PUBLICATION

Landlord Liability on the Rise as a Result of Negligent Oversight of Construction and Design

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Summary: *In Geringer v. Hartz Mountain Development Corporation,[1] the Superior Court of New Jersey held that while a landlord owed no duty to maintain or repair a stairway within the tenant's leased space when the lease expressly delegates such responsibility upon the tenant, the landlord did owe a non-delegable duty of care in approving the design and construction of the stairway when no construction could proceed without the landlord's review and approval of the tenant's plans and specifications.*

Whenever a landlord negotiates a lease with a tenant, the terms of which require the tenant to provide the construction of leasehold improvements, whether of an entire building or interior finish out, it has been traditional for the landlord to retain the right to approve the architectural plans and specifications as well as the right to inspect from time to time to determine that construction is being installed in accordance with such plans. We've seen many different variations of those retained rights. The Geringer decision is a troubling case and every landlord should be aware of its potential far reaching ramifications.

The Geringer Decision: In *Geringer*, plaintiff Geringer was injured when she fell on an interior stairway within an office building owned by defendant Hartz Mountain Development Corporation (Hartz). The plaintiff was an employee of the tenant, Metropolitan Life Insurance Company (Metlife), which, through a triplenet lease, leased the entire seventh floor from Hartz on which the accident took place. Metlife built the stairway in connection with the installation of tenant improvements on the seventh floor and hired its own architect and contractor to design and construct the stairway. As required by the lease between Hartz and Metlife, the plans and specifications were submitted to and approved by Hartz through its vice president of property management who performed “walk through” inspections of the work throughout construction. The lease delegated liability for maintenance and repair to the tenant. Furthermore, the lease delegated to the tenant liability for complying with building codes and legal requirements in connection with construction.

An examination of the issue of duty, as framed by the court, is vital in understanding the court's holding, for it was through the lens of precedent that the court focused its analysis. The court noted that four factors influence the finding of a duty of care and in language taken directly from *Hopkins v. Fox & Lazo Realtors*,[2] the court stated that "whether a duty is owed to a person injured on the premises and the extent of that duty, turns upon a multiplicity of factors, including a consideration of the relationship of the parties, the nature of the attendant risk, defendant's opportunity and ability to exercise reasonable care and the public interest in the proposed solution.”[3] After setting the parameters for discussion, the court set out to address: (1) whether Hartz owed a duty to repair or maintain the stairway; and (2)whether Hartz owed a duty of care in approving design and construction of the stairway.

The court had “no hesitation” in holding that Hartz “owed no duty to maintain or repair the interior stairway,” since the “lease confers that responsibility on Metlife.”[4] The court added that “such a result comports with the factors identified in Hopkins” and could find no public interest indicating a justification to hold otherwise.[5] The court reached “a different conclusion, however, as to plaintiff's separate allegation that the stairway was defectively designed and built in the first place.”[6] Unlike the lease provisions regarding maintenance and repair, the provisions regarding design and construction required Hartz's review and approval of plans and specifications.

The court acknowledged that the triplenet lease recited that approval by Hartz of design and construction did not "diminish [the] [t]enant's responsibility" for such work. However, the court stated that these disclaimers should not absolve Hartz of its duty under tort common law to assure that its own conduct in review and approval "reasonably adhered to sound principles of safety." [7] Moreover, the court noted that Hartz's property manager encouraged MetLife to use several of Hartz's in-house subcontractors, thus magnifying Hartz's role in the design and construction process.[8] In incorporating the *Hopkins* factors, the court stated that "Hartz kept its hand in the design and construction phase of the project, thereby providing it with both the 'opportunity and ability to exercise reasonable care' in how the stairway was built."[9]

The *Geringer* court did not find that Hartz had an ongoing duty to perform inspections of the stairway during Metlife's occupancy of the premises. Again, however, the court did find that Hartz was obligated to have "acted reasonably in reviewing the plans and specifications for the stairway before it was built, and in the 'walk through' inspections that it chose to perform before the floor was occupied."[10] The court found that these duties were "harmonious with the landlord-tenant relationship of [the] particular parties and also with the general considerations of premises liability set forth in Hopkins."[11]

