

**Moya v Tavern Estates, Inc.**

2013 NY Slip Op 30130(U)

January 22, 2013

Supreme Court, New York County

Docket Number: 112903/07

Judge: Saliann Scarpulla

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

**PRESENT:** SALIANN SCARPULLA  
J.S.C. \_\_\_\_\_  
Justice \_\_\_\_\_

**PART** 19

Index Number : 112903/2007  
MOYA, CINDY  
vs.  
TAVERN ESTATES  
SEQUENCE NUMBER : 008  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 1/22/13  
which disposes of motion sequence(s) no. 008 AND 009.

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

RECEIVED  
JAN 24 2013  
MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

FILED  
JAN 25 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/22/13

[Signature], J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 19

----- X

CINDY MOYA,

Plaintiff,

Index Number: 112903/07  
Submission Date: 10/10/12

- against -

**DECISION and ORDER**

TAVERN ESTATES, INC., J & G REST. CORP.,  
J & G REST. CORP. d/b/a BUS STOP COFFEE SHOP,  
BUS STOP COFFEE SHOP, ELYSEE INVESTMENT  
CO., and NEWMARK KNIGHT FRANK GLOBAL  
MANAGEMENT SERVICES, LLC,

Defendants.

----- X

**For Plaintiff:**  
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P.O. Box 1111  
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**For Defendant Tavern Estates Inc. & Newmark Knight:**  
Smith, Mazure, Director, Wilkins, Young & Yagerman  
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**For Defendants J&G Restaurant Corp.**  
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100 William Street, 7<sup>th</sup> Floor  
New York, NY 10038

**FILED**

JAN 25 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Papers considered in review of Defendants Tavern and Newmark's motion for summary judgment  
(motion seq. no. 008):

Notice of Motion/Affirm. of Counsel in Supp.....	1
Affirm. of Counsel in Opp.....	2
Affirm. of J & G's Counsel in Partial Opp.....	3
Reply Affirmation in Supp .....	4

Papers considered in review of Defendants J & G Restaurant Corp.'s motion for summary judgment  
(motion seq. no. 009):

Notice of Motion/Affirm. of Counsel in Supp.....	1
Affirm. of Counsel in Opp.....	2
Reply Affirmation in Supp .....	3

**RECEIVED**

JAN 24 2013

MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

**HON SALIANN SCARPULLA, J.:**

Motion sequence numbers 008 and 009 are consolidated for disposition.

In this negligence action, defendants Tavern Estates Inc. ("Tavern Estates") and Newmark Knight Frank Global Management Services, LLC ("Newmark") (collectively, "Tavern") move (motion seq. no. 008) for: (1) summary judgment dismissing all claims and cross-claims pursuant to CPLR § 3212; and (2) for summary judgment on their cross-claims against J & G Restaurant Corp. for defense and indemnification.

Defendants J & G Restaurant Corp. and J & G Restaurant Corp. d/b/a Bus Stop Coffee Shop (collectively, "J & G") move (motion seq. no. 009) for summary judgment dismissing all cross-claims pursuant to CPLR § 3212.

In her complaint, plaintiff Cindy Moya ("Moya") alleges that she fell and suffered personal injuries on October 29, 2006, upon exiting the Bus Stop Coffee Shop ("the restaurant"), 542 9th Avenue, New York, NY. On the date of the alleged injury, Tavern Estates owned the premises where the restaurant was located and Newmark managed the premises for Tavern Estates. J & G operated the restaurant pursuant to a lease with Tavern Estates. Moya alleges that defendants caused her injuries by negligently allowing or creating a hazardous and unsafe condition to exist on the premises. In her bill of particulars, Moya alleged that defendants violated New York City Building Code §§ 27-127, 27-128, and 27-375.

