

**Yuk Fong Cheung v Great N.Y. Noodletown Inc.**

2019 NY Slip Op 32298(U)

July 29, 2019

Supreme Court, New York County

Docket Number: 155405/2016

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X

INDEX NO. 155405/2016

YUK FONG CHEUNG,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002; 003

- v -

GREAT N.Y. NOODLETOWN INC., CROWN CONTAINER CO., INC.,

DECISION + ORDER ON MOTION

Defendants.

-----X

GREAT N.Y. NOODLETOWN INC.

Third-Party Index No. 595903/2016

Plaintiff,

-against-

CROWN CONTAINER CO.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 75

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for JUDGMENT - SUMMARY

Based on the foregoing, Motion Sequence 2 is granted in part and denied in part, and Motion Sequence 3 is denied.

In this slip and fall matter, defendant/third-party plaintiff Great N.Y. Noodletown Inc. (Noodletown) moves in motion sequence 002 for summary judgment against plaintiff Yuk Fong Cheung (Cheung) to dismiss her complaint (NYSCEF #39 - Notice of Motion). In motion sequence 003, defendant/third-party defendant Crown Container Co. (Crown) also moves for summary judgment to dismiss plaintiff's complaint and to dismiss all claims and cross-claims asserted against it (NYSCEF #57 - Notice of Motion). Plaintiff opposes both motions. The Decision and Order is as follows:

## FACTS

This matter stems from plaintiff's slip and fall accident on May 2, 2016, at approximately 11:30 AM on Bayard Street in the city, county, and state of New York. Defendant Noodletown is situated on the corner of Bayard and Bowery Streets; the side of Noodletown abuts Bayard Street. Plaintiff claims that she slipped on a patch of oil (or other slick substance) on a section of sidewalk where Noodletown's employees place its garbage for pickup by co-defendant Crown, a rubbish removal company. Plaintiff claims that she sustained a tri-malleolar fracture of her left ankle from her fall at that location.

Plaintiff's amended complaint makes a claim for negligence (NYSCEF #18 – Amended Complaint). Additionally, without any factual allegations, plaintiff's Verified Bill of Particulars makes claims for violations of various Administrative Code of the City of New York and New York City Building Code provisions (NYSCEF #49 – Verified Bill of Particulars). Defendant/third-party plaintiff Noodletown cross-claims against co-defendant/third-party defendant Crown for indemnification and contribution (NYSCEF #20 – Noodletown Answer with Cross-Claims). Noodletown, in its third-party action against Crown, also makes claims for breach of contract and indemnification and contribution (NYSCEF #44 – Third-Party Complaint). Crown, for its part, makes a cross-claim against Noodletown for indemnification and contribution (NYSCEF #23 – Crown Answer with Cross-Claims)<sup>1</sup>. Crown also makes a counterclaim for indemnification and contribution against Noodletown in its Answer to the Third-Party Complaint (NYSCEF #45 – Answer to Third Party Complaint).

Plaintiff testified that she was in Chinatown for a doctor's appointment, but was early, so she decided to visit her daughter, non-party Ching Li, at her place of work at an eyeglass shop in Confucius Plaza (NYSCEF #68 – Cheung tr ,19-21). At about 11:30 AM, plaintiff left the eyeglass store and crossed the street before commencing westbound along Bayard Street, walking along the sidewalk where Noodletown placed its garbage for collection (*id.* at 22). Plaintiff did not initially notice any discoloration or liquid on the sidewalk or see any garbage boxes or produce boxes as she approached the area of the sidewalk where she fell (*id.* at 28).

When plaintiff slipped and fell on the sidewalk abutting Noodletown, she testified that she noticed a dark chemical or liquid on the ground, which she described as oil, that got on her pants (*id.* at 24-25). Plaintiff called her daughter while she was on the ground, and her daughter came over and helped her up (*id.* at 39, 41, 45).

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<sup>1</sup> Crown's Answer to plaintiff's claims includes the crossclaim against Noodletown, however it is labeled as a "counterclaim" in the Answer.

Plaintiff believed that the oil spot was caused by trash bags placed on the curb by Noodletown (*id.* at 34-35). Plaintiff's belief is based on her prior knowledge; she had passed by Noodletown on previous occasions and saw trash placed on the sidewalk on the Bayard Street curb at night, apparently for pickup (*id.* at 35). However, plaintiff also testified that she had not seen Noodletown employees specifically place the garbage out for collection at night (*id.* at 36).

Plaintiff's daughter, Ching Li, testified she worked across the street from Noodletown on Bowery Street (NYSCEF #70 – Ching Li tr at 7). Ching Li claimed that she observed the garbage placed by Noodletown on Bayard many times prior to the accident and that she could often see that the bags were leaking “water” and “oil” and would make the ground “wet” and “slick” (*id.* at 30, 33-34). However, Ching Li could not recall seeing garbage being placed along Bayard Street in the twenty-four hours prior to Cheung's accident.

