

<b>Wright v Pass Props. BK LLC</b>
2021 NY Slip Op 31172(U)
April 8, 2021
Supreme Court, Kings County
Docket Number: 506467/2018
Judge: Ingrid Joseph
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At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8<sup>th</sup> day of APRIL 2021.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS  
**PRESENT: HON. INGRID JOSEPH, J.S.C**

Naisha Wright

Index No. 506467/2018

Plaintiff,

-against-

Pass Properties BK LLC and Ahmed Laundromat, Inc.

Defendants,

-----X

Pass Properties BK LLC,

Third- Party Plaintiff,

-against-

Mohammed Hussein

Third- Party Defendants,

-----X

**Recitation, as required by CPLR '2219(a), of the papers considered in the review of Defendant's Motion:**

	<u>Papers Numbered</u>
Notice of Motion and	
Affidavits/Affirmations Annexed.....	1, 2,5,6
Affirmation in Opposition Papers.....	3,7,8
Reply to Opposition Papers.....	4

This action was commenced on April 30, 2018 to recover damages for injuries allegedly sustained on April 18, 2017 when Plaintiff, Naisha Wright ("Plaintiff") tripped and fell on an

elevated cellar door<sup>1</sup> on the sidewalk that abutted a building located at 108 Albany Avenue Brooklyn, New York in which the first floor commercial space is leased to third-party Defendant Mohammed Hussein<sup>2</sup> who runs a laundry business entitled Ahmed Laundromat Inc., (“Ahmed”). Plaintiff now moves (mot. seq. 2) for summary judgment on the issue of liability against defendant, Pass Properties BK LLC., (“Pass Properties”). Third-party defendant Mohammed Hussein (“Mr. Hussein”) cross-moves (mot. seq. 3) on behalf of himself and Ahmed Laundromat, Inc. (collectively referred to as “the Defendants”) for an order denying Plaintiff’s motion for summary judgment on the issue of liability against Pass Properties and for an order declaring that Ahmed Laundromat is entitled to indemnity by Co-Defendant Pass Properties. The Defendants also seek to dismiss third-party plaintiff Pass Properties’ third-party complaint against Mr. Hussein on the ground that neither Mr. Hussein nor his business Ahmed Laundromat are liable.

Plaintiff contends that Pass Properties was negligent in maintaining the subject premises and supports this argument with her deposition testimony and the deposition testimony of Christopher Crandon (“Mr. Crandon”) an employee of Pass Properties and Mr. Hussein on behalf of Ahmed Laundromat. Plaintiff testified in her deposition that she was pushing a stroller on the sidewalk while looking straight ahead when she tripped and fell on a part of the cellar door that was elevated approximately two inches high. Plaintiff contends that no warning signs were placed around the cellar doors prior to the incident. Pass Properties’ witness Mr. Crandon discussed in his deposition that prior to the subject accident Mr. Hussein spoke with him about doing work on the hatch cellar doors and that Diane Anthony<sup>3</sup> (“Ms. Anthony”), the site manager for the subject property also discussed with him about fixing the hatch prior to the subject incident. Mr. Hussein in his deposition stated that he contacted Ms. Anthony about the cellar door not closing properly prior to the incident and that she directed him to contact Mr. Crandon. Mr. Hussein states that he sent two text messages to Mr. Crandon on January 20, 2017 and on February 27, 2017, respectively. After he received no response Mr. Hussein sent an e-mail complaining about the cellar door to Jeanna Morris, the person who signed the lease on behalf of

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<sup>1</sup> The court notes that cellar door, vault space, and hatch are used interchangeably to describe the same subject object.

<sup>2</sup> The court notes that the spelling of Mohammed Hussein’s surname varies throughout the papers as either Hossain or Hussein.

<sup>3</sup> The court notes that the spelling of Diane Anthony’s surname varies throughout the papers as either Antheny or Anthony.

