IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

SHARRON GAMMON STARKS, individually as the mother of Christopher Starks and as administrator on behalf of the estate of Christopher Starks, and WILLIE STARKS, individually as the father of Christopher Starks,	)	
Plaintiffs,	)	
	)	CIVIL ACTION FILE
v.	)	NO. 16EV004950H
USG REAL ESTATE FOUNDATION III, LLC,	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the court on the motion for summary judgment filed by Defendant USG Real Estate Foundation III, LLC ("USG").[1] The court held a hearing on this matter on February 20, 2020. Having considered the entire record and oral argument of the parties, the court finds as follows:

Plaintiffs Sharron Starks and Willie Starks filed this action on October 26, 2016. Plaintiffs allege that their son, Christopher Starks, was shot and killed by an unknown assailant in the student union building of Savannah State University on August 27, 2015. Christopher Starks was a student at Savannah State University at the time of the shooting. Plaintiffs allege that USG owned and managed the student union building where Christopher Starks was shot. Plaintiffs plead claims for premises liability and nuisance. USG filed its motion for summary judgment on August 9, 2019, which Plaintiffs oppose.

"Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Ridley v. Sovereign Solutions, LLC*, 315 Ga. App. 237, 237 (2012) (quoting O.C.G.A. § 9-11-56(c)). A moving party may meet its burden by showing that the documents, affidavits, depositions, and other evidence in the record reveal that there is no evidence sufficient to create a

[1] On May 24, 2017, Plaintiffs filed a first amended complaint purporting to add as party defendants University System of Georgia Foundation, Inc. and USGREF Manager, LLC. Plaintiffs failed to obtain leave of court to add those parties; therefore, those parties are not properly before this court. *See, e.g., La Mara X, Inc. v. Baden*, 340 Ga. App. 592, 594 (2017) ("an amendment to a complaint adding a new party without first obtaining leave of the court is without effect"). Accordingly, the court considers the instant motion only with respect to claims pled against USG.

jury issue on at least one essential element of the non-moving party's case. *See Lau's Corp., Inc. v. Haskins*, 261 Ga. 491 (1991). "So, to prevail on a motion for summary judgment, the moving party must show that there is no genuine dispute as to a specific material fact and that this specific fact is enough, regardless of any other facts in the case, to entitle the moving party to judgment as a matter of law." *Wellons, Inc. v. Langboard, Inc.*, 315 Ga. App. 183, 184 (2012) (citation omitted). A defendant who will not bear the burden of proof at trial can demonstrate that there is no genuine issue of material fact

> by either presenting evidence negating an essential element of the plaintiff's claims or establishing from the record an absence of evidence to support such claims. Thus, the rule with regard to summary judgment is that a defendant … need not affirmatively disprove the nonmoving party's case, but may point out by reference to the evidence in the record that there is an absence of evidence to support any essential element of the nonmoving party's case. Where a defendant moving for summary judgment discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue.

Law v. BioLab, Inc., 325 Ga. App. 500, 500-01 (2013) (quoting *Cowart v. Widener*, 287 Ga. 622, 623-624 (2010)). In considering a motion for summary judgment, the court must "view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant." *Season All Flower Shop, Inc. v. Rorie*, 323 Ga. App. 529 (2013) (citation omitted). "The cardinal rule of summary judgment procedure is that the court can neither resolve facts nor reconcile the issues, but can only determine if there is an issue." *Fowler v. Smith*, 237 Ga. App. 841, 844 (1999) (citations omitted).

USG acknowledges that it owns the student union building where Christopher Starks was shot. However, USG contends that it cannot be held liable because it is an out-of-possession owner/landlord.

Property owners can be liable to invitees injured by unsafe or hazardous premises.

> Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.

O.C.G.A. § 51-3-1. Moreover, under certain circumstances, property owners may be liable where an invitee is injured as a result of criminal conduct on the premises. *See, e.g., Walker v. Aderhold Props., Inc.*, 303 Ga. App. 710, 712 (2010) ("The general rule is that [a property owner] is not an ensurer of his [invitees'] safety; however, [property owners] do have a duty to exercise ordinary care to prevent foreseeable third-party criminal attacks upon [invitees]."); *accord Martin v. Six Flags Over Georgia II, L.P.*, 301 Ga. 323, 328 (2017); *Lau's Corp. v. Haskins*, 261 Ga. 491, 492 (1991); *Bolton v. Golden Business, Inc.*, 348 Ga. App. 761, 762 (2019) ("An intervening criminal act by a third party generally insulates the landowner from liability unless such criminal act was reasonably foreseeable. Thus, a landowner only has a duty

to exercise ordinary care to guard against injury from dangerous characters when it has reason to anticipate a criminal act." (citations and punctuation omitted)).

