

**Ortiz-Zayas v 98 Rivington Realty Corp.**

2020 NY Slip Op 30245(U)

January 30, 2020

Supreme Court, New York County

Docket Number: 159710/2016

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM**

*Justice*

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INDEX NO. 159710/2016

ELBA ORTIZ-ZAYAS, ESQUIO ZAYAS,

MOTION DATE 01/29/2020

Plaintiff,

MOTION SEQ. NO. 003

- v -

98 RIVINGTON REALTY CORP., CATHERINE DELI &  
BAGELS,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

98 RIVINGTON REALTY CORP.

Third-Party  
Index No. 595999/2018

Plaintiff,

-against-

THE CITY OF NEW YORK

Defendant.

-----X

CATHERINE DELI & BAGELS

Second Third-Party  
Index No. 596028/2018

Plaintiff,

-against-

THE CITY OF NEW YORK

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for JUDGMENT - SUMMARY

Defendant/Second third-party plaintiff, Catherine Deli & Bagels, moves for summary judgment and dismissal of all cross claims. All parties have opposed the instant motion. This

action arises out of injuries allegedly sustained by plaintiff when she tripped and fell over a raised metal platform adjacent to Catherine Deli & Bagel (Catherine Deli).

Catherine Deli moves on the grounds that the metal platform was “open and obvious” and in the alternative that as a structural fixture it has no duty to maintain or repair the platform, the duty lies with the landowner, defendant 98 Rivington Realty Corp. For the reasons set forth below, Catherine Deli’s motion for summary judgment is granted to the extent that all cross claims against it are dismissed, otherwise the motion is denied.

### Cross Claims

98 Rivington Corp. opposes the instant motion on the grounds that there is outstanding discovery, that the expert affidavits create an issue of fact<sup>1</sup> and that contractual obligations between the parties are in dispute. Catherine Deli has established that the lease provisions in question are invalid and violate the General Obligations Law under settled law, which holds contractual indemnity provisions such as the one in question here invalid unless insurance coverage has been provided for the other entrant into a contract (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]). During oral argument, Catherine Deli asserted that it had not purchased insurance as required by the lease to have the landowner listed as an additional insured; this was undisputed by 98 Rivington Corp. Rather 98 Rivington Corp. argued, during oral argument, that the “as is” provision of the lease was the controlling portion of the lease and enough to maintain its cross-claims against Catherine Deli, without providing authority for how this would somehow save the indemnity provision of the lease between the parties. The Court disagrees. A though review of the subject portion of the lease does not entitle

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<sup>1</sup> The Court has reviewed 98 Rivington Corp.’s arguments, with respect to outstanding discovery and expert affidavits, and finds them unavailing.

98 Rivington Corp. to maintain its cross claims against its tenant, as it was 98 Rivington that is responsible for the structural issues of the building, of which this platform was clearly a part. Accordingly, all cross claims by 98 Rivington Corp. against Catherine Deli & Bagel are dismissed.

#### Direct Claims

Turning to Catherine Deli's *prima facie* showing as against plaintiff's complaint, the Court finds that Catherine Deli did not meet its burden. To establish its *prima facie* entitlement to judgment as a matter of law Catherine Deli must establish that it did not cause or create the alleged condition and that it did not have a special use of the area in question (*see Kellogg v All Sts. Hous. Dev. Fund Co., Inc.*, 146 AD3d 615, 617 [1st Dept 2017]; *Harvey v Henry 85 LLC*, 176 AD3d 443, 444 [1st Dept 2019]). While the Court does not address Catherine Deli's "open and obvious" arguments, the Court finds that Catherine Deli has failed to establish that it did not obtain a special use from the metal platform in question and that it did not cause and create the condition that caused plaintiff's accident.

Based on the foregoing, it is hereby

ORDERED that all cross claims against CATHERINE DELI AND BAGELS are hereby dismissed, and it is further

ORDERED that the remainder of the instant motion is denied.

1/30/2020

DATE

LYLE E. FRANK, J.S.C.

**HON. LYLE E. FRANK  
J.S.C.**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE