

<b>Robinson v Concourse Food Plaza</b>
2016 NY Slip Op 30685(U)
March 16, 2016
Supreme Court, Bronx County
Docket Number: 309036/2012
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

-----X **Index No. 309036/2012**  
Elenora Robinson,  
Plaintiff,

-against-

**DECISION and ORDER**

Concourse Food Plaza, 2096 Concourse  
Food Corp. and Salomon Cojab,  
Defendants.

Present:

Hon. Julia I. Rodriguez  
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of the motion by defendant 2096 Concourse Food Corp. d/b/a Concourse Food Plaza Plaza for summary judgment, pursuant to CPLR 3212, severing and dismissing all claims and cross-claims asserted against it, and defendant Salomon Cojab's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint against him and/or Cojab's cross-claims for defense and indemnification by 2096 Concourse Food Corp.

<u>Papers Submitted</u>	<u>Numbered</u>
Concourse Food's Notice of Motion, Affirmation & Exhibits	1
Memorandum of Law	2
Affirmation in Opposition & Exhibits	3
Cojab's Affirmation in Partial Opposition	4
Reply Affirmation	5
Cojab's Notice of Motion, Affirmation & Exhibits	6
Pls. Affirmation in Opposition	7

This action arises from personal injuries Plaintiff alleges she sustained when she tripped on plastic and fell inside Defendants' grocery store at approximately 3:45 p.m. on October 19, 2011. Defendant 2096 Concourse Food Corp. d/b/a Concourse Food Plaza i/s/h/a Concourse Food Plaza, 2096 Concourse Food Corp. ("Concourse Food") now moves for summary judgment, pursuant to CPLR 3212, severing and dismissing with prejudice all claims and cross-claims asserted against it. Defendant Salomon Cojab moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint and/or for summary judgment on his cross-claims for defense and indemnification by Concourse Food.

I. Concourse Food's Motion for Summary Judgment

Concourse Food contends that it is not liable for plaintiff's claimed injuries because Concourse Food: (1) maintained the subject premise in a reasonably safe condition and (2) neither created nor had actual or constructive notice of the alleged dangerous condition.

In support of summary judgment, Concourse Food submitted, *inter alia*, the deposition testimony of Francisco Rodriguez and an Accident Report. In addition, Concourse Food relies upon the deposition testimony of Plaintiff submitted by co-defendant Salomon Cojab in support of his motion for summary judgment in this case.

At her deposition, Plaintiff testified as follows: Concourse Food is her "neighborhood supermarket" and she goes there "just about every day." On the date of the accident, she went inside Concourse Food to buy coffee creamer. While she was in the aisle where the coffee creamer is located, her foot "got caught in the wheel" of a flat cart. After she fell, she noticed that her foot was tangled in a "packing strip" that was "caught on the wheel." She did not see the packing strip prior to her fall. She "usually" sees that type of packing strip used to keep boxes closed, like the boxes "in the fish market." "Once in a while," she saw packing strips on boxes in the dairy aisle inside Concourse Food but she "never noticed" packing strips on the floor in the dairy aisle. There was nothing obstructing her view of the floor prior to the accident and there was overhead lighting.

At his deposition, Francisco Rodriguez, General Manager of Concourse Food, testified that boxes and products for the subject premise, excluding newspapers located at the front of the store, were not secured with a "packing strip" or a "bonding strip." Newspapers are delivered before the store opens and are unpacked at the front of the store. A maintenance person swept the store three times a day and mopped if necessary, at approximately 8:00 a.m., 12:00 p.m. and 4:00 p.m. That person would also check to see if there were boxes in the middle of the aisles and remove them. If anything needed to be done at other times, i.e., "if something fell, if something needed to be picked up" or "mopped," a maintenance person would be called.

The Accident Report was completed by Rodriguez based upon information provided to him by Hope Lawton, Plaintiff's friend who witnessed the accident. The Report states that

“[t]he customer walking [sic] toward the front of the store when she trip [sic] and fell over some plastic rope.” The Report also states that the accident occurred “AROUND 3:40PM-4:00PM.” The Report was taken at 4:05 p.m. on October 19, 2011.

In opposition to summary judgment, Plaintiff submitted her deposition testimony. Plaintiff also relies upon the deposition testimony of Francisco Rodriguez, submitted by Concourse Food. At her deposition, Plaintiff testified that she tripped on a hard, white piece of plastic packing strip used to keep boxes closed. The strip was about one-half inch wide and was stuck to the wheel of a cart with a flat top that store employees used to put things on. The packing strip was big enough to cover a box.

