

**Talmage v Greenpoint Mfg. & Design Ctr. Local Dev.  
Corp.**

2023 NY Slip Op 30902(U)

March 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 523183/2016

Judge: Ingrid Joseph

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At an IAS 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 360 Adams Street, Brooklyn, New York, on the 21<sup>st</sup> day of March, 2023.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
THOMAS TALMAGE,

Plaintiff,

-against-

Index No.: 523183/2016

GREENPOINT MANUFACTURING AND DESIGN  
CENTER LOCAL DEVELOPMENT CORPORATION,  
GMDC TWO CORPORATION, THE HERITAGE  
WOODSHOP INC. and WELLSTONE NYC CUSTOM  
WOODWORKING LLC,

Defendants.

-----X  
GREENPOINT MANUFACTURING AND DESIGN,  
CENTER LOCAL DEVELOPMENT CORPORATION,  
and GMDC TWO CORPORATION,

**ORDER**

Third-Party Plaintiffs,

-against-

POP CHART LAB INC.,

Third-Party Defendant.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Affidavits/ Affirmations in Reply \_\_\_\_\_

86-87, 102-103  
118-119, 123-124, 147-148  
138-139, 141, 143, 145-146  
142, 144, 149, 150, 152

Motion #2, #3, #4, and #5

Upon the foregoing papers, Third-Party Defendant Pop Chart Lab Inc. (“Pop Chart”) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party complaint and all cross-claims against it (Motion Seq. Nos. 2 and 5).<sup>1</sup> Defendants/Third-Party Plaintiffs Greenpoint Manufacturing and Design Center Local Development Corporation (“Greenpoint Manufacturing”) and GMDC Two Corporation (“GMDC”) (collectively referred to as the “Greenpoint Defendants”) move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint, cross-claims and counterclaims against them and granting them summary judgment in their favor on their contractual indemnification claims against Pop Chart and Co-Defendant Wellstone NYC Custom Woodworking LLC (“Wellstone”) (Motion Seq. No. 3). Wellstone moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint, cross-claims and counterclaims as against it (Motion Seq. No. 4).

In this negligence action, Plaintiff Thomas Talmage (“Plaintiff”) alleges that he suffered injuries on April 27, 2015, at around 12:00 p.m., when an A-frame cart loaded with four feet by eight feet sheets of pre-finished maple wood fell onto him while he was attempting to move it. The accident occurred in the loading dock area of a building owned by GMDC and managed by Greenpoint Manufacturing. The loading dock area was a common area of the building where tenants of the building, including Wellstone and Pop Chart, received deliveries and kept wheeled trash containers. Wellstone, which owned the A-frame cart at issue, had received a delivery of maple wood earlier that morning, but was unable to immediately take the cart up to its space because Greenpoint Manufacturing’s elevator operator had indicated that the elevator would not be available until later in the day. Thus, Wellstone left the loaded A-frame cart in the loading dock area in front of some of the trash containers, including one that belonged to Pop Chart.

At around noon, Plaintiff, a Pop Chart employee, took a wheeled trash can to the loading dock area in order to put trash into Pop Chart’s trash container located in the loading dock area. The accident occurred when Plaintiff went to move Wellstone’s A-frame cart out of the way of Pop Chart’s trash container. Although Plaintiff testified at his deposition that he attempted to push the cart in a direction parallel to the way the wood sheets on the cart were stacked and that the cart and its load immediately toppled over onto him, the video, submitted by the Greenpoint Defendants, from the security camera located on the loading dock shows that Plaintiff, in fact, grabbed the frame of the cart, crouched down and pulled the cart straight back toward himself (*see Schneider v Gap, Inc.*, 208 AD3d 606, 607 [2d Dept 2022] [finding that defendant established prima

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<sup>1</sup> Pop Chart’s motion sequence numbers 2 and 5 seek the same relief. Motion sequence number 5 appears to have been designated when Pop Chart submitted a corrected notice of motion with respect to its motion previously submitted as motion sequence number 2.

facie entitlement to summary judgment where plaintiff's testimony as to how the accident occurred was belied by video surveillance footage]; *Gaffney v New York City Tr. Auth.*, 210 AD3d 426, 426 [1st Dept 2022] [affirming order granting summary judgment for defendants because plaintiff's testimony about the accident was proven demonstrably false by video surveillance]). The video, however, also shows that the cart moved toward Plaintiff for a foot or two without any apparent problem, and only toppled onto Plaintiff when it appeared to reach the edge of a metal sheet or plate that covered a portion of the wood flooring. At his first deposition, Plaintiff stated that, while lying on the ground after the accident, he noticed that the area traversed by the cart was uneven because of the metal sheet covering the flooring. Plaintiff, however, was unable to estimate the height differential between the wood flooring and the metal sheet placed over it in the area of the accident. Both Plaintiff and Brian Coleman ("Coleman"), Greenpoint Manufacturing's CEO, stated that the metal sheet itself was probably a quarter inch thick.<sup>2</sup>

As evidenced by the testimony in the record and the video, the A-frame cart was a cart with four wheels on which wood sheets were placed standing up on their long edge (as opposed to lying flat) and which were supported by leaning them against the cart's frame at an angle. Each wheel of the cart at issue could swivel in any direction. Based on his own experience and training in using such carts, Roei Ben-Jacob ("Ben-Jacob"), Wellstone's shop steward who was involved in loading the cart at issue, testified at his deposition that carts like the one at issue should never be moved by pulling material directly toward yourself as Plaintiff is seen doing in the video, but rather, should be pushed in the direction of the material (i.e. pushed parallel with the length of the load). Patrick Mulligan, Pop Chart's CEO, provided similar testimony at his deposition and Plaintiff, in his own testimony, stated that "you are supposed to push [such carts] to the side" (Plaintiff 9/7/18 Tr. at 33, lns 6-7).