Moya testified about the circumstances of the accident at her deposition. At the entrance of the restaurant, there was an exterior vestibule with a door. Inside the vestibule, a single step led up to the restaurant door. Moya testified that upon exiting the restaurant, she first opened the restaurant door. Moya stated that as she was exiting “what I saw was the sidewalk and did not realize the stair was there because it was the same color as the sidewalk.” Moya Tr. 34. According to Moya, the restaurant was well-lit inside, but the corner area outside near the vestibule was a “dark area.” *Id.* at 45.

Tavern asserted two cross-claims against J & G for contractual and common law indemnification. J & G asserted four cross-claims against Tavern for (1) contribution, (2) breach of contract in failing to acquire general liability insurance on behalf of J & G, (3) defense and indemnification, and (4) common law indemnification.

In its motion for summary judgment (motion seq. no. 008), Tavern argues that it is an out-of-possession owner who is not liable for Moya’s injuries. Tavern claims that it is not liable because it did not retain control over the premises, it was not contractually obligated to repair or maintain the premises, and the premises did not violate any statutes or contain any structural or design defects. Tavern submits an affidavit from an engineer Jeff Schwalje (“Schwalje”), who inspected the premises. Schwalje stated that no statutory violations or structural defects exist on the premises.

In opposition, Moya submits an affidavit from engineer Richard G. Berkenfeld. Berkenfeld claims that the vestibule and step outside the restaurant constitute “a dangerous and hazardous condition which violates safety standards of the industry that

indicate that single steps should be avoided where possible and any difference in elevation should be accomplished by means of a ramp.” Berkenfeld Aff. ¶ 28.

In his affidavit, Berkenfeld acknowledged that the “Building Code of the City of New York does not specifically address steps in front of buildings” and that §§ 27-370 and 2-375 only apply by analogy. *Id.* at ¶ 28. However, Berkenfeld claims that defendants violated §§ 27-127 and 27-128 because the premises does not comply with industry standards which discourage the use of single steps and encourage the use of handrails. Berkenfeld also claims that defendants violated § 27-210 by failing to maintain the sidewalk in a reasonably safe condition.

J & G also opposes Tavern’s motion for summary judgment by arguing that a triable issue of fact exists as to which tenant originally created the step.

Tavern also moves for summary judgment on its defense and indemnification cross-claims against J & G (motion seq. no. 008). Tavern claims that J & G is obligated under the lease to defend and indemnify Tavern pursuant to the following provision: “Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees, paid, suffered or incurred as a result of any breach by Tenant.”

In support of its motion for summary judgment (motion seq. no. 009), J & G argues that it is under no obligation to contractually defend or indemnify Tavern Estates or Newmark. Specifically, J & G argues that it is only obligated to indemnify Tavern for

costs and expenses not reimbursed by insurance, and that all of Tavern's costs and expenses are already covered by its own insurance.

In opposition, Tavern argues that J & G must be estopped from denying indemnification because J & G's insurer, Tower Insurance, issued a tender acceptance letter agreeing to provide defense and indemnification to Tavern.

### **Discussion**

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

#### **1. Negligence**

In general, an owner is not liable for injuries that occur after transfer of possession and control of the premises to a tenant unless: (1) the owner is contractually obligated to make repairs or maintain the premises, or (2) the owner has a contractual right to reenter, inspect, and make needed repairs at tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision.

*Howard v. Alexandra Rest.*, 84 A.D.3d 498, 498 (1st Dep't 2011); *Babich v. R.G.T. Rest. Corp.*, 75 A.D.3d 439, 440 (1st Dep't 2010).

Here, I find that Tavern made a *prima face* showing of entitlement to judgment as a matter of law dismissing Moya's negligence claim. Tavern established that it is an out-of-possession owner who transferred possession and control to J & G on March 1, 2003, pursuant to the Lease. Tavern also established that it had no duty to repair and maintain the premises, except to make structural repairs. Based on these circumstances, Tavern is not liable for Moya's injuries, which occurred on the premises on October 29, 2006, after possession and control was transferred to J & G.