At his deposition, Rodriguez testified that employees responsible for maintenance were expected to sweep the store three times a day at approximately 8:00 a.m., 12 p.m. and 4:00 p.m. Store employees used flat carts to price merchandise. The products, still in boxes, were placed on carts and the carts were rolled out to each aisle. The boxes would be opened in the middle of each aisle. There was no stocking schedule for the dairy and frozen sections. It could be done at any time during the day. Each aisle had its own cart and the carts would be wheeled back and forth between the back room and each aisle. Newspapers were delivered to the store at approximately 8:00 a.m. and would have packing strips. The newspapers would be taken to the cashier and opened. No other products for the store would come with packing strips.

As Plaintiff notes, Concourse Food submitted no evidence to establish when the dairy aisle was last inspected or swept on the day of her accident. The Court also notes that the accident occurred almost four hours after the last time that the aisle was expected to be swept.

Defendant Salomon Cojab opposes that portion of the motion which seeks to sever and dismiss his cross-claims for indemnification on the ground that there is no reasoning or legal authority to indicate that his cross-claims for indemnification should be severed or tried separately. Concourse Food’s sole argument with respect to the severance and dismissal of Cojab’s claims is that Concourse Foods has no obligation to defend or indemnify Cojab because Concourse Foods was not negligent.

Based upon the deposition testimony of Plaintiff and Rodriguez, issues of fact exist, at a minimum, as to whether Concourse Foods maintained the premises in a reasonably safe condition, whether Concourse Foods created a dangerous condition which caused Plaintiff's accident, and whether Concourse Foods had actual or constructive notice of the alleged dangerous condition.

Based upon the foregoing, Concourse Food's motion for summary judgment, pursuant to CPLR 3212, is **denied** in its entirety.

## II. Cojab's Motion for Summary Judgment

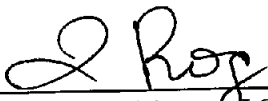
Cojab contends that he is entitled to summary judgment dismissing the complaint as to him because he is an out-of-possession landlord who retained no control over the premises and that Concourse Food is obligated to defend and indemnify him pursuant to the provisions of a September 1992 lease. However, the evidence submitted in support of those claims is insufficient to establish his *prima facie* entitlement to summary judgment. While the 1992 lease supports Cojab's claims, the Assumption and Assignment of Lease, dated May 24, 1999, indicates that the 1992 lease was modified on December 27, 1993, November 19, 1996, January 22, 1999 and May 24, 1999. However, only the January 22, 1999 lease modification was attached to the motion. Also, in his affidavit submitted in support of the motion, Michael Bluth, managing agent for Salomon Cojab d/b/a Scojac Realty Co., states that the 1992 lease was only modified on January 22, 1999. Notably, neither Bluth nor Cojab provided any explanation for the discrepancies between Bluth's affidavit and the Assumption and Assignment of Lease, which Bluth signed on behalf of Cojab Realty Co. As such, the evidence submitted by Cojab is insufficient to establish that Cojab is an out-of-possession landlord who maintained no control over the premises nor that Cojab is entitled to contractual indemnification by Concourse Food pursuant to the provisions of the lease. Also, while Bluth contends that the language in the Assumption and Assignment of Lease independently obligates Concourse Food to defend and indemnify Cojab, that document states that the "Assignee agrees to indemnify and hold Assignor harmless from any legal actions, damages and expenses, including legal fees that the Assignor

may incur arising out of the Lease.” Notably, the Assignor indicated in that document is Galam Food Corp., not Cojab or Cojab Realty Co. In the absence of a legal duty to indemnify, a contractual indemnification provision must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. *See Hooper Assoc. v. AGS Computers*, 74 N.Y.2d, 491-492, 549 N.Y.S.2d 365 (1989). As such, the Assumption and Assignment of Lease is insufficient, in itself, to establish that Concourse Food is obligated to either defend or indemnify Cojab or Cojab Realty Co.

Finally, given the Court’s finding that issues of fact exist as to Concourse Food’s negligence, Cojab’s cross-claim for common-law indemnification is premature.

Based upon the foregoing, Cojab’s motion for summary judgment, pursuant to CPLR 3212, is **denied** in its entirety.

Dated: Bronx, New York  
March 16 2016

  
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Hon. Julia I. Rodriguez, J.S.C.