The Aftermath of Geringer: Only one court, the Superior Court of New Jersey, has cited the Geringer decision but has treated the holding positively. In *Espinal v. 60 Cedar Lane, LLC*,[12] the plaintiff sued her employee's landlord after being struck by a coworker's vehicle just outside the company building. The basis of her action rested upon a "design theory" in which she alleged that given the design of the parking lot, the landlord had a duty to install pedestrian barriers in the area in front of the personnel entrance.[13] Like *Geringer*, the landlord and tenant had agreed to a triple net lease. Unlike *Geringer*, however, the landlord did not participate in any way in the construction or design of the building, but instead purchased the building from another party.[14] Citing *Geringer*, the court stated that "liability based upon a design defect remains a viable theory of liability notwithstanding the triple net lease."[15] However, since the landlord had no involvement in the design or construction of the premises, the court held the design theory to be inapplicable.[16]

Commentary: Thus, at least in New Jersey, it appears that the landlord who oversees a tenant's design and construction may find itself in a predicament—while the landlord certainly has an interest in oversight, it also must remember that with the power of oversight comes responsibility and ultimately possible liability for injuries that result from negligent design or construction.

One option may be for the landlord not to provide for the right to review the proposed construction, particularly when the landlord trusts the builder or when the project is a minor one. While this option runs counter to the landlord's interests in oversight, it may preclude a finding of landlord liability for negligent construction and design. Alternatively, a more expensive option would be to carefully scrutinize the design and construction of the project, as well as inspect it from time to time in order to eliminate the possibility of injury. In either situation, the landlord must remember that while it may not have a duty to review the design and construction, in exercising the right of such review, the landlord may become liable for its negligence.

Finally, a third option exists which was not considered by the *Geringer* decision. One could expressly specify in the lease that oversight of construction and design is conducted purely in the interest of assuring harmony with existing structures rather than in the interest of preventing injury. A clause of this nature may avoid liability for injuries arising from negligence, since the clause specifies that the landlord seeks approval of design and construction only in the interests of congruence. On the other hand, this type of clause does not seem to comport with reality, as in most instances a landlord will insist that an improvement be properly built.

In any event, it is clear that a party to a lease may not disclaim liability for injury arising from its negligence to third parties.[17] Thus, if a lease simply states that a landlord must approve a tenant's design and construction, under the principles addressed in *Geringer*, the landlord may be held liable for injuries arising from its

negligence. While one can seek indemnification from the other party to a lease, the lease should not permit a negligent party from avoiding its duty of care to prospective third party victims of its negligence.[18] It is presently unclear whether the *Geringer* case will prove to be an anomalous decision confined to New Jersey or a forerunner of decisions to come in other jurisdictions; however, regardless of the future reach of the *Geringer* decision, landlords would be wise to immediately upgrade their leases in congruence with its reasoning and policy.

We have offices in Alabama, Georgia, Louisiana, Mississippi, and Tennessee. Our lawyers in each of these states are well-versed in the ever-changing status of the landlord/tenant laws in their respective jurisdictions. We urge you to call us at the inception of any proposed construction either within an existing structure or for a new building. Again, it is particularly important that landlords revamp their leases in accordance with changes in the law and we will be happy to assist you in the review or preparation of your new or existing lease.

1. 908 A.2d 837 (N.J. Super. 2006).
2. 625 A.2d 1110 (N.J. 1993).
3. *Geringer*, 908 A.2d at 842.
4. *Id*. at 843.
5. *Id*. at 843-44.
6. *Id*.
7. *Id*. at 844.
8. *Id*.
9. *Id*. at 845 (quoting *Hopkins* at 1116).
10. *Id*. at 845.
11. *Id*.
12. 2007 WL 93218, *1 (N.J. Super. 2007).
13. *Id*.
14. *Id*. at *2.
15. *Id*. at *3.
16. *Id*.
17. See Randolph Jr., Patrick, Dirt Daily Development January 12, 2007, (comment 4).
18. *Id*.