs During a Delivery.**

On September 17, 1995, Manuel Jones, an employee of Smith’s restaurant, allegedly slipped and fell in the service stairwell while moving a delivery to the basement. (R. 138). According to Jones’s affidavit, “I reached for a handrail with my right hand, but there was no handrail to grab, thus I fell on the stairway.” (R. 138). The plaintiff’s engineering expert, George Clinton, stated in his affidavit that “[i]t is my opinion to a reasonable degree of human factors engineering certainty that the missing handrails denied the plaintiff the opportunity to prevent and/or correct plaintiff’s slip and fall sequence and thus represent a

proximate cause of the plaintiff's accident.” (R. 140). Jones refused to see a doctor at the time of the accident and did not see a doctor until the following day. He returned to work just days later. (R. 110-12).

**E. Barred from Filing a Negligence Action Against his Employer After Collecting Worker's Compensation Benefits, Jones Files a Negligence Action Against ABCD.**

Jones filed for and received worker's compensation benefits. (R. 10, ¶ 5). Prohibited from filing suit against his employer, Jones brought a negligence claim against ABCD in the Supreme Court, New York County. (R. 17-21).

**F. After Substantial Discovery, ABCD Files a Motion for Summary Judgment on the Basis that It is an Out-of-Possession Landlord, who is not Liable for Injuries Allegedly Sustained by Jones as a Result of Its Tenant's Negligence.**

ABCD filed a motion for summary judgment asserting that it was not liable as a matter of law because it did not have possession or control of the property, had no knowledge of the design or building of the staircase, lacked notice of the alleged defects, and, in any event, did not have a right or duty of repair. (R. 10-12). ABCD offered proof that it did not retain a right or duty of repair and that the provision upon which Jones relied – section 3.07 of the lease – was not effective at the time of the accident and only applied when and if Smith defaulted. (R. 143, ¶ 3). In fact, the lease made it abundantly clear that Smith had sole responsibility for repairs, including structural repairs, both inside and outside of the restaurant. (R. 143, ¶ 3). Moreover, both the affirmation of ABCD counsel and Smith's supervisor's deposition testimony revealed that ABCD had no involvement in the

design and the construction of the stairwell, which occurred after Smith assumed possession of the property and two months before Jones's alleged fall. (R. 11, ¶ 7; R. 103-105; R. 144, ¶ 4).

Jones opposed ABCD motion and filed a cross-motion for summary judgment claiming that ABCD was liable as an owner and landlord because (1) it had a contractual right to re-enter, inspect, and make needed repairs at the tenant's expenses and (2) liability is based on a significant structural or design defect that is contrary to a specific statutory or regulatory safety provision. (R. 132). Jones argued that ABCD committed negligence per se because it had a duty under the Administrative Code section 27-375(f) to install handrails on the stairway. (R. 134-136). Jones also claimed in the court below that under default provisions in the operator's lease, ABCD had a contractual right to make repairs. (R. 132-134). In opposition to Jones's cross-motion for summary judgment, ABCD argued that a fact question existed regarding proximate cause. (R. 146, ¶ 8). When asked what caused him to fall, Jones stated "I suppose that it was because the stair was wet because when those stairs get wet, they immediately are very slippery." (R. 148, 156).

**G. The Lower Court Granted ABCD Motion for Summary Judgment and Dismissed the Complaint after Concluding that ABCD, an Out-of-Possession Landlord, was not Liable as a Matter of Law.**

The lower court granted ABCD motion for summary judgment, denied Jones's cross-motion for summary judgment, and dismissed the complaint. (R. 5). The court concluded that ABCD was not liable as a matter of law because "defendant was and is an out of

possession landlord and franchisor to plaintiff's employer, the tenant and franchisee, and the employer caused the staircase at issue to be built....” (R. 5).

## ARGUMENT

### Standard of Review

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574, 508 N.Y.S.2d 923 (1986); accord *Greenidge v. HRH Construction Corp.*, 2001 WL 59446, \*2 (1st Dep’t 2001). The burden then shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Alvarez*, 68 N.Y.2d at 324.

