

**Manochio v Kimco Realty Corp.**

2010 NY Slip Op 31043(U)

April 28, 2010

Supreme Court, Richmond County

Docket Number: 102225/05

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

**DCM PART 3**

FRANK MANOCHIO,

**Index No: 102225/05  
Motion No: 3317-005**

*Plaintiff(s),*

*-against-*

**DECISION & ORDER  
HON. JOSEPH J. MALTESE**

KIMCO REALTY CORP., FOX HILL II, INC., and  
PATHMARK STORES, INC.,

*Defendants.*

-----X  
PATHMARK STORES, INC.,

**Index No: A102225/05  
Motion No: 2716-006**

*Third-Party Plaintiff,*

*-against-*

MJ & T CORP. and QUALITY PARKING AREA  
MAINTENANCE,

*Third-Party Defendants.*

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The following papers numbered 1 to 8 were submitted on these motions the 3<sup>rd</sup> day of March, 2010:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant/Third-Party Plaintiff Pathmark Stores, Inc., with Supporting Papers and Exhibits (dated October 14, 2009).....	1
Notice of Motion for Summary Judgment by Third-Party Defendant Quality Parking Area Maintenance, with Supporting Papers and Exhibits (dated November 2, 2009).....	2
Affirmation in Opposition by Plaintiff Frank Manochio, with Exhibits (dated January 4, 2010).....	3
Reply Affirmation by Defendant/Third-Party Plaintiff Pathmark Stores, Inc. (dated January 15, 2010).....	4
Affirmation in Opposition to Third-Party Defendant's Motion for Summary Judgment by Defendant/Third-Party Plaintiff Pathmark Stores, Inc., with Exhibit (dated January 15, 2010).....	5

Reply Affirmation by Third-Party Defendant Quality Parking Area Maintenance (dated February 15, 2010).....	6
Affirmation in Opposition by Defendants Kimco Realty Corp., and Fox Hill II, Inc., with Exhibits (dated February 18, 2010).....	7
Reply Affirmation by Defendant Third-Party Plaintiff Pathmark Stores, Inc., with Exhibit (dated February 24, 2010).....	8

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Upon the foregoing papers, the motions are decided as indicated herein.

Defendant/Third-party plaintiff Pathmark Stores, Inc. (hereinafter “Pathmark”) moves for an order, *inter alia*, granting it (1) summary judgment dismissing the complaint and all cross claims against it, as well as summary judgment in its favor on its cross claims for indemnification against co-defendants Kimco Realty Corp. and Fox Hill II, Inc., and (2) directing these co-defendants to reimburse it for all of the costs and expenses it has incurred in the defense of this action, including attorney fees. Plaintiff Frank Manochio (hereinafter “Plaintiff”) opposes that part of the motion which seeks dismissal of his complaint. Co-defendants Kimco and Fox Hill II, Inc. (hereinafter collectively, “Kimco”) jointly oppose the motion in its entirety<sup>1</sup>. Third-party defendant Quality Parking Area Maintenance (hereinafter “Quality Parking”) moves for summary judgment dismissing the third-party complaint as against it. Defendant/third-party plaintiff Pathmark opposes the requested dismissal of the third-party complaint.

This litigation arises from a trip-and-fall by plaintiff in which he is alleged to have sustained personal injuries on January 14, 2005, at approximately 2:30 a.m., due to a missing piece of the concrete apron adjacent to the loading dock of the Pathmark store located at 2875 Richmond Avenue on Staten Island, where he was making a delivery. Kimco owned and managed the shopping center in which Pathmark was located when the accident occurred.

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<sup>1</sup>The legal relationship between Kimco and Fox Hill relative to the subject premises is complicated by repeated references to the former as the owner and manager of the subject property, while Pathmark’s lease indicates that it runs between “Fox Hill II, Inc., a New York corporation, having an office c/o Kimco Development Corporation” and Pathmark’s apparent owner, “Supermarkets General Corporation”.

Plaintiff commenced this action by the filing and service of a summons with complaint upon the defendants on or about August 3, 2005. Issue was joined by the service of an answer with cross claims by Pathmark on or about August 22, 2005<sup>2</sup>. A third-party action was subsequently commenced by Pathmark by the filing and service of a summons with complaint upon MJ&T Corp. and Quality Parking Area Maintenance. Issue was joined in that action by the service of an answer by defendant Quality Parking, but co-defendant MJ&T Corp. failed to appear or answer, whereupon a default judgment was entered against it by order dated March 23, 2009.

