

**Garcia-Rosales v 370 Seventh Ave. Assoc., LLC**

2010 NY Slip Op 31669(U)

June 29, 2010

Supreme Court, New York County

Docket Number: 114863/07

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

JANE S. SOLOMON

PART 55

Index Number : 114863/2007  
**GARCIA-ROSALES, UBALDO**  
 vs.  
**370 SEVENTH AVENUE**  
 SEQUENCE NUMBER : 004  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
 MOTION DATE 2/8/10  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...  
 Answering Affidavits -- Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1-3	
4-7	
8-10	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

**FILED**  
 JUL 06 2010  
 NEW YORK  
 COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/29/10

  
 JANE S. SOLOMON s.c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 55

-----X  
UBALDO GARCIA-ROSALES,

Plaintiff,

DECISION AND ORDER

-against-

370 SEVENTH AVENUE ASSOCIATES, LLC,

Index No. 114863/07

Defendant.

-----X

370 SEVENTH AVENUE ASSOCIATES, LLC,

Third-party Plaintiff,

-against-

NEW BAGEL MAVEN CORP.,

Third-party Defendant.

-----X

**JANE S. SOLOMON, J.:**

Defendant 370 Seventh Avenue Associates, LLC (370 Seventh) moves for summary judgment dismissing the complaint in this personal injury lawsuit. The motion is granted for the reasons below.

Plaintiff Ubaldo Garcia-Rosales (Garcia-Rosales) worked in the Bagel Maven bagel shop at 370 Seventh Avenue in Manhattan. 370 Seventh owns the building in which the shop is located, and it leased the premises to Bagel Maven Corp. pursuant to a 1992 lease that expired in 2008 (Lease, Notice of Motion, Ex. H). Bagel Maven Corp. assigned the lease to third-party defendant New Bagel Maven Corp., d/b/a Bagel Maven (Bagel Maven) in 1993. The

leased premises include a street-level shop and the basement under it. Bagel Maven was responsible for maintaining the basement stairs and making non-structural repairs (Lease, paragraph 4). The sole owner of Bagel Maven, Joseph Dvir, testified that 370 Seventh never used the basement below the shop since the lease went into effect, and that such repairs and alterations to the stairs as were made during the term of the lease, were made by Bagel Maven (EBT of Joseph Dvir, annexed to Notice of Motion, Ex. G). These alterations included putting a corrugated metal surface over the steps. Bagel Maven stored food in the basement, and food deliveries were brought down each day and stored in a refrigerator and freezer located there.

Garcia-Rosales alleges that on June 21, 2007, he fell as he carried boxes down a set of stairs from the shop to the basement, and suffered a broken leg and other injuries. He was employed as a food preparer, and traversed the steps up to twenty times each day. He cleaned the steps each week. He noticed that sometimes the steps were slippery, apparently because the fruit and vegetables were wet and water would drip on the steps. A co-worker had warned him to be careful of the wet steps (EBT of Garcia-Rosales, Notice of Motion Ex. E, 66). Garcia-Rosales had slipped two times in the two or three weeks prior to his accident, but did not tell anyone about it. He also noticed that some of the steps were "short", meaning that his entire foot did

not fit on the step, but extended about half an inch over the edge of the step (*id.*, at 95).

On the day of the accident, Garcia-Rosales made several trips up and down the stairs, carrying loads of ice up from the basement to the shop, and carrying meat deliveries down. At the time of the accident, he was carrying two boxes, and made it down nearly to the bottom of the stairs when his foot slipped out and he fell forward.

Garcia-Rosales commenced this negligence action against 370 Seventh, which in turn commenced a third-party action against Bagel Maven for contractual indemnification under the Lease, and for contribution and common law indemnity.

