

**Johnson v Nino**

2020 NY Slip Op 34368(U)

October 23, 2020

Supreme Court, Bronx County

Docket Number: 23595/2016E

Judge: Julia I. Rodriguez

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

-----X Index No. 23595/2016E

Rashema Johnson,  
  
Plaintiff,

-against-

DECISION & ORDER

Daniel Nino, Christopher Roberts  
and Joan Lewis,  
  
Defendants.

Present:  
Hon. Julia I. Rodriguez  
Supreme Court Justice

-----X  
Daniel Nino,  
  
Third-Party Plaintiff,

-against-

The Door Restaurant Corp. d/b/a The Door,  
Christopher Roberts and Joan Lewis,  
  
Third-Party Defendants.

-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in review of Defendant/Third-Party Plaintiff Daniel Nino's motion for summary judgment and the summary judgment motion of Defendants/Third-Party Defendants The Door Restaurant Corp., Christopher Roberts and Joan Lewis.

<u>Papers Submitted</u>	<u>Numbered</u>
Nino Notice of Motion, Affirmation & Exhibits	1
Pl. Affirmation in Opposition	2
Door, Roberts and Lewis Affirmation in Opposition & Exhibits	3
Nino Reply Affirmation (to Pl. Opposition)	4
Nino Reply Affirmation & Exhibits (to Door, Roberts and Lewis Opposition)	5
Door, Roberts & Lewis Notice of Motion, Affirmation & Exhibits	6
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In the instant action, plaintiff alleges she was injured when she slipped and fell on interior stairs while working at a restaurant owned by Third-Party Defendant The Door

Restaurant Corp. d/b/a The Door (“The Door”). Defendant/Third-Party Plaintiff Daniel Nino (“Nino”) owned the premises at which the restaurant was operated and leased those premises to Defendants/Third-Party Defendants Christopher Roberts (“Roberts”) and Joan Lewis (“Lewis”), the owners of The Door. In the third-party complaint, Nino alleges causes of action against Roberts, Lewis and The Door for contractual and common law indemnification, contribution and breach of contract for failure to procure insurance.

Nino now moves for summary judgment, pursuant to CPLR §3212, dismissing the complaint against him and in his favor on his third-party complaint, on the grounds that: (1) plaintiff cannot make out a *prima facie* case of causation; (2) Nino is an out-of-possession landlord and not liable for the transient condition of the stairs alleged by plaintiff; and (3) Nino did not create or have any notice of the alleged dangerous condition.

Defendants The Door, Christopher Roberts and Joan Lewis separately move for summary judgment, pursuant to CPLR §3212, dismissing the complaint against Roberts and Lewis, and dismissing Nino’s third-party complaint and cross-claims against all of them, on the grounds that: (1) Roberts and Lewis are immune from liability for plaintiff’s claims pursuant to Workers Compensation Law §§11 and 29(6); (2) the stairs were not dangerous; (3) the transient water condition was a patent condition of which they had no knowledge; (4) Roberts and Lewis were not negligent and did not violate the terms of their lease; (5) The Door was not in privity with Nino as it was not a party to the lease; and (6) Nino’s third-party claims against The Door are barred by Workers’ Compensation Law §11.

#### I. Nino’s Motion for Summary Judgment.

In support of summary judgment, Nino submitted, *inter alia*, the deposition testimony of plaintiff, Fiona Taffe, Christopher Johnson and Joan Lewis, Nino’s affidavit and three leases. At her deposition, plaintiff testified as follows: Her accident occurred at approximately 10:00 a.m. At that time, she was going downstairs to eat her breakfast/lunch. Plaintiff was carrying a bowl in her right hand and her left hand was on the railing. She was looking down when she descended the stairs, looking at the stairs, and did not observe anything on any of the steps. She slipped on the third step from the top of the staircase. Plaintiff fell on her “butt” to the bottom of

the staircase. At the time of the accident, plaintiff did not know what caused her to slip and fall. Approximately 5 to 15 minutes after she fell, plaintiff was helped up the staircase to see what had caused her to fall. At that time, she saw droplets of water on the treads of the steps; there was no pooling of water and water was not moving over any of the stairs. Thereafter, she was helped back downstairs to lay down on a couch and wait for an ambulance because she was in severe pain. The stairs were mopped at closing time every day. Plaintiff believes that the water came from “the condensation – reservoir that they put over the stairs to catch air condition condensation.” Plaintiff never made any complaints about water on the stairs prior to her accident and is unaware of anyone who had made any such complaint(s). Plaintiff never saw Nino do any work or direct anyone else to do any work at the property. Plaintiff did see Christopher Roberts and Joan Lewis direct people to do work at the property.