The law in this area is well settled. Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see* Rotuba Extruders v. Ceppos, 46 NY2d 223; Herrin v. Airborne Freight Corp., 301 AD2d 500). On a motion for summary judgment, the function of the court is issue finding, not issue determination (*see* Weiner v. Ga-Ro Die Cutting, 104 AD2d 331, *affd* 65 NY2d 732). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (*see* Glennon v. Mayo, 148 AD2d 580). To prevail upon the motion, the moving party must present *prima facie* evidence of its entitlement to judgment as a matter of law (Alvarez v. Prospect Hosp., 68 NY2d 320, 324). Upon its failure to do so, the motion will be denied. Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (Zuckerman v. City of New York, 49 NY2d 557, 562). In this regard, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a triable issue (*id.* at 562).

In support of its motion, Pathmark has submitted an attorney’s affirmation, a copy of the summons and complaint, as well as its answer and discovery demands, copies of the deposition testimony of (1) plaintiff, (2) Nina Frankel (the current property manager for Kimco), (3) Joseph Santigate (director of property management for Kimco), (4) Richard LaDuc (general manager of the Pathmark store at the time of the accident) and (5) John McCarthy (the manager for Pathmark at the time of the accident). In addition, Pathmark has submitted copies of the third-party summons and complaint, the answer of third-party defendant Quality Parking, a copy of the default order against its co-defendant MJ&T Corp., copies of the deposition testimony by Ted Albanese (president and owner of Quality Parking), a copy of the certification order dated September 9, 2009, an affidavit by Richard LaDuc, photographs of the void in the concrete which allegedly caused plaintiff to trip, a

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<sup>2</sup>The Court notes that in violation of CPLR 3212(b), Pathmark has failed to attach to its motion papers copies of all of the pleadings served in this action.

copy of Pathmark's lease with Kimco, purchase orders for maintenance submitted to Kimco by Quality Parking for 2000-2001, copies of invoices submitted by Quality Parking and paid by Kimco through January 31, 2005, and a July 16, 2003 proposal from defaulting third-party defendant MJ&T Corp. to Kimco for repair work to the front parking lot as well as the rear area including the loading dock.

Based upon these submissions, Pathmark contends that it is entitled to summary judgment dismissing the complaint as there are no triable issues of fact upon which liability could be imposed against it since it lacked any duty of care toward plaintiff. With respect to the cross claims against it, Pathmark maintains that they also must also be dismissed, as the former did not own, control or maintain the "parking area" where plaintiff fell. In addition, it is argued that Pathmark neither caused or created the alleged dangerous condition, or had actual or constructive notice of it. Finally, it is argued that Pathmark is entitled to contractual indemnification from Kimco for the costs and expenses incurred in defending this action.

In opposition, plaintiff has submitted a personal affidavit, an attorney's affirmation and photographs of the alleged dangerous condition. In addition, plaintiff has cited excerpts from the deposition testimony by Mr. LaDuc to the effect that Pathmark knew or should have known of the purported dangerous condition. Based upon these submissions, plaintiff contends that numerous issues of fact exist including, but not limited to, questions relating to Pathmark's notice of the alleged hazard. In this regard, plaintiff argues that Pathmark may be held liable, *e.g.* as the owner of the business in exclusive control of the loading dock.

In support of its opposition, Kimco has also submitted an attorney's affirmation, as well as photographs of the accident site and a letter purportedly demonstrating Pathmark's participation in the funding of prior repairs to the loading area behind the store. Kimco also purports to rely upon the deposition testimony by plaintiff and Mr. Santigate to the effect that the loading dock was used exclusively by Pathmark, which had mounted "wall packs" on the rear of the building to provide lighting. Based on these submissions, Kimco contends that triable issues of fact exist which preclude summary judgment and dismissal of the complaint against Pathmark as well as their cross claims for, *e.g.*, indemnification from it. These issues are said to include the alleged inadequacy of the lighting in the area of the loading dock provided by Pathmark; its failure to notify Kimco of the alleged dangerous condition; and its exclusive use of the area where the accident occurred. In essence, it is Kimco's position that the loading dock was exclusively under the control of Pathmark, and not a common area under the terms of their lease.