Garcia-Rosales alleges in the complaint that he slipped and fell, and that the condition causing him to slip existed for at least fifteen days (Verified Complaint, Notice of Motion, Ex. A, paragraphs 15-17). In his bill of particulars, he states that he slipped on the broken, sloped and worn treads of the basement stairs (Verified Bill of Particulars, Aff. In Opposition of Ian Asch, Esq., Ex. E). At his deposition, Garcia-Rosales only mentions the slippery condition as a factor in his fall. In opposing this motion, he submits an affidavit stating that the step risers were of differing heights, and that the hand rail was too low, and that he fell due to these conditions, and not because the steps were wet. He also relies on the affidavit of

an engineer, who opines that the steps are structurally defective, and that they are not in accord with certain building codes. He also states that the stairs should have had a non-slip surface and "nosing", i.e., a raised edge, and that these conditions were factors in causing the accident. The opinion is based upon his reading of plaintiff's deposition, and his review of color photographs of the steps that were taken by plaintiff's attorney's office.

Garcia-Rosales's attorney complains that he was denied the opportunity to have an expert inspect the steps in person. The preliminary conference order, dated April 28, 2008, states that discovery will be completed by October 30, 2008, and that plaintiff has the right to send an engineering expert to inspect and photograph the steps (Asch Aff., Ex. G). Counsel for 370 Seventh and Bagel Maven contend that plaintiff never identified an expert to look at the steps, and no inspection was made as of the date this motion was initiated in October, 2009, despite inquiries made by counsel in 2008 with respect to scheduling the inspection.

#### DISCUSSION

Although plaintiff's attorney complains that he was denied an inspection, the letters referred to show that he never identified an engineer or proposed a date for inspection. Under these circumstances, it cannot be said that plaintiff's engineer

was denied access to the premises. In any event, plaintiff does not show how an inspection would materially improve his case in light of the facts as set forth in the complaint, bill of particulars and at deposition.

The terms of the Lease, together with the testimony of Bagel Maven's owner, establish that 370 Seventh was an out-of-possession landlord. An out of possession landlord is not liable for a non-structural defect (*Baez v Barnard College*, 71 AD3d 585 [1<sup>st</sup> Dept]), but can be liable for a structural defect that is contrary to a specific statutory safety provision (*Nameny v East NY Savings Bank*, 267 AD2d 108 [1<sup>st</sup> Dept 1999]).

Here, Garcia-Rosales does not show that he fell as a result of a structural defect. His testimony, and his verified bill of particulars, allege that he slipped on a slippery surface. He testified that the steps were frequently wet from water dripping off food, and that he had carried ice and food up and down the steps immediately before the accident. There also was testimony that the corrugated metal surface of the steps was installed by Bagel Maven, which was responsible for maintenance.<sup>1</sup> He also testified that the step was "short", but there is no indication that this was a factor in causing him to fall. His

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<sup>1</sup> Bagel Maven was Garcia-Rosales's employer, so is not a defendant, and cannot be liable for contribution or common law indemnification because he did not sustain a "grave injury" (Workers Compensation Law § 11).

claim that he fell due to an inappropriate hand rail is raised for the first time in opposition to this motion, and is not consistent with his pleadings and deposition testimony. Therefore, no triable issue of fact is created by these new allegations. Although he claimed in the verified bill of particulars that the stairs had "uneven proportions" (and assuming this means that there were risers of differing heights, which is an allegation raised in opposition to this motion), the deposition testimony of Garcia-Rosales does not show that this played any role in his accident. His testimony shows that he slipped and fell on a slippery surface, which is not a condition chargeable to the out-of-possession landlord.

Accordingly, it hereby is

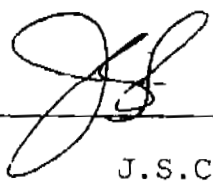
ORDERED that the motion for summary judgment by defendant 370 Seventh is granted, and the complaint is dismissed, with costs and disbursements to 370 East as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it further is

ORDERED that the third-party action (index number 590723/08) is severed, and shall continue; and it further is

ORDERED that defendant/third-party plaintiff 370 Seventh shall file and serve a note of issue by August 31, 2010, or call Part 55 (646-386-3289) by that date if the third-party claim is otherwise resolved.

Dated: June 29, 2010

ENTER:

  
\_\_\_\_\_

J.S.C.

**JANE S. SOLOMON**

**FILED**

JUL 06 2010

NEW YORK  
COUNTY CLERK'S OFFICE

**FILED**

JUL 06 2010