

**Pattitucci v BJ's Wholesale Club, Inc.**

2021 NY Slip Op 33680(U)

March 23, 2021

Supreme Court, Nassau County

Docket Number: Index No. 604861/2015

Judge: David P. Sullivan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. DAVID P. SULLIVAN,  
*Supreme Court Justice.*

-----X  
ROSARIA PATTITUCCI,

Plaintiff,

-against-

BJ'S WHOLESALE CLUB, INC.,

Defendant.

-----X  
BJ'S WHOLESALE CLUB, INC.,

Third-Party Plaintiff,

-against-

AAA REFRIGERATION SERVICE, INC.,

Third-Party Defendant.

-----X

The following papers having been read on this motion:

Notice of Motion.....	1
Opposition.....	2
Reply.....	3

Third-Party Defendant moves for an order, pursuant to CPLR §3212, seeking summary judgment dismissing the third-party complaint against it. Defendant/Third-Party Plaintiff has opposed the motion, and the Court has received timely reply. Based upon the following, the motion is granted in its entirety and the third-party complaint is hereby dismissed forthwith.

The instant matter before the Court is a negligence action stemming from a slip and fall

Plaintiff suffered while shopping in Defendant/Third-Party Plaintiff's store located in Valley Stream, Nassau County, New York. Plaintiff commenced this action alleging certain injuries she suffered from the incident that occurred on July 9, 2013, claiming she had been shopping in the open refrigerated section of the store when she stepped on water with her right foot and slipped. Plaintiff testified that after she hit the ground, she felt water drip onto her head, leading her to look up and determine that the air-conditioning unit above was leaking, which had caused water to accumulate on the floor and her eventual slip.

Plaintiff commenced the within action against Defendant/Third-Party Plaintiff only. Following the completion of discovery between Plaintiff and Defendant/Third-Party Plaintiff, Defendant/Third-Party Plaintiff filed a third-party complaint, seeking relief for contractual indemnification, common law indemnification, and contribution. Plaintiff has not asserted a direct claim against Third-Party Defendant since its addition in this action. Third-Party Defendant has now sought summary judgment dismissing the third-party complaint in its entirety.

The proponent of a summary judgment motion 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 Hospital, 68 NY2d 320, 508 NYS2d 923 (1986). To make a *prima facie* showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a *prima facie* 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 of the action. Id.; *see also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

To establish a claim for common law indemnification, a third-party plaintiff is required to prove not only that it was not negligent, but also that the proposed indemnitor was responsible for the negligence that contributed to the accident, or in the absence of any such negligence, had the authority to direct, supervise, and control the work giving rise to the injury. Bellefleur v. Newark Beth Israel Medical Center, 66 AD3d 807, 888 NYS2d 81 (2<sup>nd</sup> Dept., 2009). A party's right to contractual indemnification depends upon the specific language of the relevant contract. Castillo v. Port Authority of New York & New Jersey, 159 AD3d 792, 72 NYS3d 582 (2018). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances. Morris v. Home Depot USA, 152 AD3d 669, 59 NYS3d 92 (2<sup>nd</sup> Dept., 2017).

To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that a duty was owed to the plaintiff as an injured party and that a breach of that duty contributed to the alleged injuries. Eisman v. Village of East Hills, 149 AD3d 806, 52 NYS3d 115 (2<sup>nd</sup> Dept., 2017). The critical requirement is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought. Id at 808-809, 118.

In the instant case, it appears undisputed in the moving papers that there was not any formal contract or written agreement between Defendant/Third-Party Plaintiff during the time that Plaintiff was caused to slip and fall in Defendant/Third-Party Plaintiff's store. While Third-Party Defendant provided service to Defendant/Third-Party Plaintiff, the relationship was not the result of a service contract whereby Third-Party Defendant would perform any type of routine maintenance for Defendant/Third-Party Plaintiff; rather, Defendant/Third-Party Plaintiff would contact Third-Party Defendant as needed to perform repairs in its stores. Third-Party Defendant

has met its *prima facie* burden on this portion of the motion, and Defendant/Third-Party Plaintiff has failed to demonstrate that a triable issue of fact still exists; therefore, the first cause of action for contractual indemnification as asserted in the third-party complaint is properly dismissed.

Turning now to the second cause of action still remaining, the Court finds that Third-Party Defendant has also met its burden on this portion of the motion. In support of the motion, Third-Party Defendant has included all three deposition transcripts from Plaintiff, a deposition transcript from a witness from Defendant/Third-Party Plaintiff, a deposition transcript from its own witness, and Third-Party Defendant's service records for work performed for Defendant/Third-Party Plaintiff by it at the subject store's location, amongst other things. This evidence submitted more than adequately satisfies for this Court that the work performed by Third-Party Defendant nearly two months before Plaintiff's slip and fall was merely coincidental and did not cause this incident. In opposition, while Defendant/Third-Party Plaintiff speculates that Third-Party Defendant's work was done improperly and led to water leaking out and onto the floor, such assertion is specious at best. The record before the Court indicates that Third-Party Defendant was the regular repair service used by Defendant/Third-Party Plaintiff and, despite Plaintiff's slip and fall, no work order was put in with Third-Party Defendant by Defendant/Third-Party Plaintiff to even come and check the unit that it fixed some forty-nine (49) days prior to see if there was an issue. Thus, in the absence of a triable issue of fact, the second cause of action for common law indemnification and contribution in the third-party complaint must also be dismissed and the remaining portion of the motion is granted. *See Buffardi v. BJ's Wholesale Club, Inc.*, 191 AD3d 833, 2021 NY Slip Op. 01023 (2<sup>nd</sup> Dept., 2021).

Third-Party Defendant shall file and serve a copy of the within order with notice of entry upon Defendant/Third-Party Plaintiff and Plaintiff within thirty (30) days from the date of this

order. Thereafter, subject to the discretion of the Justice there presiding, the remaining parties to the instant proceeding shall appear in the DCM Trial Part of Supreme Court, Nassau County, on June 4, 2021.

Finally, in light of the foregoing, the caption is hereby amended to read as follows:  
"ROSARIA PATTITUCCI, Plaintiff, against BJ'S WHOLESALE CLUB, INC., Defendant."

This hereby constitutes the Decision and Order of this Court.

Dated: March 23, 2021  
Mineola, New York

**ENTER**

**ENTERED**

**Mar 26 2021**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

  
HON. DAVID P. SULLIVAN, J. S. C.