

<b>Fox v Infinity 103, Inc.</b>
2013 NY Slip Op 31667(U)
July 22, 2013
Supreme Court, New York County
Docket Number: 110763/10
Judge: Manuel J. Mendez
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MANUEL J. MENDEZ  
*Justice*

PART 13

ANGELA MONTI FOX,

**FILED**

INDEX NO. 110763/10

JUL 24 2013

MOTION DATE 7-17-2013

Plaintiff(s),

**NEW YORK  
COUNTY CLERK'S OFFICE**

MOTION SEQ. NO. 001

- v -

MOTION CAL. NO. \_\_\_\_\_

INFINITY 103, INC. d/b/a 103 GROCERY FRUIT & VEGETABLE  
and 2701 BROADWAY REALTY LLC,

Defendant(s).

The following papers, numbered 1 to 6 were read on this motion and cross-motion to/ for Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2-3</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>4, 5</u>
Replying Affidavits _____	<u>6</u>

**Cross-Motion: Yes X No**

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's, 2701 Broadway Realty LLC ("Broadway Realty"), Motion for Summary Judgment is granted.

This is a personal injury claim arising out of a trip and fall accident. Plaintiff, Angela Monti Fox ("Fox"), claims to have fallen due to a piece of wood in front of the grocery store owned by Defendant Infinity 103, Inc. d/b/a 103 Grocery Fruit & Vegetable ("103 Grocery").

103 Grocery leased the space for the grocery store from Broadway Realty pursuant to a lease dated May 17, 2006 (the "Lease").

Broadway Realty moves for Summary Judgment to dismiss Fox's claims against it and all cross-claims asserted against it, or in the alternative for defense

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

and indemnity from 103 Grocery.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. See *Klein v. City of New York*, 89 N.Y.2d 883, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

Broadway Realty argues that as an out of possession landlord with no duty to maintain the premises, it owed no duty to Fox.

In support of its argument, Broadway Realty annexes the deposition transcripts of Fox, Hamid Khan, and Min Kyong Oh. Fox appeared on behalf of herself, Mr. Khan appeared on behalf of Broadway Realty, which he manages, and Ms. Oh appeared on behalf of 103 Grocery, which she owns.

Referencing the deposition of Fox, Broadway Realty notes that Fox alleges she tripped over a piece of wood located outside the main area of the grocery store, but within an enclosed area on the sidewalk in front of the store. The grocery store used this area to sell flowers. Fox alleges she tripped and fell while walking through the area.

Referencing the deposition of Ms. Oh, Broadway Realty notes that 103 Grocery admits it sets up an awning with plastic partitions to protect the flowers in the winter. Ms. Oh stated that pieces of wood were used to keep the plastic partitions in place.

At the time of his deposition, Mr. Khan testified that according to the terms of the Lease, 103 Grocery is responsible for the inside and outside areas of the leased premises. Mr. Khan testified that according to the terms of the Lease, 103 Grocery is responsible for keeping the sidewalk free of debris and maintaining the front of the store.

Therefore, Broadway Realty argues that it owed no duty to Fox and consequently cannot be found liable. However, in the event liability is attributable to Broadway Realty, it argues that an indemnification clause in the Lease requires 103 Grocery to defend and indemnify Broadway Realty for all claims.

In opposition to Broadway Realty's Motion, Fox argues that a lease provision cannot delegate a commercial landowner's statutory duty to maintain the sidewalk in a reasonably safe condition as imposed by Section 7-210 of the Administrative

Code of the City of New York.

Broadway Realty counters Fox's argument by asserting that the case law relied upon by Fox is specific to cases where there are structural defects in the sidewalk, not a transient piece of wood as alleged here and that the First Department has held that a plaintiff may not rely on Section 7-210 where the plaintiff has not alleged a violation of the provision. See *Bing v. 296 Third Ave. Grp., L.P.*, 94 A.D.3d 413, 941 N.Y.S.2d 141 leave to appeal denied, 19 N.Y.3d 815, 979 N.E.2d 815 (N.Y.A.D. 1<sup>st</sup> Dept. 2012).

103 Grocery opposes the Motion by first arguing that the affirmation of an attorney is not sufficient for a motion for summary judgment, that such a motion must be supported by an affidavit of a person with knowledge, which it is not in the present case. See CPLR Section 3212(b).

Broadway Realty asserts that "[t]he affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980). As noted above, Broadway Realty annexed deposition transcripts from three people with knowledge.

103 Grocery also argues that pursuant to General Obligations Law Section 5-322.1, agreements exempting owners from liability for negligence are void and unenforceable. 103 Grocery argues that the indemnification clause in the Lease violates this by requiring 103 Grocery to indemnify Broadway Realty for Broadway Realty's own negligence.

The Court need not address the enforceability of the indemnification clause as Broadway realty has already established the basis to grant this Motion for Summary Judgment such that there are no allegations for 103 Grocery to indemnify or defend Broadway Realty against.

Accordingly, it is ORDERED that Defendant Broadway Realty's Motion for Summary Judgment to dismiss Fox's complaint and all cross-claims is granted.

Accordingly, it is ORDERED that Defendant Broadway Realty's Motion for Summary Judgment is granted, and it is further,

ORDERED that Fox's causes of action asserted against Broadway Realty and all cross-claims asserted against Broadway Realty are severed and dismissed,

and the Clerk is directed to enter judgment accordingly, and it is further,

ORDERED that the causes of action asserted against 103 Grocery shall continue.

ENTER :

Dated: July 22, 2013

MANUEL J. MENDEZ  
J.S.C. **MANUEL J. MENDEZ**  
J.S.C.

Check one:  FINAL DISPOSITION

X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

**FILED**  
JUL 24 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