At her deposition, Fiona Taffe testified as follows: She was employed by The Door and was working at the restaurant at the time of the accident. Her shift started at either 7 or 8 a.m. that day. Prior to plaintiff’s accident, Taffe had walked up and down the stairs where plaintiff slipped and fell about 5 to 6 times. Each time, the stairs were dry with no liquid or other substance(s) on them. Taffe walked on the subject stairs between 15 and 30 minutes before plaintiff’s accident and the stairs were dry at that time. Taffe witnessed plaintiff’s accident; Taffe was standing on the landing near the top of the stairs talking to plaintiff as plaintiff descended the stairs. Taffe observed plaintiff walking down the stairs carrying a plate in one hand, a cup in the other, and not holding onto the handrail. As plaintiff was talking to Taffe and descending the stairs, plaintiff looked up at Taffe, missed a step and fell. Taffe went down the stairs after plaintiff’s fall and observed that there was no substance or debris on the stairs. Taffe is no longer employed by The Door.

At his deposition, Christopher Roberts testified as follows: He was the CEO of The Door in 2014. He and Joan Lewis are signatories to the leases for the restaurant and they operate the business together. Lewis is the General Manager of the restaurant and an officer of The Door. Roberts had an air conditioner, with a drip tray to catch condensation, installed above the subject staircase, which was present at the time of plaintiff’s accident. Roberts never observed water

dripping from the tray onto the stairs or anywhere else; there was a pump in the drip tray which pumped water to a hose to bring any condensation/water outside. Under the lease, it was the tenant's responsibility to maintain and repair the air conditioner. Roberts is unaware of any complaints regarding the subject stairs prior to plaintiff's accident.

At her deposition, Joan Lewis testified as follows: Lewis spoke to plaintiff about the accident and plaintiff told Lewis that she "missed a step" and fell down the stairs. An employee went and looked at the stairs immediately after the accident and did not observe any water on the stairs. The air conditioning unit and metal plates were installed at the request of her husband, Christopher Roberts. Lewis never observed water dripping from the air conditioning unit or tray beneath it prior to plaintiff's accident. It was the restaurant's responsibility pursuant to the lease to clean any water that could have come down from the air conditioning unit and to maintain the cleanliness of the stairs.

In his affidavit Nino states as follows: Under the leases for the property, the tenants are responsible for maintaining the stairs. Since Roberts and Lewis leased the subject property, no changes have been made to the air conditioning unit or stairs at his request or direction. Nino has not inspected, repaired or maintained the subject stairs at The Door Restaurant. Since the tenants took exclusive possession of the property, Nino has never been "noticed" of any slippery condition on the staircase at issue; made aware of any claim of water dripping from an air conditioning unit onto the stairs; or notified of any complaints about either the stairs being slippery or any slipping/tripping hazards at the property. The conditions alleged by plaintiff are transient conditions which, under the leases, would be the responsibility of the tenants. Upon the signing of the leases, Nino divested himself of maintenance and repair responsibilities related to the alleged dangerous conditions. The stairs and air conditioning units are the responsibility of the tenants as is removing "refuge" and keeping the stairs free from dangerous conditions.

There are three leases between Nino and Roberts and Lewis, in their individual capacities, which reflect the expansion of the restaurant to adjacent lots. All three leases require the tenants to "take good care of the demised premises and the fixtures and appurtenances therein." Under all three leases, Nino reserved the right to re-enter for inspection and repairs.

All three leases provide that the tenants “shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys’ fees paid, suffered or incurred as a result of any breach by Tenant, Tenant’s agent, contractors, employees, invitees, or licensees, of any covenant on condition of this lease, or the carelessness, negligence or improper conduct of the Tenant, Tenant’s agents, contractors, employees, invitees or licensees.” Under all three leases, the tenant was responsible to maintain, repair and replace any air conditioning systems at the premises at the tenant’s own cost and expense.