Viewing the evidence, as it must, in a light most favorable to the opponents of Pathmark's motion, the Court concludes that triable issues of fact exist including, *inter alia*, whether any negligence on the part of Pathmark was a substantial factor in causing the accident, and whether Pathmark had actual or constructive notice of the alleged dangerous condition and a sufficient time to cure<sup>3</sup>. Thus, Pathmark's motion for summary judgment is denied in its entirety. Next, the Court will consider the summary judgment motion by third-party defendant Quality Parking.

In support of its summary judgment motion, Quality Parking has submitted an attorney's affirmation, copies of all of the pleadings in the action, copies of the various discovery demands, a copy of plaintiff's bill and supplemental bill of particulars, copies of the deposition testimony by plaintiff, Nina Frankel, Richard LaDuc, John McCarthy and Ted Albanese, and a copy of a proposal for the repair of the front parking areas and rear loading dock dated July 16, 2003 submitted by MJ&T Corp. to Kimco. On the basis of the foregoing, Quality Parking contends that no triable issues exist as to its potential for liability, and that it is entitled to summary judgment dismissing Pathmark's third-party complaint as against it.

In opposition, Pathmark has submitted its own attorney's affirmation, a copy of the fourth amendment to the lease between Kimco and Supermarkets General Corporation effective July 8, 1991, and a copy of the original lease dated November 1, 1967. Based upon these submissions, as well as selected references to the deposition testimony of Joseph Santigate and Ted Albanese, and multiple exhibits attached to the third-party defendant's motion papers, Pathmark alleges that triable issues of fact exist as to the nature of the third-party defendant's contractual agreement with Kimco, which is alleged to include maintenance of the loading dock as part of the "common areas" of the parking lot. In addition, Pathmark notes that its third-party complaint alleges causes of action for breach of contract; negligence; common-law and contractual indemnity [*sic*] contribution and the third-party defendant's failure to procure additional insurance protection.

Viewing this evidence in a light most favorable to Pathmark this Court nevertheless concludes that the third-party plaintiff has failed to raise a triable issue of fact as to the purported liability of third-party defendant Quality Parking. Contrary to Pathmark's contentions, the undisputed evidence establishes that the activities of Quality Parking were restricted to the sweeping and cleaning of the customers' parking lot, and that it neither made nor was required to effect repairs to the rear loading dock, a location which all of the relevant evidence reveals was used solely by

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<sup>3</sup>Although questions of Pathmark's negligence presupposes the existence of a duty towards plaintiff, the evidence of its past financial contribution to the repair of the area of the loading dock is indicative of some level of responsibility and/or control.

Pathmark and its vendors rather than the general public. As a result, the third-party complaint against Quality Parking must be dismissed.<sup>4</sup>

Accordingly, it is hereby:

**ORDERED** that Pathmark’s motion for summary judgment is denied in its entirety; and it is further

**ORDERED** that the like motion by third-party defendant Quality Parking is granted; and it is further

**ORDERED** that the third-party complaint as against Quality Parking is severed and dismissed; and it is further

**ORDERED** that the caption of the action be amended to read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

-----X  
FRANK MANOCHIO,

*Plaintiff(s),*

**Index No: 102225/05**

*-against-*

KIMCO REALTY CORP., FOX HILL II, INC., and  
PATHMARK STORES, INC.,

*Defendants.*

-----X  
PATHMARK STORES, INC.,

**Index No: A102225/05**

*Third-Party Plaintiff,*

*-against-*

MJ & T CORP.

*Third-Party Defendants.*

-----X

and it is further

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<sup>4</sup>On the facts presented, any claim that Quality Parking undertook to “entirely displace” the owner’s duty to maintain the premises safely (*see Eopinal v. Melville Snow Contrs*, 98 NY2d 136, 140) must remain purely speculative.

**ORDERED** that the Clerk shall enter judgment and mark his records accordingly.

All parties shall appear in DCM Part 3 on **May 24, 2010** at 9:30 a.m. for a pre-trial conference.

ENTER,

DATED: April 28, 2010

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Joseph J. Maltese  
Justice of the Supreme Court