Nevertheless, Ching Li testified that when she assisted her mother, the area around plaintiff was oily and slippery (*id.* at 49-50). Ching Li stated that the concrete where plaintiff fell was discolored and darker than other parts of the sidewalk and that it looked oily (*id.* at 63-64).

Stephen Li (SL), a manager of Noodletown, testified on its behalf. SL testified that he worked for Noodletown since 2001 and is responsible for “taking care of everything”, including managing the cleaning of the restaurant (NYSCEF #71 – Stephen Li tr at 12). SL testified that under Noodletown's lease with landlord Five Moy Sisters LP, it is responsible for keeping the sidewalk around the restaurant clean and free of debris and substances (*id.* at 9, 13, 23, 30-31). SL stated that the restaurant employs three shifts of “cleaners”, with shifts beginning at 8:00 AM until closing at 3:30 AM (*id.* at 16-17). SL claimed that the cleaning staff would inspect and clean the sidewalk along Bayard Street first thing each morning, which consisted of picking up any debris or obstruction, but stopped short of power washing, hosing, mopping or using water to clean the sidewalk (*id.* at 20, 22-23, 40-41). SL also stated that when he or another manager arrived at the restaurant, they would also check if the sidewalk needed cleaning and act immediately if attention was needed (*id.* at 27-28). SL testified that the restaurant would hire a power cleaner to wash the sidewalk periodically (*id.* at 39).

SL testified that Noodletown contracted with Crown for non-recyclable rubbish removal collected daily and recyclables collected four times a week (*id.* at 64, 78). SL testified that Noodletown would never put out garbage that included cooking oil or grease and that it had a contract with non-party Clean Air to clean the oil traps. However, SL claimed that if any liquid, oil or grease was present in a non-recyclable bag, it would be double bagged (*id.* at 123-124). Noodletown employees would remove garbage from the restaurant at around 6:00 PM each evening and place the garbage bags along the curb of Bayard Street from the

parking sign to the end of the property line (*id.* at 59-60; NYSCEF #69 – Photos of Noodletown on Bayard Street). SL testified that Crown would occasionally fail to pick up the garbage or that Crown would throw the bags to the garbage truck and that the bags would rip (NYSCEF #71 at 95-96).

Gerald Antonacci, president of Crown, testified on its behalf (NYSCEF #74 – Antonacci Tr). Antonacci authenticated the contract between Noodletown and Crown (NYSCEF #73 – Noodletown/Crown Contract). Antonacci testified that his drivers on the route at the time of the accident were Jose Davila (non-recyclables) and Anthony Cummings (recyclables) (NYSCEF #74 at 20-21, 87). Antonacci would occasionally join his drivers for ride-alongs (*id.* at 36-38). Antonacci testified that he felt Noodletown placed the bags appropriately and that he was never alerted to any issues with their bags regarding leaks or breakage (*id.* at 44-46). Antonacci stated that it was custom and practice for Crown to clean up areas where his employees picked up garbage or face a fine from the Department of Sanitation (*id.* at 46).

Antonacci confirmed that the Noodletown-Crown contract stated that “Crown Container will keep the sidewalk, lagging, curb stone and roadway abutting the waste collection area free from obstruction, garbage, litter, debris and other offensive material resulting from its activities” (NYSCEF #73). The contract further stated that “[t]itle to and liability for unacceptable waste and hazardous waste shall remain... with the customer and the customer agrees to defend, indemnify, and hold harmless Crown Container from and against any damages... and liabilities ... arising out of the delivery for collection of unacceptable materials of any nature whatsoever” (*id.*). Antonacci denied that Crown was responsible for handling “residue”, as it was not part of the contract, but stated that his employees were equipped to clean up bag leakage (NYSCEF #74 at 58-59).

Antonacci testified that the garbage bags typically weigh 40 to 50 pounds and are filled with leftover food and liquids (*id.* at 40). He further stated that restaurant workers often drag the bags on the sidewalk which could rip the bags and cause sidewalk staining, as seen in the photos of Bayard Street (*id.* at 42).

## DISUCSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba*

*Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

*Noodletown's Motion for Summary Judgment on Negligence*

The branch of Noodletown's motion for summary judgment regarding negligence is denied. To prevail on a negligence claim, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] [citations omitted]).

Noodletown argues that plaintiff's claims should be dismissed because there is no evidence that it was negligent in the failure to identify and remove the dark liquid on which plaintiff allegedly slipped. Noodletown states that plaintiff did not produce any photographic evidence of the alleged condition, that she did not smell or touch the substance, and that plaintiff merely assumes that the slippery condition came from the restaurant closest to the location of the fall.