In opposition to Nino’s motion for summary judgment, plaintiff submitted the affirmation of counsel who contends that Nino has not met his initial burden “as to a cleaning schedule of the subject stairs or that they were properly maintained.” Counsel also contends that there is a question of fact as to “the cleaning, mopping and/or maintenance of the stairs.” Counsel further contends that Nino was an out of possession landlord with the right of reentry and right to repair who remained in control of the premises.

Defendants Roberts, Lewis and The Door only oppose that portion of Nino’s motion which seeks summary judgment on Nino’s third-party complaint and cross-claims against them. In support, Defendants submitted the affidavits of Christopher Roberts, Joan Lewis and Glenford Beatle and an Accident Report. In his affidavit Roberts states as follows: He is President and Chief Operating Officer of The Door Restaurant Corp. Roberts and his wife, Joan Lewis, started The Door Restaurant in 2000. They personally signed two leases with Nino by which they leased 163-3 through 163-7 Baisley Boulevard in Jamaica, Queens for the location of their restaurant. They were drafted by Nino and their provisions were identical. One lease was dated June 26, 2000 and the other was dated August 1, 2000. The June 26, 2000 lease states their objective to own and operate an “elegant West Indian” neighborhood restaurant. They planned to start an upscale full services restaurant with a bar as well as an adjacent but separate take-out food business. In 2003, Roberts and Lewis incorporated The Door Restaurant Corp. (“The Door”) in New York. Since its incorporation, The Door has been the owner and operator of the restaurant business. All permits and licenses are held in its name. Roberts and Lewis continued

as tenants under the 2000 leases which were in effect as of July 6, 2014. The leases were not assigned to the corporation. Roberts and Lewis are the sole shareholders and officers of the corporation. Roberts holds 60 percent of the shares of the corporation and Lewis holds 40 percent. Lewis is the Vice President of the corporation and has acted as the restaurant's manager. Roberts and Lewis elected to have the corporation treated as a Sub-Chapter S corporation and have received weekly salaries for their service to the business. It is Roberts' understanding that, under the IRS Tax Code, they are owners and officers of the corporation and also deemed employees of the corporation. As owners and officers, Roberts and Lewis have been involved in the business on a daily basis. Unless they were away on a family vacation, Roberts and/or Lewis were at the restaurant on a daily basis. On the rare occasion when both Roberts and Lewis were away, they would be in continuous contact with their staff. Roberts and Lewis are the only ones who have made decisions regarding how the restaurant was to be run. Together they determined "employee policy, procedures and protocol," staff hirings and terminations, worker hours and job responsibilities. Roberts and Lewis developed worker safety rules and enforced them. It is their understanding under the lease that they as tenants are required to keep and maintain the space in which the restaurant is operated in safe and good condition and repair. They also know that the corporation, as employer of their staff, is required to make sure that the workers have a safe place to work. It is up to the owners and officers to see that the workplace is safe. Because of their hands-on involvement with the restaurant, Roberts and Lewis "thought that [their] lease responsibility to keep the premises safe and as owners to give the restaurant workers a safe work environment were one and the same." They personally inspect the restaurant each time they are there to make sure that there are no dangerous conditions. The subject staircase was in place when they leased the space. It connected the take-out area to the basement where food was prepped and where bathrooms and a storage room were located. It was "a straight stairway which consisted of 12 steps with metal treads and a left wall mounted metal handrail." The staircase was used by workers, delivery persons, NYC Health Department inspectors and other non-workers. In 2006, they decided to improve "stair safety by having a contractor install metal grooved plates in the middle of each step with diamond plate on

each side of the middle plate.” Since the installation of the plates and up to plaintiff’s accident, Roberts has not received or been told of any complaints regarding the surfaces of the tread. No NYC Building Department violations have been issued regarding the stairway. At the time of plaintiff’s accident, the subject air conditioning unit was in good operating condition. It was equipped with “a drip tray below the air handler and a hose to drain any condensation out of the building.” The unit has not been repaired due to a leak condition either before or after plaintiff’s accident. At no time prior to plaintiff’s accident had Roberts ever seen any water on any of the steps of the staircase. Roberts never saw water dripping from the air conditioner onto the staircase. Roberts has never been told by anyone that water from any source had been left on the staircase. The staircase was checked several times a day to see if there was anything on the steps. Each night at closing the staircase was washed.

