

**Carrington v Braha NJ Realty Assoc.**

2022 NY Slip Op 31290(U)

April 18, 2022

Supreme Court, Kings County

Docket Number: Index No. 517348/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

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**WILLONA CARRINGTON,**

**Plaintiff,**

**-against-**

**BRAHA NJ REALTY ASSOCIATES and  
PRETTY GIRL, INC.,**

**Defendants.**

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**BRAHA NJ REALTY ASSOCIATES,**

**Third-Party Plaintiff,**

**-against-**

**165-24 JAMAICA CORP.,**

**Third-Party Defendant.**

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**Recitation, as required by CPLR §2219(a), of the papers considered in the review of  
defendant Braha N.J. Realty Associates' motion for summary judgment**

<b>Papers</b>	<b>NYSCEF Doc</b>
Notice of Motion, Affirmation and Exhibits .....	<u>98-112</u>
Answering Affidavit (Affirmation).....	<u>133</u>
Reply Affidavit (Affirmation).....	<u>135</u>

**Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:**

In Motion Seq. # 6, defendant Braha N.J. Realty Associates, Inc. moves for summary judgment against co-defendant Pretty Girl, Inc. on its cross-claims, and against the third-party defendant 165-24 Jamaica Corp. on its third-party claims. The plaintiff has not opposed the motion. Counsel for both defendant Pretty Girl and for the third-party

defendant opposes. For the reasons which follow, the motion is granted in part and denied in part.

This action arises from a trip and fall accident which allegedly took place inside of the premises known as 165-24 Jamaica Avenue, Queens, New York. The accident occurred on April 28, 2017. Plaintiff has apparently not been deposed as yet. Her Bill of Particulars [Doc 103] is not very particular. It states at Par. 3 that “The incident occurred on the premises and building known as and located at 165-24 Jamaica Avenue, Jamaica, New York specifically at the stairs within the premises. The plaintiff was caused to trip and fall on defective stairs.” Then, at Par. 22, asked to state what laws, etc. were violated, it states “The defendant, its agents, servants and/or employees violated those statutes, ordinances, laws, rules and regulations of the County and State of New York or which cases are made and provided and of which this Court may take judicial notice including but not limited to Multiple Dwelling Law sections 52, 78, 80, 83 and 309, as well as the Administrative Code of the City of New York sections 27-127, 27- 128, 27-375 and 27-2005, and Real Property Law, section 235-b.”

Movant avers that it is the owner of the premises, and that it leased the store at the premises to the third-party defendant corporation, 165-24 Jamaica Ave. Corp., which was, at all relevant times, “doing business as” co-defendant corporation Pretty Girl. A corporation cannot “do business as” another corporation. Nor is there a corporation on file in New York with the name “Pretty Girl Inc.” Perhaps it was incorporated elsewhere. The court takes judicial notice of the New York State Department of State, Division of Corporations database on the internet.<sup>1</sup> The corporation 165-24 Jamaica Ave. Corp. did not file any certificate of doing business under an assumed name (see General Business

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<sup>1</sup> <https://apps.dos.ny.gov/publicInquiry/>

Law § 130).<sup>2</sup>

A copy of the 2010 lease covering the time period of the accident is Doc. 106. It states that 165-24 Jamaica Ave. Corp. leased part of the basement, the first floor store and part of the second floor. It seems the lease is for the entire property, but that cannot be definitely ascertained from the lease. The lease makes no mention of any subtenant or assumed name for the tenant. There is no mention of "Pretty Girl." It says the tenant will use the premises for the retail sale of general merchandise, including but not limited to the sale of apparel and footwear.

The lease is a standard form of store lease. It has the usual language, at Paragraph 4, "Owner shall maintain and repair the public portions of the building, both exterior and interior" and that structural repairs are the responsibility of the property owner and non-structural repairs are the responsibility of the tenant. There is a rider, which provides, as applicable here, at Par. 68, that "Anything to the contrary contained in this Lease notwithstanding, Landlord shall promptly make all structural repairs to the demised premises except those caused by reason of the acts of Tenant." There is a provision that any assignment or subletting of the lease cannot take place without the property owner's prior written consent, which shall not be unreasonably withheld.

The rider has an indemnity clause at Par. 61. It supersedes the form clauses. It requires the tenant to "protect and hold harmless each of the Indemnitees from and against any and all Losses to which any Indemnitee may (except to the extent arising from the gross negligence or willful misconduct of any such Indemnitee in the operation and maintenance of the Building) be subject or suffer, whether by reason of, or by reason of any claim for, any injury to, or death of, any person or persons or damage to property

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<sup>2</sup> General Business Law §130 (1)(b) provides that a certificate must be filed.

(including any loss of use thereof) or otherwise arising from or in connection with the use of, or from any work or thing whatsoever done in, any part of the Premises (other than by such Indemnitee) or by any Tenant Party in the Building.” Section 61.2 provides in pertinent part “If any claim, action or proceeding is made or brought against any party entitled to indemnification hereunder, then, upon demand by the indemnified party, the indemnifying party, at its sole cost and expense, shall resist or defend such claim, action or proceeding in the indemnified party's name (if necessary), by attorneys approved by the indemnified party, which approval shall not be unreasonably withheld.” There is also a clause that provides that the tenant will obtain insurance, and will name the owner as an additional insured.