#### **I. THE LOWER COURT PROPERLY DISMISSED JONES’S COMPLAINT BECAUSE ABCD, AN OUT-OF-POSSESSION LANDLORD, CANNOT BE HELD LIABLE ON A NEGLIGENCE CLAIM WHERE Jones FAILED TO PROVE THAT ABCD EITHER HAD A CONTRACTUAL DUTY OF REPAIR OR RETAINED A RIGHT OF RE-ENTRY FOR PURPOSES OF REPAIR.**

The lower court correctly granted summary judgment in ABCD favor because it cannot be held liable for its tenant’s negligence as an out-of-possession landlord who relinquished all control over the premises other than a general right of inspection. Contrary to Jones’s assertion, ABCD did not reserve a right to re-entry for maintenance and repair and

lacked actual or constructive notice of the alleged defect. ABCD only retained a right of inspection in order to protect its trademark. If Smith's restaurant served an inferior product, delivered poor-quality service, or abused its license, ABCD name and reputation, as well as the reputation of its other licensees, would be adversely affected. In the absence of actual or constructive notice, however, ABCD retained a right of inspection to protect its trademark, reputation, and name does not render it absolutely liable for the allegedly defective stairwell on which Smith's employee fell. Smith, and not ABCD, was responsible for all repairs, including structural repairs. Smith designed, built, and paid for the stairwell after he assumed possession of the property. ABCD did not participate in the building of the stairwell, nor was it aware of the stairwell's allegedly defective condition. It is undisputed that ABCD agents never saw the staircase and confined their inspections to the "customer experience" and common areas. In the absence of a duty of repair and notice of any defect under the New York City Building Code, ABCD is not liable as a matter of law.

**A. ABCD was not Liable as an Out-of-Possession Landlord because It Did Not have a Contractual Duty nor a Right of Repair.**

The lower court correctly granted summary judgment in ABCD favor. It is well-settled law that an out-of-possession landlord can only be held liable for injuries sustained on its premises if it retains a duty to repair or a right of re-entry for the purposes of making repairs and all other elements of a negligence claim such as the existence of a dangerous condition, breach of duty of care to the plaintiff, proximate cause, and damages are present. *See Schoenwandt v. Jamfro Corp.*, 261 A.D.2d 117, 689 N.Y.S.2d 461 (1st Dep't 1999);

*Dalzell v. ABCD Corp.*, 220 A.D.2d 638, 632 N.Y.S.2d 635 (2d Dep't 1995), *leave to appeal denied*, 88 N.Y.2d 815, 673 N.E.2d 1244, 651 N.Y.S.2d 17 (1996). In *Dalzell*, the plaintiff, an employee of a ABCD franchisee, was sexually assaulted during the course of an armed robbery at a ABCD restaurant owned by the franchisee, W & K Management. The plaintiff brought a negligence action against ABCD for its alleged failure to install and maintain a security system or security program. *Id.* At 638-39. The lower court granted summary judgment in ABCD favor and the Appellate Division affirmed, concluding that ABCD was not liable as an out-of-possession landlord who had no duty of repair:

[T]he lease and licensing agreements required W & K Management [the lessee] to maintain the premises and to make all necessary repairs. The defendant's reservation of a right to enter and to inspect the premises is insufficient to impose liability on the defendant. Moreover, there was no evidence that the defendant had retained a sufficient degree of dominion and control over the leased premises to provide a basis for the imposition of liability. Finally, there is no evidence of any affirmative conduct on the part of the defendant which would show that it had assumed a duty of care toward the plaintiff.

*Dalzell*, 220 A.D.2d at 639 (internal citations omitted). Citing *Dalzell*, this Court reached the same conclusion in *Schoenwandt* that a franchisor's right to re-enter the premises is insufficient to trigger liability for injuries arising from a franchisee's negligence. *See Schoenwandt*, 261 A.D.2d at 117. In that case, this Court reversed the lower court's denial of Burger King Corporation's motion for summary judgment:

Defendant BKC should have been granted summary judgment. The record shows the relationship between BKC and defendant Jamfro Corporation to be merely franchisor-franchisee, and there is no showing of the existence of a parent-subsidary relationship, let alone of the means by which BKC

purportedly exercised the complete domination and control of Jamfro's daily operations or how such control resulted in Plaintiff's injury. BKC surrendered control of the premises over 15 years prior to the occurrence that resulted in plaintiff's claim. The suggestion that certain terms of the subject franchise agreement, such as BKC's right to terminate the agreement if it disapproved of the franchisee's conduct or its right to re-enter the premises, provide a basis for imposing liability on BKC is without merit.