In her affidavit, Lewis reiterates much of what was said in Roberts’ affidavit. In addition, Lewis adds that an accident report was prepared by Rachael Wray, a corporation worker, which was prepared in the ordinary course of Ms. Wray’s business and it was Ms. Wray’s business to have prepared it. The Report is an exhibit attached to her attorney’s affirmation. According to the report, Lewis states, plaintiff “lost her grip on about the third step down and slid to the last step.” Lewis personally spoke with plaintiff after the accident; plaintiff told Lewis that “she had missed a step and slid down the stairs.” Plaintiff also told Lewis that she had “lost her balance;” nothing was said to Lewis about plaintiff having slipped on water. Prior to plaintiff’s accident, “no one had slipped and fallen going up or down the stairway.” Lewis has never observed, or been told of, water or any other wet condition on any of the steps. At no time prior to plaintiff’s accident had Lewis “seen or been told of water having leaked from the air conditioning unit located near the top of the stairway onto the steps.”

In his affidavit, Glenford Beatle states: On the date of plaintiff’s accident, July 6, 2014, he was employed by The Door Restaurant Corp. as a baker. Beatle has been employed by the restaurant since 2003. His bakery area is located in the basement close to the bottom of the stairway which he uses each workday to get to and from the upper level of the restaurant where the take-out section is located to the basement. On July 6, 2014, he walked down the stairway

and arrived at the bakery area at 6:00 a.m., which was his normal arrival time. On his way down the stairway, Beatle did not see or feel any wet or slippery spots on any of the steps. At approximately 10:00 a.m. he was in the bakery when he heard a loud noise outside. He went outside to see what had happened and saw plaintiff on the basement floor next to the bottom of the stairway. Beatle helped her up and over to the bathroom, located in the basement, where plaintiff laid down on a couch or sofa. Plaintiff remained in the bathroom until she was removed from the basement by EMS. After Beatle helped plaintiff, he looked at the stairway and did not see any water or other wet or slippery condition on any of the steps. Beatle used the stairway many times before the day of the accident and never saw or felt any water or other wet or slippery condition on any of the steps.

A handwritten Accident Report indicates the subject as being "Rashena's fall down the steps." In the "Detail" section is written the following: "Rashena (cashier) was on her way down the flight of stairs connecting the basement to the kitchen area. With breakfast items in both hands she lost her grip on about the third step down and slid to the last step. The prep/bakery staff heard the thud and went [to] her assistance. Yours truly called 911 immediately. The plates were broken with food & porrage thrown away. She appeared to be in severe pain as she cried softly but uncontrollably. The staff helped her to the bathroom and had her lay on the bench until the paramedics arrived. They took her to the ambulance where she was closely examined after which they left for Jamaica Hospital accompanied by Joan Wright. Mr. Roberts and Ms. Lewis were notified and her family members have also been notified." The report states that it was prepared by "Rachel W., Supervisor (Take-out), 7/6/14 10:31 a.m."

## II. The Summary Judgment Motion of Christopher Roberts, Joan Lewis and The Door.

In support of their motion for summary judgment Christopher Roberts, Joan Lewis and The Door, submitted, *inter alia*, the deposition testimony of plaintiff, Christopher Roberts and Joan Lewis, Fiona Taffe, the affidavits of Christopher Roberts, Joan-Lewis and Glenford Beatle, the June 26, 2000 lease, the Accident Report, all discussed *supra*. In addition, Defendants submitted a Certificate of Incorporation for The Door Restaurant Corp. and a Workers' Compensation Lien letter. The Certificate of Incorporation is dated April 2, 2003. The

Workers' Compensation Lien letter dated December 17, 2018 indicates that a total amount of \$10,434.37 in Workers' Compensation benefits was paid to plaintiff for the subject occurrence.

In opposition to the motion, plaintiff submitted the affirmation of her attorney who contends that the Workers' Compensation defense is not applicable to Roberts and Lewis; Defendants failed to meet their *prima facie* burden as to whether Defendants had a reasonable cleaning routine; and there is a question of fact as to the cleaning, mopping and/or maintenance of the stairs.