Shinda Management Corporation which was Pass Properties managing agency at the time. Mr. Hussein stated that he also complained to Ms. Anthony in person and that she assured him that she would take care of it. At the examination before trial, Mr. Hussein stated that he also made complaints to the building's superintendent about the cellar door. Mr. Hussein asserted in essence that despite his numerous efforts in alerting the landlord and managing agency that the cellar doors did not properly close, no one repaired the cellar doors. Plaintiff asserts that these deposition testimonies demonstrate that Pass Properties negligently allowed a dangerous condition to remain on the sidewalk abutting its property, which caused her to trip and fall. Plaintiff maintains that since Pass Properties is the owner of the subject property it was responsible for maintaining the cellar doors in a safe condition pursuant to NYC Administrative Code § 7-210. Plaintiff states that Pass Properties breached this duty by failing to repair the condition of the cellar doors despite numerous attempts by Mr. Hussein to get them repaired. Plaintiff further argues that the two-inch elevation of the cellar door was a dangerous condition in violation of NYC Administrative Code S 19-152(6) that created a tripping hazard. Plaintiff asserts that a potential issue of comparative negligence does not warrant a denial of summary judgment since Pass Properties was negligent as a matter of law.

Pass Properties opposes Plaintiff's motion for summary judgment and contends that it should be denied since several issues of fact exist such as whether the alleged defect in question is trivial in nature, the exact measurements of the height differential for the area that allegedly caused her to fall, the location of the fall, why she walked on top of the cellar doors instead of continuing her path on the sidewalk and whether Plaintiff failed to see what was in front of her. Pass Properties contends that this is borne out by the fact that the photographs marked as exhibits at Plaintiff's deposition depict nothing unusual about the condition of the cellar door, that Plaintiff testified that her fall occurred between the two cellar doors but then she marked another area in the paragraph; that during Plaintiff's deposition she described the height differential by using her hand instead of giving a verbal answer and that her counsel made an estimate of two (2) inches based upon her hand gesture and she agreed to that description of the height of the alleged defect. Pass Properties highlights the fact that Mr. Crandon affirmed in his affidavit that he never noticed a two-inch height differential on the metal cellar door during his periodic inspections of the property. Additionally, Pass Properties states that Plaintiff failed to attach an engineer's report to support the allegation that the defect was two inches high. Pass

Properties also asserts that there is a question of fact as to whether it had notice of the condition in question since Mr. Hussein testified that he had complained about the cellar door not closing properly and not about the raised portion on the right corner. Pass Properties maintains that it did not have a reasonable opportunity to cure any potential defect because iron work should be done in warmer weather.

In Plaintiff's reply to Pass properties opposition she maintains that she is entitled to summary judgment and states that at the deposition Pass Properties failed to object to counsel's verbalization of the estimated height of Plaintiff's hand gesture thus, waiving any objection to it. Plaintiff further argues that Mr. Crandon did not dispute the height differential in question but just stated that he did not recall a two-inch differential.

In the Defendants' cross-motion, they maintain that pursuant to the lease agreement between Ahmed Laundromat, Inc., and Pass Properties the vault doors (cellar doors) located outside the premises on the sidewalk is solely controlled by Pass Properties. Mr. Hussein contends that he provided Pass Properties with actual notice of the cellar doors were not closed on multiple occasions and Pass Properties failed to correct the cellar doors thus he is not responsible for the injuries and damages allegedly sustained by Plaintiff since he is not liable under section 7-210 of the Administrative Code of NYC. Alternatively, Mr. Hussein argues that if the Court were to find Ahmed Laundromat and/or him in his individual capacity to be liable, and a judgment is entered against them then they are entitled to common law and or contractual indemnification from Pass Properties.

Plaintiff partially opposes that part of the Defendants' cross motion which seeks dismissal of third-party plaintiff Pass Properties' action against Mr. Hussein<sup>4</sup>.