*Id.* at 461-62; *see also Jones v. Bartlett*, 275 A.D.2d 956, 713 N.Y.S.2d 407, 408 (4th Dep't 2000) ("the retention by defendant...lessor of the right to inspect the premises is insufficient to raise a question of fact on this issue"). Thus, to be held liable as an out-of-possession landlord, ABCD must have retained both a right of re-entry and a right of repair, in addition to the necessary elements of a defective condition on the premises, a breach of a duty of care to the plaintiff, proximate cause, and damages.

Here, the franchise agreement, lease and license agreement between ABCD and Smith undisputably shows that Smith, and not ABCD, was responsible for all repairs.

- Smith alone was responsible for "the maintenance of the Restaurant and its equipment and furnishing in good repair." (Franchise Agreement - R. 51).
- Smith, and not ABCD, is responsible for "mak[ing] repairs or replacements required because of damage, wear and tear, or in order to maintain the Restaurant building and parking area in good condition and in conformity to blueprints and plans." Smith also agreed to "comply with all federal, state and local laws, ordinances and regulations affecting the operation of the Restaurant." (R. 59, § 12 (k)). (License Agreement - R. 59, § 12(e)).

- Smith, at his own expense, is obligated to “keep the entire Premises, all improvements, utility lines and Lessee’s or Lessor’s fixtures and equipment at all times in good repair.” (Lease Agreement - R. 74, § 4.02).

It is clear from the parties’ contractual relationship that Smith, and not ABCD, was responsible for any repairs of defects on the premises. Smith hired and paid the construction company for replacing the basement stairs and never consulted ABCD. (R. 99, 100, 103-04, 119). Smith’s supervisor Carmen Paulino testified in an examination before trial that Smith did not contact ABCD about the replacement of the stairwell because “[i]t wasn’t anything that have to do with them [ABCD].” (R. 104). In the absence of a duty or right of repair, the lower court properly granted ABCD motion for summary judgment in accordance with *Schoenwandt* and *Dalzell*.

Jones’s argument that ABCD retained a right of repair in its contracts with Smith is baseless. Jones failed his burden of offering evidence of a material issue of fact to counter ABCD evidence that it relinquished all control to Smith with the exception of a general right of inspection to protect its trademark. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574, 508 N.Y.S.2d 923 (1986); accord *Greenidge v. HRH Construction Corp.*, 2001 WL 59446, \*2 (1st Dep’t 2001). Jones’s argument that default provisions found in the lease granted ABCD a right of repair lacks merit. (Appellant’s Brief pp. 3-4, citing R. 74, § 3.07). At the time of the alleged accident, Smith was not in default and ABCD did not have the right to enter and make repairs under the default provisions.

Jones's argument that ABCD had a right of repair under section 7.09 of the lease is equally baseless because it cannot be raised for the first time on appeal. Section 7.09 states "if Lessee [Smith] should fail to perform any of its obligations under the provisions of this Lease, Lessor, at its option, may (but shall not be required to) do the same or cause same to be done." (Appellant's Brief pp. 2-3, citing R. 78, § 7.09). "On a motion for summary judgment, even one brought pursuant to CPLR 3211, the court's consideration is limited to the grounds stated in the moving papers." *Tortorello v. Carlin*, 260 A.D.2d 201, 205, 688 N.Y.S.2d 64, 68 (1st Dep't 1999). By failing to raise the issue before the lower court for its consideration, Jones failed to preserve his claim for appeal. In the past, this Court has affirmed the granting of summary judgment against a plaintiff, rejecting the plaintiff's theories raised below and refusing to consider new theories raised for the first time on appeal. *International Merchandise Group Americas, Inc. v. Segerman Int'l Inc.*, \_\_\_ A.D.2d \_\_\_, 717 N.Y.S.2d 126 (1st Dep't 2000) (affirming summary judgment against plaintiff where plaintiff argued before the lower court that it complied with the letter of credit at issue and only raised theory of substantial performance for the first time on appeal). Jones never argued below that section 7.09 of the lease established ABCD right of repair, instead relying exclusively upon section 3.07 in opposing ABCD motion for summary judgment. (R. 132-134). Thus, Jones's attack on the lower court's decision on the basis of section 7.09 is unwarranted when he never presented this argument to the lower court and has failed to

preserve his claim for appeal. In any event, even if Jones had raised section 7.09 below, this vague provision does not establish that ABCD retained a right of repair.