Ben-Jacob also testified, based on his review of the video and invoice for the delivery at issue, that the subject sheets were four feet by eight feet sheets of pre-finished maple, each sheet of which weighed no more than 100 pounds. Since there were six sheets of pre-finished maple on the cart at the time of the accident, the cart load weighed no more than six hundred pounds. According to Ben-Jacob, the cart itself was rated to hold up to 3,000 pounds.

The Greenpoint Defendants assert that they are entitled to summary judgment because: (1) Plaintiff will be unable to prove that there was a defective premises condition; (2) any such condition was not a proximate cause of the accident; and (3)

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<sup>2</sup> Despite his testimony at his first deposition that he could not estimate the height differential between the two surfaces and that the metal sheet itself was probably a quarter inch thick, Plaintiff later testified at his second deposition that the differential between the wood flooring and the metal sheet was one inch or more.

defendants had no actual or constructive notice of a dangerous condition. The testimony from Plaintiff and Coleman that they believed that the steel sheets over the wood floors were only a quarter of an inch thick does tend to support a finding that the elevation differential between the wood flooring and steel plated section of the floor in the area of the accident was a trivial defect and did not constitute a defective property condition (*see Trincere v County of Suffolk*, 90 NY3d 976, 977-978 [1997]; *DePascale v E&A Constr. Corp.*, 74 AD3d 1128, 1131 [2d Dept 2010]; *Charnov v New York City Bd. of Educ.*, 171 AD3d 409, 410 [1st Dept 2019]). However, such testimony fails to show that the elevation differential at issue was only a quarter of an inch because there is no testimony or other evidence showing that the steel plates lay flush on top of the wood flooring in the area at issue, and the Greenpoint Defendants have failed to provide actual measurements of the elevation differential or clear photographs of the area in question in support of their motion. The Greenpoint Defendants have thus failed to demonstrate, *prima facie*, that the condition was trivial as a matter of law (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 82-84 [2015]; *Nicotra v Giunta's Meat Farms, Inc.*, \_\_\_ AD3d \_\_\_, 2023 NY Slip Op 01095, \*1-2 [2d Dept 2023]; *E.F. v City of New York*, 203 AD3d 887, 889 [2d Dept 2022]; *Nagin v K.E.M. Enters., Inc.*, 111 AD3d 901, 902-903 [2d Dept 2013]; *Gogu v Gap, Inc.*, 180 AD3d 439, 440 [1st Dept 2020]; *Brumm v St. Paul's Evangelical Lutheran Church*, 143 AD3d 1224, 1225-1226 [3d Dept 2016]).

The Greenpoint Defendants next assert that, based on Plaintiff's deposition testimony that he did not feel the wheels of the cart engage or bang on anything before it fell, there is no evidence that the steel sheet laid over the loading dock area's floor contributed to the cart tipping over. While such testimony would support a finding that any defect relating to the elevation differential between the wood flooring and the steel sheet was not a proximate cause of the accident, the video of the accident, which shows that Plaintiff was able to move the cart one to two feet without incident and that the cart and wood sheets only began to fall when the cart reached the edge of the steel sheet, is sufficient to demonstrate factual issues as to proximate cause.

The Greenpoint Defendants also contend that they did not have actual or constructive notice that the elevation differential between the wood floor and the steel plate could cause an A-frame cart to tip over. To support this claim, the Greenpoint Defendants rely upon Coleman's testimony that he had never previously heard of any A-frame cart tipping over because of the height differential and that there had been no prior complaints that the steel sheets were a tripping hazard or that they made it difficult to move wheeled equipment through the loading dock. While this testimony may be sufficient to demonstrate, *prima facie*, the absence of actual notice, the testimony fails to demonstrate, *prima facie*, the absence of constructive notice of the defect (*see*

*Hutchinson*, 26 NY3d at 83). Moreover, a cart tipping over or material falling off of a cart is undoubtedly a foreseeable consequence of a non-trivial defect in a floor, even if the Greenpoint Defendants were not aware of any such incidents at their facility prior to Plaintiff's accident (see *New v Stachowiak*, 84 AD3d 1326, 1326 [2d Dept 2011]; *Farrar v Town of Waterford*, 99 AD2d 599, 600 [3d Dept 1984]; see also *Chuqui v Amna, LLC*, 203 AD3d 1018, 1022-1023 [2d Dept 2022]).