Pass Properties opposes the Defendants' motion for common-law and contractual indemnification and contends that any potential claim for contractual indemnification would only be between Mr. Hussein and Pass Properties since the lease agreement is between Pass Properties and Mr. Hussein. Pass Properties further argues that it is the entity that is entitled to indemnification from the tenant since in the lease agreement it states that the "tenant is to make repairs to the sidewalk, boiler and nonstructural portions of the premises and states in part that the tenant agrees to indemnify and save harmless landlord from and against all claims against

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<sup>4</sup> The court notes that Plaintiff's summary judgment motion is solely against Defendant Pass Properties and not Ahmed Laundromat.

landlord arising from any act, omission, or negligence of tenant, its contractors, licensees, agents... including any claims arising from any act, omission or negligence of landlord or landlord and tenant all claims against landlord arising from any accident, injury or damage whatsoever caused to any person or to the property of any person and occurring during the term in or about the premises". Pass Properties argue that Mr. Hussein is not entitled to summary judgment since he did not provide any proof that he did not cause or create the condition in question when he was using the cellar doors to renovate the building. Pass Properties also contend that Mr. Hussein did not show how he is entitled to common-law indemnification since there are question of fact as to whether Hussein had a duty under the lease.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] and *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d at 853). However, once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial in the action (*Zuckerman v City of New York*, 49 at 562). To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault (*Rodriguez v City of New York*, 31 NY3d 312, 324-25 [2018]).

According to New York City Administrative Code § 7-210(a) it shall be the duty of the owner of real property abutting any sidewalk... to maintain such sidewalk in a reasonably safe condition. New York City Administrative Code § 7-210(b) provides that the owner of real property abutting any sidewalk... shall be liable for any injury to property or personal injury proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such a sidewalk in a reasonably safe condition shall include the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags....

According to New York City Administrative Code § 19-152 the owner of any real property shall install, construct, repave, reconstruct and repair the sidewalk flags in front of or abutting such property. The commissioner shall direct the owner to install, reinstall, construct, reconstruct, repave or repair only those sidewalk flags which contain a substantial defect. A substantial defect shall include a trip hazard where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch or where a sidewalk flag contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch or more in depth. Hardware defects which shall mean hardware or other appurtenances not flush within ½” of the sidewalk surface or cellar doors that deflect greater than one inch when walked on, are not skid resistant or are otherwise in a dangerous or unsafe condition.

A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses (*Simos v Vic-Armen Realty, LLC*, 161 AD3d 1023, 1024 [2d Dept 2018]). In determining whether a defect is trivial, the court must examine all of the facts presented, including the “width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury. There is no “minimal dimension test” or “per se rule” that the condition must be of a certain height or depth in order to be actionable (*Id*). Physically small defects may be actionable “when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot (*Id*).

The Court of Appeals affirmed *Trincere*’s holding that a defect alleged to have caused injury to a pedestrian may be trivial as a matter of law, but requires a holding of triviality to be based on all the specific facts and circumstances of the case like, not size alone (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]).

After a careful review of the documents the court finds that Plaintiff failed to meet her prima facie burden since she failed to accurately identify the area where she fell. Moreover, there are issues of fact as to whether the defect of the cellar door was trivial and whether plaintiff established the height of the alleged defect. The court also finds that third-party defendant Mr. Hussein failed to show an entitlement to contractual or common law indemnification as a matter

of law since there are question of fact as to whether negligence, if any, by Mr. Hussein caused or contributed to the Plaintiff's accident.

Accordingly, Plaintiff's motion for summary judgment on the issue of liability against Pass Properties is denied. Mr. Hussein cross motion for an order dismissing the third-party complaint is denied. All other contentions are either moot or without merit.

This constitutes the decision and order of the court.

ENTER



**HON. INGRID JOSEPH, J.S.C.**

Hon. Ingrid Joseph  
Supreme Court Justice