Nino only opposes that portion of Defendants' motion which seeks dismissal of Nino's third-party action and cross-claims against them. In support, Nino submitted the affirmation of his attorney who contends that based on the lease agreement between Nino and Roberts and Lewis, Nino is entitled to contractual indemnification. Counsel states that "if plaintiff's Complaint is not dismissed as to Nino, Nino is entitled to contractual indemnification from Roberts and Lewis." As to Nino's common law indemnification and contribution claims, counsel contends that since Defendants had "exclusive responsibility to repair the air conditioning unit and maintain the stairs under the lease agreements . . . any finding of negligence would be attributable to co-defendants/third-party defendants and not Nino." Counsel also alleges that Roberts and Lewis were contractually obligated to obtain insurance naming Nino as an additional insured and failed to do so. Finally, counsel contends that Roberts and Lewis are not entitled to the exclusivity defense of the Workers' Compensation Law because their affidavits "fail to establish the control over the day-to-day operations as required by case law."

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The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence

submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1<sup>st</sup> Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

An out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific safety provision. *DeJesus v. Tavares*, 140 A.D.3d 433, 33 N.Y.S.3d 47 (1<sup>st</sup> Dept. 2016). Here, while Nino is an out-of-possession landlord who retained a right to reenter to inspect and make repairs, the alleged defect, i.e., water dripping from an air conditioner unit onto the stairs, is not a significant structural or design defect, nor has plaintiff alleged the violation of a specific safety provision. As such, Nino cannot be held liable to plaintiff for her injuries.

Subdivision 6 of section 29 of the Workers' Compensation Law makes compensation under that statute the exclusive remedy of an employee injured "by the negligence or wrong of another in the same employ." Regardless of Roberts and Lewis' status as lessees of the premises where plaintiff was injured, "they remain co-employees in their relations with plaintiff in all matters arising from and connected with their employment." *Heritage v. Van Patten*, 59 N.Y.2d 1017, 1019, 466 N.Y.S.2d 958, 959 (1983). Contrary to the contentions of both Nino and plaintiff, New York courts have consistently held in similar cases that an officer of a corporation which employs the plaintiff is a co-employee of the plaintiff in all matters arising from and connected with their employment. *Macchirole v. Giamboi*, 97 N.Y.2d 147, 736 N.Y.S.2d 660 (2001); *Heritage v. Van Patten, supra*; *Keibel v. Riina*, 126 A.D.3d 629, 3 N.Y.S.3d 608 (1<sup>st</sup> Dept. 2015); *DeJesus v. Todaro*, 48 A.D.3d 341, 852 N.Y.S.2d 96 (1<sup>st</sup> Dept. 2008). Notably, the evidence demonstrates that both Roberts and Lewis actively worked at the restaurant on a regular basis. Also, plaintiff's accident occurred while she was working as an employee of the Door at premises leased by Roberts and Lewis. In this instance, the obligation of Roberts and Lewis to maintain a safe workplace for their employees is indistinguishable from their obligation

to maintain the premises in a safe condition. *Keibel v. Riina*, 126 A.D.3d at 629; *DeJesus v. Todaro*, 48 A.D.3d at 343; *Concepcion v. Diamond*, 224 A.D.2d 189, 190, 637 N.Y.S.2d 135 (1<sup>st</sup> Dept. 1996). As such, plaintiff's claims against Roberts and Lewis are barred pursuant to Workers' Compensation Law § 29(6).

Plaintiff makes no direct claims against The Door, recognizing that she is barred from doing so pursuant to Workers' Compensation Law § 11.

Given the foregoing findings, the Court need not reach the parties' remaining arguments.

The motion for summary judgment brought by Defendant Daniel Nino is **granted solely to the extent that** plaintiff's complaint is dismissed as against him; otherwise the motion is **denied**.

The motion for summary judgment brought by Defendants/Third-Party Defendants The Door Restaurant Corp. d/b/a The Door, Christopher Roberts and Joan Lewis is **granted in its entirety**.


Accordingly, it is hereby

ORDERED that the complaint against Daniel Nino, Christopher Roberts and Joan Lewis is dismissed; and it is further

ORDERED that the third-party complaint and all cross-claims against the Door Restaurant Corp. d/b/a The Door, Christopher Roberts and Joan Lewis are dismissed.

The Clerk is directed to enter judgment.

Dated: Bronx, New York  
October 23 2020

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