This Court's decision in *Schoenwandt* and the decision in *Dalzell* are consistent with the well-settled view that the possessor, rather than the owner, of property is responsible for damages arising from defects on the premises because the possessor, rather than the absent owner, is in the best position to remedy defects. *See Putnam v. Sout*, 38 N.Y.2d 607, 345 N.E.2d 319, 381 N.Y.S.2d 848 (1976). In *Putnam*, the Court of Appeals first adopted the rule of the Restatement (Second) of Torts, holding that despite the general rule that an out-of-possession landlord or owner is not liable for damages arising from injuries on the premises, "a landlord may be liable for injuries to persons coming onto his land with the consent of his lessee ... on the basis of his contract or covenant to keep the premises in repair." *Id.* at 618.

A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and (c) the lessor fails to exercise reasonable care to perform his contract.

Restatement, Torts 2d., § 357. ABCD was not in a position to remedy the alleged defect, having relinquished all control over the premises to its franchisee, Smith, with the exception of the right of inspection to protect ABCD trademark and to conduct quality checks on the service and product. Jones's attempt to sue ABCD for Smith's negligence in failing to have

handrails installed on a stairwell for which he paid and contracted is a misguided attempt to recover a tort judgment in addition to worker's compensation payments from his negligent employer.<sup>1</sup>

It is unreasonable to hold ABCD liable for damages arising from alleged defects in a staircase built at the direction of ABCD tenant. Smith was an independent contractor “responsible for ... all claims or demands based on damage or destruction of property or based on injury, illness or death of any person or persons, directly or indirectly, resulting from the operation of the Restaurant.” (R. 61, § 16; R. 79, § 8.01). ABCD was unaware of the alleged stairwell defects and only conducted quality inspections of those aspects of the restaurant that touched upon customer satisfaction and ABCD trademark. (R. 22). The inspectors never used the stairs or observed deliveries. (R. 97-98, 125). Smith's supervisor, Sara Parker, testified at a deposition that “[t]hey don't go into any area unless they feel a need to do something for whatever reason, but they wouldn't go as far as checking the stairs and stuff like that.” (R. 123).

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<sup>1</sup>By filing suit against ABCD for injuries arising from Smith's alleged negligence, Jones attempts to circumvent the Worker's Compensation Law. “The sole and exclusive remedy of an employee against his employer for injuries in the course of employment is compensation benefits.” *Gonzalez v. ARMAC Industries, Ltd.*, 81 N.Y.2d 1, 8, 611 N.E.2d 261, 264, 595 N.Y.S.2d 360, 363 (1993).

**B. The Alleged Violation of New York City’s Administrative Code Section 27-375 Does Not Dispense with the Requirement that ABCD Have Notice of and the Ability to Repair the Claimed Defect.**

The lower court properly granted summary judgment in ABCD favor, notwithstanding the alleged violation of the New York City’s Administrative Code section 27-375,<sup>2</sup> because ABCD lacked notice of the alleged defect. The Administrative Code, a codification of local ordinances, does not create an independent statutory cause of action, nor does a breach of the Administrative Code support a claim for negligence per se. Violation of an ordinance is merely evidence of negligence and not a basis for negligence per se. *See Velazquez v. Tyler Graphics*, 214 A.D.2d 489, 490, 625 N.Y.S.2d 537 (1st Dep’t 1995). The Court of Appeals acknowledged in *Guzman* that although the codification of ordinances in the Administrative Code has the force of statute, it was uncertain whether courts would treat the Administrative Code as a state legislative enactment giving rise to a claim of negligence per se. *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559, 644, 509 N.E.2d 51, 516 N.Y.S.2d 451 (1987); *Nielson v. City of N.Y.*, 38 A.D.2d 592, 593, 328 N.Y.S.2d 698 (2d Dep’t 1971), *leave to appeal dismissed* 30 N.Y.2d 568, 281 N.E.2d 837, 330 N.Y.S.2d 787 (1972). In fact, the Administrative Code specifically provides that “any provision of this chapter may be superseded, supplemented or amended by local law in the same manner and to the same extent as such provisions could be superseded, supplemented or amended had

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<sup>2</sup>Section 27-375 provides in pertinent part that “[s]tairs shall have walls, grilles, or guards at the sides and shall have handrails on both sides, except that stairs less than forty-four inches wide may have a handrail on one side only.” N.Y.C. Code § 27-375 (f).

this chapter not been enacted.” N.Y.C. Code § 1-103. Thus, notwithstanding an alleged breach of the New York City Administrative Code, a plaintiff must prove all elements of a negligence claim, including notice.

