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| <b>Herrera v 1-9 E. 167th St. Real Estate Corp.</b>                                                                                                                                                                                                              |
| 2016 NY Slip Op 30684(U)                                                                                                                                                                                                                                         |
| March 14, 2016                                                                                                                                                                                                                                                   |
| Supreme Court, Bronx County                                                                                                                                                                                                                                      |
| Docket Number: 308692/2012                                                                                                                                                                                                                                       |
| Judge: Sharon A.M. Aarons                                                                                                                                                                                                                                        |
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA- 24

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JUANA HERRERA,

Plaintiff(s),

- against -

INDEX NO: 308692/2012

1-9 EAST 167<sup>TH</sup> STREET REAL ESTATE CORP.,  
99 CENTS BEST CENTER, INC. AND EDDIE'S  
PLACE AFRICAN MARKET,

DECISION/ORDER

Defendant(s).

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**HON. SHARON A.M. AARONS**

The summary judgment motions of Defendant 1-9 East 167<sup>th</sup> Street Real Estate Corp. (hereinafter 167<sup>th</sup> St. Corp.), and defendant 99 Cents Best Center, Inc. (hereinafter 99 Cents Store), are decided as follows:<sup>1</sup>

Plaintiff alleges that on January 4, 2011, at approximately 7:00 a.m., she slipped and fell on ice as she was walking in front of the 99 Cents Store on 167<sup>th</sup> Street, while heading to a store two doors away. Specifically, while in front of the 99 Cents Store, she observed two black trash bags in front of the store, one of which was torn with debris and liquid coming out. As she walked by, she stepped on some of the trash and she fell on what she later observed to be ice.

The 99 Cents Store seeks summary judgment on the grounds that it neither created the alleged hazardous condition nor had actual or constructive notice of

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<sup>1</sup>The separate motions have been consolidated for a single decision.

it. In support of the motion, the 99 Cents Store provides the deposition testimony of Mr. Mirza, the principal of the 99 Cents Store, who testified that his custom and practice was to dispose of all garbage in cardboard boxes, which were taped-up and placed for pick-up at the Jerome Avenue entrance of the store. This practice included all bottles and items containing liquid; any container with liquid would be dumped prior to placing it in the cardboard boxes. Mr. Mirza further testified that he would make continuous, daily inspections of the sidewalk to clear away any snow, ice or rubbish.

Defendant 167<sup>th</sup> St. Corp. seeks summary judgment on the grounds that plaintiff has failed to establish any evidence that it created any hazardous condition on the sidewalk and that there is no evidence that it had actual or constructive notice of the alleged condition. Moreover, it argues that it was an out-of-possession lessor of the premises and as such did not occupy the demised premises, and that it was not contractually obligated to repair or maintain any portion thereof. In support of its motion, 167<sup>th</sup> St. Corp. submits the lease, which clearly states that defendant 99 Cents Store was responsible for the maintenance of the sidewalk in question. It also submits the deposition testimony of the defendant 99 Cents Store's principal, Mr. Mirza, who testified that the store (as lessee) assumed the duty and undertook to maintain and clean the sidewalk abutting the demised premises.

Plaintiff opposes defendant 99 Cents Store's motion, arguing that it failed

to establish its *prima facie* entitlement to judgment as a matter of law by failing to demonstrate that it lacked constructive notice of the leaking trash causing an icy hazardous condition. Plaintiff relies on the deposition testimony of Mr. Mirza (99 Cents Store's principal), who testified, among other things, that he never used black garbage bags and would not dispose of garbage on 167th Street. Plaintiff argues that this testimony is implausible and self-serving. Plaintiff further argues that Mr. Mirza's testimony conflicts with plaintiff's deposition testimony that two black garbage bags remained outside of the 99 Cents Store for two to three days prior to the accident, one of which was ripped, allowing liquid to leak.

Plaintiff opposes defendant 167<sup>th</sup> Street Corp.'s motion on the grounds that the landlord remained responsible for the condition of the trash and ice on the sidewalk under Administrative Code of the City of New York § 7-210 (obligating owners of non-exempt properties to maintain the sidewalk abutting their property in a reasonably safe condition). Defendant 99 Cents Store opposes defendant 167<sup>th</sup> Street Corp.'s motion on the grounds that the indemnity clause in the lease violates General Obligations Law § 5-321 by attempting to relieve the landlord of its responsibility for damages caused as a result of its own negligence.

The party moving for summary judgment must first make out a *prima facie* showing that it is entitled to judgment as a matter of law. Absent such showing, the motion must be denied regardless of the sufficiency of the opposing papers. Only after the moving party has satisfied its initial burden will the court examine

the sufficiency of the non-moving parties' opposition. Flynn v. Fed Cap Rehabilitation Services, Inc., 31 AD3d 602, 603 (2d Dept 2006).

"On summary judgment... self-serving statements of an interested party [that] refer to matters exclusively within the party's knowledge create an issue of credibility [that] should not be decided by the Court but should be left for the trier of facts." Sacher v. Long Island Jewish Hillside Medical Center, 142 AD2d 567, 568 (2d Dept 1988). Here, defendant 99 Cents Store's motion for summary judgment is predicated on the deposition testimony of its principal regarding that individual's particular waste removal practices, information that may be exclusively within the 99 Cents Store's knowledge. Therefore, defendant 99 Cents Store failed to demonstrate as a matter of law that it did not create the hazardous condition. While the 99 Cents Store's evidence was sufficient to make a *prima facie* showing that it lacked notice of the condition, plaintiff's deposition testimony raised a triable issue of fact with respect to whether the store had constructive notice. Notably, plaintiff testified that she frequented the area at issue and saw the trash bags in front of the store on the two to three days immediately preceding the incident. Therefore, the 99 Cents Store's motion is denied.

Defendant 167<sup>th</sup> St. Corp., however, has established its *prima facie* entitlement to judgment as a matter of law by making an affirmative showing that it was not responsible for maintaining the sidewalk in question. In opposition,

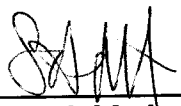
neither plaintiff nor defendant 99 Cents Store has raised a triable issue of fact. There is no question of fact as to the contents of the lease or its application. Moreover, Mr. Mirza, the principal of the 99 Cents Store, admitted to the existence of the lease and that pursuant to it he had full responsibility for trash removal and cleaning the sidewalk. In addition, the Court agrees with defendant 167<sup>th</sup> St. Corp. that Administrative Code § 7-210 does not apply where, as here, the lease clearly states that the tenant is responsible. Defendant 99 Cents Store's argument that the indemnification clause of the lease is invalid under General Obligations Law § 5-321 is without merit; there is no evidence suggesting that defendant 167<sup>th</sup> St. Corp. was negligent or in anyway responsible for the maintenance of the subject sidewalk. Therefore, the indemnification provision of the subject lease is enforceable.

Accordingly, it is hereby ordered that defendant 99 Cents Store's motion for summary judgment is denied; and it is further,

ORDERED that defendant 167<sup>th</sup> St. Corp.'s motion for summary judgment is granted in its entirety.

This constitutes the decision of the Court.

Dated: March 14, 2016

  
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Sharon A.M. Aarons, J.S.C.