However, owners who have fully parted with possession of the premises are subject to a different rule.

> Having fully parted with possession and the right of possession, the landlord is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; provided, however, the landlord is responsible for damages arising from defective construction or for damages arising from the failure to keep the premises in repair.[2]

O.C.G.A. § 44-7-14; *see also Boone v. Udoto*, 323 Ga. App. 482, 486 (2013) ("Landlords who fully part with possession and the right of possession of the premises are not liable to third parties for damages arising from the tenant's negligence."); *Lake v. APH Enterprises, LLC*, 306 Ga. App. 317, 319 (2010) (same); *Ray v. Smith*, 259 Ga. App. 749, 749 (2003) (same). "In *Colquitt v. Rowland*, 265 Ga. 905, 906 … (1995), the Supreme Court stated that O.C.G.A. § 44-7-14 makes it clear that 'a landlord who relinquishes possession of the premises cannot be liable to third parties for damages arising from the negligence of the tenant.'" *Johnson v. Loy*, 231 Ga. App. 431, 437 (1998).[3]

The parties acknowledge that neither exception to O.C.G.A. § 44-7-14 – defective construction or failure to repair – are applicable here. In addition, the parties agree that USG has fully parted with possession of the student union building and that Savannah State University exclusively possesses and operates the student union. Instead, the question presented is whether USG has fully parted with the right of possession to the premises.

The undisputed evidence of record reflects the following: USG was created in 2010 as a mechanism whereby institutions within the University System of Georgia could finance buildings used for non-academic purposes. USG used money obtained from the issuance of bonds to construct the student union building here at issue. The land on which the building sits is owned by the Board of Regents, which leased the land to USG for a 30-year term. After building the student union facility, USG leased the land and building to the Board of Regents under a rental agreement dated August 12, 2010, which has a 30-year term. Savannah State University, a member institution under the Board of Regents, makes payments to USG pursuant to the rental agreement.

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[2] "The term 'repair' … contemplates an existing structure which has become imperfect, and means to supply in the original structure that which is lost or destroyed, and thereby restore it to the condition in which it originally existed, as near as may be." *Barclay v. Stephenson*, 337 Ga. App. 365, 369 (2016).

[3] These same principles also govern claims for nuisance. *See, e.g., Younger v. Dunagan*, 318 Ga. App. 554, 555 (2012) (holding that O.C.G.A. § 44-7-14 shielded defendant landlord from liability for nuisance resulting from tenant keeping a dangerous dog on the premises); *Asbell v. BP Exploration & Oil*, 230 Ga. App. 700, 708 (1998).

Savannah State University manages and operates the student union. USG has retained no possession of those premises and has minimal rights of entry for purposes of inspection and repair of the premises. "The landlord's retention of the right to inspect the leased premises does not evidence such dominion and control of the premises so as to vitiate landlord's limited liability under O.C.G.A. § 44-7-14 and replace it with the liability imposed by O.C.G.A. § 51-3-1." *Ray v. Smith*, 259 Ga. App. 749, 751 (2003) (citations omitted); *accord Lake*, 306 Ga. App. at 319; *see also Rainey v. 1600 Peachtree*, 255 Ga. App. 299, 300 (2002) ("[N]othing prohibits a landlord of commercial premises from assigning by contract its duty to repair and maintain the premises."). USG does not have any authority to control access to the student union building by Savannah State University or its employees, students, invitees, or others. Further, Savannah State University is the only entity providing security at the student union property and provides such security through the Savannah State University Police Department.

In order to establish that USG maintains a right of possession, Plaintiffs point out that stipulation 21(a) of the lease agreement between USG and the Board of Regents provides as follows:

> **COMPLIANCE WITH LAWS, ORDINANCES AND REGULATIONS.**
>
> Landlord [USG] shall be responsible for compliance with all applicable laws, ordinances, and regulations, including permitting and zoning ordinances and requirements and local and state building codes, life safety codes, security, and the holding of a current and proper certificate of occupancy.[4]

Plaintiffs contend that the reference to "security" in that provision could support an inference that USG has not fully parted with the right of possession of the premises.