Noodletown claims that as a lessee of property abutting a public sidewalk, it is not liable for the alleged dangerous condition on a public sidewalk. "[A]n owner or one in possession of property will not be liable to a pedestrian injured by a condition on a public sidewalk abutting the premises unless the owner or possessor created the dangerous condition or caused the condition to occur because of some special use or a statute or ordinance placed the obligation to maintain the sidewalk upon the owner or possessor" (*Montalvo v Western Estates, Ltd.*, 240 AD2d 45, 47 [1st Dept 1998] [citations omitted]).

There is no dispute to Noodletown's assertion that it did not cause the condition because of a special use or that no statute or ordinance placed an obligation on it to maintain the sidewalk. Liability cannot be predicated on those theories.

However, it remains a question of fact whether Noodletown created the dangerous slipping condition. In the First Department, "a plaintiff may prove the claim that a defendant is responsible for the condition that caused him to slip without direct evidence. Such claims may be substantiated with circumstantial evidence sufficient to create an issue of fact as to whether the defendant created the condition" (*Healy v ARP Cable, Inc.*, 299 AD2d 152, 154 [1st Dept 2002]).

Here, while there is no direct evidence that Noodletown caused the slippery condition, there is sufficient circumstantial evidence to permit an inference of negligence on the part of Noodletown. Plaintiff fell in the exact spot where Noodletown puts out its garbage. Plaintiff identified the location of her fall and circled a location on a photograph that corresponds to other photographs showing

where Noodletown placed its garbage. SL and Antonacci both identified the same location as where Noodletown placed its garbage. And Li, who is familiar with the area, also identified the location as where Noodletown placed its garbage.

Further, the photographs show a segment of dirty sidewalk on the Bayard Street side of Noodletown that is noticeably darker than the surrounding sidewalk. Antonacci testified that the photographs show a sidewalk stained by grease or oil remnants (NYSCEF #74 at 89-90). Additionally, Li testified that when she found plaintiff on the sidewalk, she noticed that the area was oily. Li also testified that she had on previous occasions seen garbage bags leaking in front of Noodletown. As such, Noodletown may be liable as a lessee for creating a dangerous condition on a public sidewalk.

Next, Noodletown claims that it did not have actual or constructive notice of the defect (NYSCEF #39 – Noodletown Aff in Support at ¶48). “A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of establishing, prima facie, that it neither created the alleged hazardous condition nor had actual or constructive notice of its existence” (*Adamson v Radford Management Associates, LLC*, 151 AD3d 913, 914 [2d Dept 2017]).

Here, it is undisputed that Noodletown did not have actual notice of the dangerous condition. However, it remains a question of fact whether Noodletown had constructive notice of the dangerous condition. To provide constructive notice, “a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). A general awareness that litter or some other dangerous condition may be present is not sufficient to charge a defendant with constructive notice (*id.* at 838).

Noodletown attempts to establish that there is a lack of constructive notice by “producing evidence of its maintenance activities on the day of the accident and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell” (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Noodletown points to SL’s testimony that addresses Noodletown’s garbage removal and sidewalk cleaning practices. However, Noodletown does not point to any evidence of its maintenance activities *on the day of the accident* and produces no evidence that the dangerous condition did not exist when the area was last inspected or cleaned. Noodletown only testifies to its policies generally. As such, Noodletown has not met its burden of establishing a prima facie entitlement to summary judgment (*see id.* [representative of bank who testified as to sidewalk condition did not offer any testimony concerning sidewalk maintenance prior to and contemporaneous with the incident and thus there was an issue of fact as to constructive notice of greasy substance on sidewalk]). As such, this branch of Noodletown’s motion is denied.

*Crown's Motion for Summary Judgment on Negligence*

Crown's motion for summary judgment is similarly denied. Crown's primary argument is that, as a third-party contractor, it did not owe a duty to plaintiff. A threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*see Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). A party may assume a duty of care to third-parties in the following scenarios: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140 [citations omitted]).

Here, it is undisputed that plaintiff did not detrimentally rely on the performance of the contracting party's duties and Crown did not displace Noodletown's duty to maintain the premises. However, it remains a question of fact whether Crown launched a force or instrument of harm that caused plaintiff's injuries.

The testimony of Crown's president Antonacci confirms as much. Antonacci testified that "occasionally trash bag break when picked up or thrown into the truck" (NYSCEF #74 At 58-59). There is no evidence in this matter that establishes that it was not a Crown employee who caused one of the garbage bags to tear and leak oily liquid during pick up prior to plaintiff's fall. As such, Crown has failed to meet its burden to establish a prima facie showing of entitlement to summary judgment. As such, its motion is denied.