Because ABCD only retained a right of re-entry to inspect food quality and delivery of services in protection of its trademark and did not retain a right of repair, ABCD is not liable for injuries to Jones caused by Smith’s negligence. “[I]n order to recover damages, a party must establish that the landlord created or had actual or constructive notice of the hazardous condition which precipitated the injury.” *Pappalardo v. New York Health & Racquet Club*, \_\_\_ A.D.2d \_\_\_, 718 N.Y.S.2d 287, 292 (1st Dep’t 2000). This Court has repeatedly held that a landlord/owner is not liable and does not have notice of a violation of a specific section of the Administrative Code unless the landlord retained a right of entry for inspection and maintenance and repair. *Manning v. New York Tel. Co.*, 157 A.D.2d 264, 269, 555 N.Y.S.2d 720 (1st Dep’t 1990) (“Under the language of Guzman, the reservation of a right to re-enter, inspect and make repairs, even without a duty to do so, may subject a landlord to liability in commercial premises covered by the New York City Administrative Code.”); *accord Pappalardo*, 718 N.Y.S.2d at 292; *Nameny v. East N.Y. Savings Bank*, 267 A.D.2d 108, 109, 699 N.Y.S.2d 412 (1st Dep’t 1999); *Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325, 642, N.Y.S.2d 897, 898 (1st Dep’t), *leave to appeal denied*, 88 N.Y.2d 814, 673 N.E.2d 1243, 651 N.Y.S.2d 16 (1996); *Quinones v. 27 Third City King Restaurant, Inc.*, 198 A.D.2d 23, 23, 603 N.Y.S.2d 130 (1st Dep’t 1993); *Levy v. Daitz*, 196 A.D.2d 454, 455, 601

N.Y.S.2d 294 (1st Dep't 1993); *Garcia v. Dormitory Auth.*, 195 A.D.2d 288, 288, 599 N.Y.S.2d 600 (1st Dep't 1993). In *Manning*, this Court refused to hold an out-of-possession landlord liable and characterized the *Guzman* holding as “deal[ing] with significant structural and/or design defects involving specific Code violations which the landlord had ample opportunity to discover and repair.” (emphasis added). It is clear that a statutory violation is insufficient to trigger an out-of-possession landlord’s liability where the landlord does not retain a right of repair and, thus, does not have constructive notice of the defect. Here, although ABCD did retain a right of inspection to protect its trademark and to preserve the quality of the services and product, it did not retain a right to re-enter and make repairs absent a default. (R. 74, § 3.07 (g) & (p); R. 77, § 7.01). Under the lease and license agreements, Smith, rather than ABCD, had the duty to make all repairs to the premises. (R. 51; R. 59, §§ 12(e) & (k); R. 74, § 4.02).

The Court of Appeal’s decisions upon which Jones relies on pages 7 through 9 of his brief are distinguishable. See *Guzman v. Haven Plaza Housing Development Fund, Co.*, 69 N.Y.2d 559, 565, 516 N.Y.S.2d 451, 509 N.E.2d 51 (1987); *Worth Distributors v. Latham*, 59 N.Y.2d 231, 451 N.E.2d 193, 464 N.Y.S.2d 435 (1983); *Tkach v. Montefiore Hosp.*, 289 N.Y. 387 (1943). Jones’s claim that ABCD “right to re-enter the premises is sufficient to charge it with constructive notice” ignores the facts underlying the Court of Appeal’s decisions in *Guzman* and *Latham* and neglects the necessary inquiry into the purpose of the right of re-entry. (Appellant’s Brief p. 8). In *Guzman*, the owner of the building retained

both a right of inspection and a right of repair, thereby leading to a finding of constructive notice of the defective stairwell. *Id.* Likewise, in *Latham*, the Court of Appeals affirmed a finding of liability against an out-of-possession landlord for the collapse of a building caused by its failure to repair a cracking support wall in violation of New York Multiple Dwelling Law § 78 only after concluding that (1) the landlord retained a right of re-entry and a right of repair (absent in this case) and (2) the landlord had actual and constructive notice of the defect (also absent in this case). *Id.* at 238. Contrary to Jones's assertions, neither case involved a limited right of re-entry for the sole purpose of inspection for trademark protection and compliance, as in this case.