USG, on the other hand, contends that this lease provision is limited to security matters only as required by "any applicable law, ordinance, or regulation." By way of example, USG references O.C.G.A. § 44-7-4(a), which provides that "Municipalities and counties may establish by local ordinance minimum security standards not in conflict with applicable fire codes to prevent the unauthorized entry of premises occupied by a tenant as a dwelling place and may require landlords to comply with such standards." The court agrees that the term "security" in the lease provision pertains solely to any security measures required by "applicable laws, ordinances, and regulations."

However, Plaintiffs counter that O.C.G.A. § 51-3-1 is an "applicable law" for purposes of construing stipulation 21(a) of the lease agreement and that said statute imposes on property owners, such as USG, a duty to exercise ordinary care in keeping premises and approaches safe.

In point of fact, O.C.G.A. § 51-3-1 imposes a duty on either the "owner or occupier of land." Nothing in that statute precludes an out-of-possession owner from availing itself of the

[4] Under the lease agreement, the Board of Regents agreed to pay USG additional rent equal to the costs incurred by USG pursuant to Stipulation 21(a).

protection afforded by O.C.G.A. § 44-7-14, leaving the occupier tenant subject to the duty imposed by O.C.G.A. § 51-3-1. Nevertheless, even if USG had agreed to provide security for the premises, whether under stipulation 21(a) of the lease agreement or otherwise, such fact would not controvert the conclusion that USG fully parted with the right of possession as to the premises when it entered into the lease agreement with the Board of Regents. That an out-of-possession landlord provides services to the premises or tenant – such as inspection and repair – does not suffice to show that the landlord has retained a right of possession to the premises.

The decision of *Boone, supra*, is instructive. In *Boone*, the plaintiff was assaulted in the parking lot of a club he was patronizing. The plaintiff sued the club owner and the landlord. The Court of Appeals affirmed the grant of summary judgment to the landowner on the basis of O.C.G.A. § 44-7-14.

> Here, the Club Owners were responsible for maintenance, repair, and replacement, and the landlord had no obligation to repair or maintain. Nevertheless, the landlord did have the right to inspect and enter the premises and could, in its own discretion, increase security at the sole cost of the Club Owners. Such limited rights, however, do not evidence such dominion and control of the premises so as to vitiate the landlord's limited liability imposed by O.C.G.A. § 44-7-14.

Boone, 323 Ga. App. at 487 (citations and punctuation omitted).

In addition, the court finds unpersuasive Plaintiffs' argument that, because USG maintains liability insurance coverage on the premises, it has not fully parted with the right of possession of the premises. USG built the student union building and remains the owner of the premises. Whether USG maintains insurance coverage with respect to its interests in the property does not serve to rebut the facts of record demonstrating that USG has fully ceded possession and right of possession of the premises to Savannah State University.

On this point, *Lake, supra*, is instructive. In *Lake*, the plaintiff was shot by an unknown assailant in a parking lot of a restaurant he was patronizing. Lake sued the landlord and restaurant owner. The trial court granted the landlord summary judgment as the evidence showed that the landlord had leased the premises to the restaurant owner pursuant to an oral lease agreement. Under the parties' agreement, the landlord was responsible for any major repairs to the premises. In addition, the landlord paid property taxes and maintained insurance on the premises. However, the restaurant owner "was responsible for providing security and day-to-day maintenance of the premises, including the parking lot." *Lake*, 306 Ga. App. at 318. The Court of Appeals affirmed, finding that the landlord was an out-of-possession landlord. "[A] landlord's right to inspect is not the equivalent of the right to possess premises, so as to make the landlord liable under O.C.G.A. § 44-7-14. Landlords still fully part with possession of leased premises when they retain limited entry or inspection rights for landlord-related purposes." *Id.* at 319 (citations and punctuation omitted); *accord Sidhi Inv. Corp. v. Thrift*, 336 Ga. App. 617, 619 (2016).

On this record, the court finds that there are no genuine issues of fact with respect to Plaintiffs' claims against USG. USG fully parted with possession and the right of possession to the premises. Therefore, the court hereby **GRANTS** USG's motion for summary judgment. This is a final Order, and this case is now concluded and shall be closed.

SO ORDERED, this 25th day of February, 2020.

/s/ Wesley B. Tailor
Wesley B. Tailor, Judge
State Court of Fulton County