*Noodletown's Motion to Dismiss Administrative Code Claims*

The branch of Noodletown's motion regarding plaintiff's Administrative Code claims is unopposed and is granted. The Administrative Code violations alleged are sections 7-201, 7-210, 7-211, 16-123, 19-147, 19-152, and sections 27-127 and 27-128 of the New York City Building Code. None of these sections are applicable to a lessee of the premises. Summary judgment is appropriate on these claims.

*Crown's Motion to Dismiss Noodletown's Claims and Cross-Claims*

Crown's motion for summary judgment to dismiss Noodletown's cross-claims and third-party complaint is denied. As it remains a question of fact whether Crown's negligence caused the slick substance to accumulate on the ground and caused plaintiff's accident, it is premature to dismiss Noodletown's claims and cross-claims for breach of contract and for indemnification and contribution. Crown's argument that the contract states that "liability for unacceptable waste"

lies with Noodletown does not end this matter; it is a question of fact to determine if the slick substance on the ground was cooking oil (which would not be Crown's responsibility) or other non-recyclable food detritus (which would potentially be Crown's responsibility if it caused the leakage). As such, summary judgment on this branch of Crown's motion must be denied.

*Crown's Motion for Summary Judgment on its Counterclaim*

Crown also claims that it is entitled to summary judgment on its counterclaim in the third-party action for contribution/indemnification as Noodletown failed to respond (NYSCEF #58 at ¶83). Noodletown's rejoinder is that Crown is not entitled to a default judgment as the counterclaim is actually just a cross-claim which does not require an answer (NYSCEF #83 – Noodletown Opposition and Reply at ¶4).

Noodletown's confusion stems from Crown's mislabeling of its cross-claim in its Verified Answer to Plaintiff's Complaint as a "counter-claim" while Crown simultaneously maintains a proper counterclaim in the third-party action between Noodletown and Crown.

Noodletown's opposition to Crown's motion is ineffective. First, it is clear, even with the mislabeling, that Crown alleges both a cross-claim and a counterclaim against Noodletown. Thus, Noodletown's argument that it did not need to provide an answer to counterclaim is incorrect. Noodletown needed to respond to Crown's counterclaim in the third-party action and failed to do so. Second, Noodletown appears to view Crown's motion as one for default judgment; it is not, rather, it is a motion for summary judgment. Thus, Noodletown's citations to cases regarding default judgment are misplaced.

However, Crown's motion for summary judgment on its counterclaim is unsupported by an affidavit from a person with knowledge of the claim and its Answer with Counterclaim is unverified (*see* CPLR 3212[b] ["A motion for summary judgment shall be supported by affidavit... by a person having knowledge of the facts"]). All Crown offers on this motion is an affirmation by its counsel and deposition transcripts. There is no documentary evidence to establish, *prima facie*, Crown's counterclaim for indemnification and contribution. Further, as discussed at various points in this discussion, there remain numerous fact issues that prevent summary judgment at this time. Critically, there are open questions as to the type of substance plaintiff slipped on, and whether Crown's actions regarding bag handling led to the substance being there in the first place. The procedural and substantive infirmities of Crown's motion are too much to overcome. As such, summary judgment is denied.

On a different note, Noodletown requests that “the Court permit service of a reply to the counter claim *nunc pro tunc*” (NYSCEF #83 at ¶7). However, Noodletown does not explain why it failed to timely reply to the counterclaim and did not attach a proposed response to counterclaim. As such, Noodletown’s request is denied. In any event, as Crown’s cross-claim and counterclaim seek identical relief, Noodletown will still be able to litigate the issue of indemnification regardless of its ability to respond specifically to the counterclaim.

*Noodletown’s Claims Against Crown*

While Noodletown did not indicate that it was moving against Crown in its Notice of Motion, Noodletown’s Opposition to Crown’s Motion seems to seek such relief. In an abundance of caution, the court turns to these claims (NYSCEF #39 at ¶61). Simply, a determination on Noodletown’s breach of contract and indemnification and contribution claims cannot be made at this time given the questions of fact regarding the alleged slick spot on which plaintiff slipped. As such, summary judgment on Noodletown’s third-party action claims and cross-claims is denied.

Accordingly, it is ORDERED that the branch of Great NY Noodletown’s motion for summary judgment dismissing plaintiff’s Administrative Code and Building Code claims is granted; it is further

ORDERED that Great NY Noodletown’s motion for summary judgment is denied in all other respects; it is further

ORDERED that Crown Container’s motion for summary judgment is denied in its entirety; and it is further

ORDERED that Great NY Noodletown’s request to file a late reply to Crown Container’s counterclaim is denied.

This constitutes the Decision and Order of the court.

7/29/2019  
DATE

  
MARGARET A. CHAN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT

APPLICATION:  DENIED

CHECK IF APPROPRIATE:  OTHER

REFERENCE