Moreover, the decision in *Tkach*, decided over half a century ago, is also distinguishable because it also did not concern a limited right of re-entry by a franchisor to protect its trademark, name, and reputation. Jones overreaches by claiming that the right of re-entry for inspection in an average landlord/tenant lease is comparable to the right of re-entry for inspection retained by franchisors in order to protect the integrity of their trademarks. For example, if ABCD did not retain a right of inspection, it could risk trademark appropriation or even damage to its name and reputation if the franchisee did not comply with food quality and service standards. It is unreasonable to hold a franchisor responsible for injuries occurring on the premises on the basis of a limited right of inspection for protection of its trademark, name, and reputation. At the time it decided *Tkach*, the Court of Appeals could not have possibly contemplated the subsequent

proliferation of franchises across America and the benefits that consumers reap as a result. Holding franchisors liable as out-of-possession landlords for the negligence of their tenants to workers who collect worker's compensation benefits will punish the wrong party with crushing liability. Such broad liability does not advance the tort principle of placing liability on the party who is in the best position to remedy the defect. Moreover, as franchisors must retain a right of re-entry to protect their trademarks, all franchisors would face unlimited liability for the negligence of others, the costs of which would be passed on to equally-innocent consumers through higher prices.

In addition to overstating the decisions in *Guzman*, *Latham*, and *Tkach*, Jones erroneously asserts that "it has been specifically held that an out of possession owner may be liable for violations of the Administrative Code which involves [sic] a significant structural mandate, provided it has a right of entry. (Appellant's Brief pp. 9-10). Jones ignores the necessary inquiry into the purpose of the right of re-entry. A limited right of re-entry to inspect for trademark protection is insufficient in the absence of a right of re-entry for purposes of repair or maintenance. Contrary to Jones's mischaracterization, the majority of the cases that he cites merely reiterate the *Guzman* rule requiring a right of entry and a right to make repairs prior to a finding of constructive notice in cases involving violations of statutes or ordinances. *See Manning v. New York Tel. Co.*, 157 A.D.2d 264, 269, 555 N.Y.S.2d 720 (1st Dep't 1990) ("the reservation of a right to re-enter inspect and make repairs, even without a duty to do so, may subject a landlord to liability in commercial

premises covered by the Administrative Code of the City of New York.”); accord *Velazquez v. Tyler Graphics, Ltd.*, 214 A.D.2d 489, 489, 625 N.Y.S.2d 537 (1st Dep’t 1995); *Quinones v. 27 Third City King Restaurant, Inc.*, 198 A.D.2d 23, 603 N.Y.S.2d 130 (1st Dept. 1993); *Levy v. Daitz*, 196 A.D.2d 454, 455, 601 N.Y.S.2d 294 (1st Dep’t 1993); *Hilaire v. Stanley Mgmt. Co.*, 229 A.D.2d 423, 644 N.Y.S.2d 518 (2d Dep’t 1996).

Moreover, the Second Department cases which Jones cites, which are not binding on this Court, improperly broaden the Court of Appeal’s decision in *Guzman*, which concerned a right of re-entry for purposes of inspection and repair, by neglecting an analysis of the purpose of the right of re-entry. See *Dorestant v. Snow, Inc.*, 274 A.D.2d 542, 712 N.Y.S.2d 131 (2d Dep’t 2000); *Davis v. New York City Housing Auth.*, 272 A.D.2d 365, 707 N.Y.S.2d 212 (2d Dep’t 2000); *Escobar v. New York City*, 248 A.D.2d 667, 670 N.Y.S.2d 322 (2d Dep’t 1998).

Finally, the decisions in *Elliott v. City of New York*, 267 A.D.2d 62, 699 N.Y.S.2d 395 (1st Dep’t 1999), *leave to appeal granted*, 95 N.Y.2d 759, 737 N.E.2d 951, 714 N.Y.S.2d 709 (2000); *Santiago v. Port Authority of New York and New Jersey*, 203 A.D.2d 217, 217, 611 N.Y.S.2d 174 (1st Dep’t), *leave to appeal denied*, 84 N.Y.2d 807, 645 N.E.2d 1216, 621 N.Y.S.2d 516 (1994), and *Brooks v. Dupon Associates, Inc.*, 164 A.D.2d 847, 849, 559 N.Y.S.2d 733 (1st Dep’t 1990) are not instructive as these decisions do not even discuss whether the plaintiff in the case retained a right of entry or right of repair. Jones’s

arguments on appeal fail, and the lower court's dismissal of the complaint should be affirmed.

## **CONCLUSION**

For the foregoing reasons, Respondent respectfully requests this Court affirm the order of the Supreme Court, New York County, dated February 1, 2000, in its entirety with costs, along with such other and further relief to Respondent this Court deems just and proper.

Dated:           New York, New York  
                    February 22, 20xx

RESPECTFULLY SUBMITTED,

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