Furthermore, although Tavern had a contractual right to reenter the premises under the lease, no significant structural or design defects existed on the premises that violated any specific statutory safety provision. The Building Code sections cited by Moya are inapplicable to the facts of this case. Section 27-370 and 27-375 govern exit passageways and interior stairs in a building. As acknowledged by Moya's own expert, Berkenfeld, these two provisions do not apply to exterior steps.

Moya's argument that defendants violated § 7-210 is also meritless. Section 7-210 governs the maintenance of sidewalks. A sidewalk is defined as the "portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." N.Y.C. Admin. Code. § 19-101; *Fernandez v Highbridge Realty Assoc.*, 49 A.D.3d 318, 318 (1st Dep't 2008). An exterior step and vestibule do not fall within the definition of a sidewalk, and therefore § 2-710 does not apply.

Further, Sections 27-127 and 27-128 are “non-specific and only state a general duty to maintain the premises in a safe condition.” *Reddy v. 369 Lexington Avenue Co., L.P.*, 31 A.D.3d 732, 733 (2d Dep’t 2006). Moya’s reference to these provisions is not sufficient to state a specific statutory violation that would impose liability on Tavern.

Accordingly, defendants Tavern and Newmark’s motion for summary judgment dismissing plaintiff’s negligence claim is granted.

## **2. Defense and Indemnification**

Tavern also moves for summary judgment on their cross-claims against J & G Restaurant Corp. for defense and indemnification. However, in accordance with my grant of summary judgment dismissing plaintiff’s negligence claim in favor of Tavern, the indemnification claim is now moot.

An insurer’s duty to defend arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy. *Fitzpatrick v. Am. Honda Motor Co., Inc.*, 78 N.Y.2d 61, 65 (1991). If the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend. *Technicon Electronics Corp. v. Am. Home Assur. Co.*, 74 N.Y.2d 66, 73 (1989).

Tavern established its right to defense from J & G. Moya’s complaint contained allegations against Tavern, which may have given rise to an indemnification claim by Tavern against J & G. The lease indemnification provides that J & G shall indemnify Tavern “against and from all liabilities, obligations, damages, penalties, claims, costs and

expenses for which Owner shall not be reimbursed by insurance.” Based on the plain and unambiguous language of this provision, Tavern’s right to defense is limited to those amounts that are not reimbursed by any insurance, including its own insurance. *Diaz v. Lexington Exclusive Corp.*, 59 A.D.3d 341, 342 (1st Dep’t 2009); *Amill v. Lawrence Ruben Co., Inc.*, 100 A.D.3d 458, 460 (2012).

Further, I find that Tavern demonstrated a *prima facie* showing of its entitlement to judgment as a matter of law dismissing J & G’s cross-claims for contribution, contractual and common law indemnification, and breach of contract. J & G failed to introduce any evidence that Tavern contributed to Moya’s injury, was contractually obligated to provide indemnification to J & G, or was vicariously liable for Moya’s injury.

In accordance with the foregoing, it is

ORDERED that defendants J & G’s motion for summary judgment (motion seq. no. 009) dismissing all cross-claims by Tavern Estates and Newmark pursuant to CPLR § 3212 is denied; and it is further

ORDERED that defendants Tavern Estates and Newmark’s motion for summary judgment (motion seq. no. 008) dismissing all claims and cross-claims pursuant to CPLR § 3212 is granted; and it is further

ORDERED that defendant J & G’s cross-claims against Tavern Estates and Newmark are severed and dismissed; and it is further

ORDERED that defendants Tavern Estates and Newmark’s motion for summary judgment (motion seq. no. 008) on their cross-claims against J & G Restaurant for

defense and indemnification pursuant to CPLR § 3212 is granted only to the extent that Tavern Estates and Newmark are entitled to defense from J & G Restaurant, including prior defense costs, to the extent not reimbursed by any insurance, and otherwise denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: New York, New York  
January 22, 2013

ENTER:

**FILED**



JAN 25 2013

~~NEW YORK~~  
Saliann Scarpone, U.S. CLERK'S OFFICE