

Movsesyan v Angel Eyebrow Threading

2022 NY Slip Op 32510(U)

January 20, 2022

Supreme Court, Queens County

Docket Number: Index No. 718331/2018

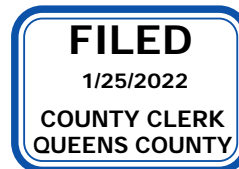
Judge: Pam Jackman Brown

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**NEW YORK STATE SUPREME COURT
COUNTY OF QUEENS – IAS PART 19**

SHORT FORM ORDER



**Present: HONORABLE PAM JACKMAN BROWN
Justice**

-----X
IRMA MOVSESYAN,

Plaintiff,

Index No: 718331/2018

-against-

Mot. Seq. No. 5

**ANGEL EYEBROW THREADING,
ERASMO TROIA and CALGERO TROIA,
NEW CENTURY 99 INC., ALIJA TEJOJ and
SIBE TEJOVI,**

Defendants.

-----X

The following e-filed papers read on this motion by Defendant Angel Eyebrow Threading (hereinafter referred to as “Defendant Angel”) for an order granting summary judgment dismissing the complaint, and in the alternative for an order granting Defendant Angel’s cross-claims for indemnification and contribution against Co-Defendants Erasmo Troia and Calogero Troia.

E-Filed Papers

	<u>Numbered</u>
Notice of Motion- Statement of Material Facts-Affirmations- Memorandum of Law-Exhibits.....	89-107
Opposing Affirmation-Affidavit-Exhibits-Response to Statement of Material Facts-Other Affirmations.....	108 -111
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Upon the foregoing papers the motion is determined as follows:

Plaintiff Irma Movsesayn (hereinafter referred to as “Plaintiff”) commenced the within action on November 30, 2018, to recover damages for personal injuries sustained on September 26, 2018. Plaintiff in her verified complaint alleges that she was walking on Myrtle Avenue in Glendale, New York, with her care giver, when she tripped over a

raised sidewalk flag located at what appears in front of the real property located at 66-09 Myrtle Avenue and fell onto the sidewalk in front of the real property located 66-07 Myrtle Avenue. It is undisputed that the real property located at 66-09 Myrtle Avenue is a mixed-use property owned by Defendants Calogera Troia and Erasmo Troia (hereinafter referred to as “Defendants Troia”), and that the real property located at 66-07 Myrtle Avenue is owned by Defendants Allja Tejoj (hereinafter referred to as “Defendant Tejoj”) and Sibe Tejovic (hereinafter referred to as “Defendant Tejovic”). Defendant Angel occupies the first-floor commercial unit and basement of the property owned by the Defendants Troia. Defendant New Century 99, Inc. occupies the first-floor commercial space owed by Defendants Tejoj and Tejovic.

Defendants Troia served an amended verified answer and interposed 22 affirmative defenses and cross claims against all of the other Co-Defendants for common law indemnity and contribution, and a cross claim against Co-Defendant Angel for contractual indemnification.

Defendant New Century 99 Inc. served a verified answer and interposed 9 affirmative defenses and cross claims against all of the other Co-Defendants for common law indemnification and contribution for contractual indemnification, and for breach of contract based upon the failure to procure insurance.

Defendant Angel served a verified answer and interposed 11 affirmative defenses and cross claims against all of the other Co-Defendants for common law indemnification and contribution, and for contractual indemnification.

Defendants Tejoj and Tejovic served a verified answer and interposed 5 affirmative defenses and cross claims against all of the other Co-Defendants for common law or contractual indemnification.

Defendant Angel now moves for summary judgment dismissing the complaint in its entirety on the grounds that it did not have a duty to maintain the sidewalk outside of its premises. Defendant Angel asserts that the alleged defective sidewalk was a structural defect and that it was the landlord’s duty to repair said alleged defect. In the alternative, Defendant Angel seeks an order granting summary judgment on its cross claims against Defendants Troia for indemnification and contribution. Defendant Angel asserts that pursuant to its lease agreement, Defendants Troia are required to indemnify it for personal injuries and/or damages resulting from structural defects on the sidewalk.

Plaintiff opposes the motion. Defendants Troia only oppose that branch of the motion which seeks relief on the cross claims.

As a general rule, liability for a dangerous or defective condition on property is

predicated upon ownership, occupancy, control, or special use of the property (see, *Ruffino v New York City Tr. Auth.*, 55 AD3d 817, 818 [2d Dept 2008]). A tenant of property abutting a public sidewalk “owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty” (*Leitch-Henry v Doe Fund, Inc.*, 179 AD3d 655, 655-56 [2d Dept 2020] quoting, *Martin v Rizzatti*, 142 AD3d 591, 592–593 [2d Dept 2016]; see, *Torres v City of New York*, 153 AD3d 647, 648 [2d Dept 2017]; *O’Toole v City of Yonkers*, 107 AD3d 866, 867 [2d Dept 2013]).

Pursuant to Administrative Code of the City of New York § 7–210(a), “the owner of real property abutting any sidewalk” has a duty “to maintain such sidewalk in a reasonably safe condition.” “Notwithstanding any other provision of law, the owner of real property abutting any sidewalk ... shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition” (Administrative Code § 7–210[b]). “As a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party” (*Hsu v City of New York*, 145 AD3d 759, 760 [2d Dept 2016]; see, *Leitch-Henry v Doe Fund, Inc.*, 179 AD3d at 655-56; *Maltese v Metropolitan Transp. Auth.*, 179 AD3d 780 [2020]; *Torres v City of New York*, 153 AD3d at 649; *Martin v Rizzatti*, 142 AD3d at 593; *Paperman v 2281 86th St. Corp.*, 142 AD3d 540 [2d Dept 2016]).

Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third person (see, *Church v Callanan Indus.*, 99 NY2d 104 [2002]; *Maltese v Metropolitan Transp. Auth.*, 179 AD3d 780; *Rodriguez v County of Westchester*, 138 AD3d 713 [2d Dept 2016]). However, there are three exceptions to this general rule: (1) where a contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) where the Plaintiff detrimentally relies on the continued performance of the contracting party’s duties, and (3) where the contracting party has entirely displaced the other party’s duty to maintain the premises safely (see, *Espinal v Melville Snow Contrs.*, 98 NY2d 136; *Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253 [2007]; *Randazzo v Consolidated Edison of N.Y., Inc.*, 177 AD3d 796 [2019]; *Reeves v Welcome Parking, Ltd. Liab. Co.*, 175 AD3d 633 [2019]; *Pinto v Walt Whitman Mall, LLC*, 175 AD3d 541; *Espeleta v Synergy Resources, Inc.*, 172 AD3d 1320 [2019]; *Rothstein v Elohim*, 133 AD3d 839 [2015]).

As Plaintiff does not allege facts in the complaint that would establish the possible

applicability of any of the *Espinal* exceptions, Defendant Angel is not required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law (see, *Hsu v City of New York*, 145 AD3d at 760; *Barone v Nickerson*, 140 AD3d 1100, 1101 [2d Dept 2016]; *Leibovici v Imperial Parking Mgt. Corp.*, 139 AD3d 909, 910 [2d Dept 2016]; *Sperling v Wyckoff Hgts. Hosp.*, 129 AD3d 826, 827 [2d Dept 2015]).

This Court finds that Defendant Angel has established its prima facie entitlement to judgment dismissing the complaint as a matter of law by demonstrating that it did not create the alleged defect, make special use of the sidewalk, violate any applicable statute, or had a contractual duty to maintain the sidewalk where the accident occurred (see, *Leitch-Henry v Doe Fund, Inc.*, 179 AD3d at 656).

The lease and rider agreements submitted herein establishes that the premises located at 66-09 Myrtle Avenue was leased to Anjila Corporation, and that Kusum Tamang executed said lease as president of Anjila Corporation and Defendants Troia. The lease term commenced on March 1, 2016, and ended on February 28, 2021, and provided that the premises may be used and occupied only for a threading and nail salon. Anjila Corporation is not a party to this action and the lease makes no reference to Defendant Angel. Ms. Kusam testified at her deposition that she is the owner of Defendant Angel and operates a threading and nail salon at the subject location. This Court therefore finds that in the absence of a lease agreement between Defendant Angel and Defendants Troia, Defendant Angel had no contractual duty to maintain the abutting sidewalk. Furthermore, even assuming that Anjila Corporation is doing business as Defendant Angel, the lease agreement requiring the tenant to keep the sidewalk in good order and repair, without requiring the tenant to do so at its own cost and expense is not so comprehensive and exclusive as to sidewalk maintenance so as to entirely displace the property owner's statutory duty to maintain the abutting sidewalk (*cf. Paperman v 2281 86th Corp.*, 142 AD3d 540).

In opposition, Plaintiff failed to raise a triable issue of fact. Plaintiff's contentions regarding Defendant Angel's "special use" of the sidewalk is without merit. There is no evidence that Defendant Angel had "exclusive possession or control" over that area of the public sidewalk (*O'Toole v City of Yonkers*, 107 AD3d at 867 [2013]). Moreover, the use of the public sidewalk to enter the business does not amount to a "special use" (see, *Berkowitz v Spring Creek, Inc.*, 56 AD3d 594 [2d Dept 2008]; *Sampino v Crescent Associates, Inc.*, 34 AD3d 779 [2d Dept 2006]).

Plaintiff's reliance upon a tenant's a common-law duty of reasonable care to maintain the demised premises in a reasonably safe condition is misplaced. The lease terms make it clear that Anjila Corporation and not Defendant Angel is the tenant. Furthermore, even assuming that Anjila Corporation is doing business as Defendant

Angel, there is no evidence that the sidewalk abutting the subject premises is part of the demised premises. Paragraph 35 of the rider to the lease entitled "SIDEWALKS" provided that "[t]he grant of the demised premises from Landlord to Tenant in this Lease is strictly limited to the floor area in the building and does not include any right or license of use or occupancy to any sidewalk or public area outside said floor area other than the right of access to the demised premises Building and Land which may be specifically set forth in this Lease". The rider to the lease thus excluded the abutting sidewalk from its description of the demised premises and limited the use of said sidewalk to access to the premises.

Finally, Plaintiff has failed to present any evidence that Defendant Angel had actual or constructive notice of the alleged condition of the abutting sidewalk where Plaintiff's accident is alleged to have occurred.

In view of the foregoing, Defendant Angel's motion to dismiss the complaint in its entirety is granted, and the request for alternative relief on its cross claims is denied as moot.

Accordingly, the application in the motion sequence #005 seeking summary judgment is granted. The application seeking alternative relief on the cross claims is denied as moot.

IT IS HEREBY ORDERED that the complaint, all claims and cross claims against Defendant ANGEL EYEBROW THREADING are dismissed.

IT IS FURTHER HEREBY ORDERED that the caption is amended to delete Defendant ANGEL EYEBROW THREADING.

The movant, Defendant ANGEL EYEBROW THREADING, must serve a copy of this Order with Notice of Entry on Counsels for Plaintiff and all other Defendants and the Clerk of the Court within 20 days of Entry.

The above constitutes the Decision and Order of the Court.

Dated: January 20, 2022
Jamaica, NY



HON. PAM JACKMAN BROWN, J.S.C.