**Pretty Girl, Inc.**

The movant’s cross claims against Pretty Girl, Inc. are for contribution, contractual indemnification, including a defense, and failure to provide insurance. The opposition states that the insurance was provided, and counsel provides a certificate of insurance [Doc 109] allegedly demonstrating this. As with all such certificates, it states at the top “THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRIVIATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.” In addition, this certificate indicates that the insured was 165-24 Jamaica Ave. Corp., not Pretty Girl. Further, the opposition states that as the nature of the claimed defect has not been established, as plaintiff has not been deposed, whether it

was the owner's obligation to repair or the tenant's cannot be determined at this time.

In reply, Braha states that it was not an insured on Pretty Girl's policy at the time of the accident. Counsel attaches a letter that he sent to the tenant's (165-24 Jamaica Ave. Corp.) insurance company seeking them to take over the defense of this action. The response is not provided. The court notes that Pretty Girl did not have a policy. Or a lease. Or a sublease. The certificate of insurance states [Doc 109] that the insured was the tenant, 165-24 Jamaica Ave. Corp., and their mailing address is "c/o Pretty Girl, Inc., 1407 Broadway, Rm 2310, NY, NY 10018."

In conclusion, the only mention of "Pretty Girl, Inc." in the documents in the motion papers is as a mailing "in care of" address. This does not rise to the level required to demonstrate that this claimed corporate entity, not an entity registered in New York, was the tenant of the premises and bound by the terms of the lease with the landlord.

Accordingly, the branch of the motion for summary judgment on Braha's cross claims against Pretty Girl, Inc. is denied.

**165-24 Jamaica Ave. Corp.**

The third-party complaint against 165-24 Jamaica Ave. Corp., asserts causes of action for contribution, common law indemnification and contractual indemnification, but not for breach of contract with regard to the obligation under the lease to procure insurance naming the landlord as an additional insured. There are several certificates of insurance in the motion papers, all of which indicate that the tenant was insured, and the landlord (Braha) was named as an additional insured.

With regard to the issue of contribution, in these circumstances and with these lease terms, the tenant either must indemnify the landlord or need not, depending on where the plaintiff's accident took place and what the nature of the alleged defect is. The

landlord, as third-party plaintiff, cannot be granted summary judgment on this claim, set forth as the first cause of action, or for the second cause of action, a claim for common law indemnification, without more facts. The case is not on the trial calendar, and a note of issue has not been filed. It is not clear why this motion for summary judgment was made prematurely.

The third cause of action is for contractual indemnification. To obtain conditional summary judgment, the property owner must demonstrate that its liability, if it is determined to be liable, would be solely vicarious. While not worded artfully, it is clear that this is the basis of this cause of action. There is not enough information without plaintiff's EBT, and probably additional evidence will be necessary as well, to determine that the property owner's liability is solely vicarious. The cases in the Second Department have held that conditional summary judgment is the appropriate relief where the contract requires a showing of negligence, but the party seeking indemnification has demonstrated that its own liability is vicarious only (*see Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612 [2d Dept 2011]; *George v Marshalls of MA, Inc.*, 61 AD3d 931, 932 [2d Dept 2009]; *see also Hughey v RHM-88, LLC*, 77 AD3d 520, 523 [1<sup>st</sup> Dept 2010]).

Here, depending on the nature of the alleged defect, where it was located, whether it existed when the tenant leased the premises in 2010, whether the landlord conducted regular inspections of the premises, whether the tenant had notified the landlord of any problem, whether the tenant did any renovations during the seven years between the date the lease started and plaintiff's accident, and other factors, the responsibility for maintaining and repairing the applicable but unspecified area of the premises will either have been solely on the landlord or solely on the tenant. On the issue of liability, this summary judgment motion is premature.

Turning to the part of the third cause of action in the third-party complaint for the provision of counsel to defend the action, plus attorneys' fees and costs already incurred in defending this action, as further elaborated upon in the affirmation in support as a demand for a defense, the court finds that this branch of the motion has merit. The lease agreement provides that the tenant shall indemnify and defend Braha, the property owner, from all claims by third-parties. Braha made a demand for a defense, and it should have been granted.

Accordingly, it is **ORDERED** that third-party plaintiff Braha is granted summary judgment on its claim against third-party defendant 165-24 Jamaica Ave. Corp. for reimbursement of its attorneys' fees and costs incurred in defense of the action thus far, and 165-24 Jamaica Ave. Corp. must hereafter assume the defense of defendant/third-party plaintiff Braha in this action. If the parties cannot agree to the amount of the reimbursement due, Braha may bring a motion, or file a stipulation, that a hearing on the issue is needed, and the court will appoint a referee to conduct a hearing.

The remainder of the motion is denied.

The foregoing shall constitute the decision and order of the Court.

Dated: Brooklyn, New York  
April 18, 2022

ENTER:



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Hon. Debra Silber, J.S.C.