Plaintiff, in his bill of particulars, alleges that Wellstone was negligent in blocking access to garbage bins belonging to other building tenants by leaving the heavily loaded cart in front of such bins for an extended period of time. Based upon the deposition testimony submitted by Wellstone that loaded A-frame carts, like the one at issue, must only be moved in a specific manner and suggesting that at least some training is required to properly move loaded A-frame carts, Wellstone has failed to demonstrate, prima facie, the absence of factual issues as to whether its leaving the unattended cart in front of Pop Chart's bins, without any warning regarding the danger presented in moving it, created a dangerous condition (see *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1158-1159 [2d Dept 2016]; *Van Salisbury v Elliott-Lewis*, 55 AD3d 725, 726-727 [2d Dept 2008]; *Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415, 416 [1st Dept 2022]; *Vliet v Crowley Foods*, 263 AD2d 941, 942 [3d Dept 1999]).

Plaintiff similarly alleged that the Greenpoint Defendants were negligent in allowing the cart to be placed in front of the tenant garbage bins for an extended period of time. The Greenpoint Defendants, however, did not address this theory of liability in their motion papers, and thus, have failed to demonstrate their prima facie entitlement to summary judgment in this respect (see *Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 842 [2d Dept 2021]; *Garcia v Market Assoc.*, 123 AD3d 661, 665 [2d Dept 2014]; see also *Padilla*, 204 AD3d at 416; *Houston v McNeilus Truck & Mfg., Inc.*, 124 AD3d 1205, 1206 [4th Dept 2015]).

Both Wellstone and the Greenpoint Defendants also assert that they may not be held liable because Plaintiff's pulling of the cart directly toward himself was the sole proximate cause of the accident. Under the subject circumstances, however, where there are factual issues as to whether the condition of the floor itself presented a dangerous condition that may have been a proximate cause of the accident and factual issues as to whether the placement of the cart in front of the tenant garbage bins for an extended period created a dangerous condition, any negligence by Plaintiff in how he moved the cart presents an issue of comparative fault, and may not be considered the sole proximate cause of the accident as a matter of law (see *Parrinello v Independence Plaza SC, LLC*, 189 AD3d 1441, 1444 [2d Dept 2020]; *Cortez v Northeast Realty Holdings, LLC*, 78 AD3d 754, 756 [2d Dept 2010]; *Pabon v Nouveau El. Indus., Inc.*, 49 AD3d 702, 703 [2d

Dept 2008]; *Bullock v Angry Goat Pub, Inc.*, 196 AD3d 1115, 1116-1117 [4th Dept 2021]; *Solecki v Oakwood Cemetery Assn.*, 158 AD3d 1088, 1090 [4th Dept 2018]; *Houston*, 124 AD3d at 1206; *Mizell v Bright Servs., Inc.*, 38 AD3d 267, 267 [1st Dept 2007]; *Baker v Sportservice Corp.*, 142 AD2d 991, 993 [4th Dept 1988]).

Accordingly, defendants have failed to demonstrate their prima facie entitlement to summary judgment dismissing the complaint and their respective motions must thus be denied regardless of the sufficiency of Plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Turning to the portions of Pop Chart, Wellstone and the Greenpoint Defendants' respective motions addressing the Greenpoint Defendants' contractual indemnification claims, section 46 of the Greenpoint Defendants' respective leases with Pop Chart and Wellstone contain identical indemnification provisions that provide, as is relevant here, that Pop Chart and Wellstone are required to defend, indemnify and hold harmless the "Owner Parties" from claims "arising or occurring in connection with: . . ."

"(c) all fines, suits, proceedings, claims, demands and actions of any kind or nature whatsoever brought by anyone whomsoever arising or growing out of or in any wise [sic] connected with the Tenant's or a Tenant's Party's possession, use, operation and maintenance of the demised premises, except for acts and/or omissions of Owner, its agents, officers, directors, members, partners, employees or independent contractors." (Lease § 46).

The broad language of this provision providing for indemnification for claims "arising" or "growing" out of Pop Chart and Wellstone's "possession," "use," and "operation" of the "demised" premises covers Wellstone's acts in placing the A-frame cart in front of Pop Chart's garbage bins and acts of Plaintiff, Pop Chart's employee, in moving the A-frame cart regardless of whether these acts were negligent and despite the fact that these acts occurred in a common area repaired and maintained by the Greenpoint Defendants (*see Rodriguez v 5432-50 Myrtle Ave., LLC*, 148 AD3d 947, 949 [2d Dept 2017]; *Campisi v Gambar Food Corp.*, 130 AD3d 854, 855-856 [2d Dept 2015]; *DeCoursey v Briarcliff Cong. Church*, 104 AD3d 799, 802 [2d Dept 2013]; *Reutzel v Hunter Yes, Inc.*, 135 AD3d 1123, 1125-1126 [3d Dept 2016]; *see also Amato v Our Lady of Peace R.C. Church*, 56 NY2d 999, 1000-1001 [1982]). This indemnification provision, however, expressly provides that it is inapplicable if the claim is the result of acts or omissions of the Greenpoint Defendants. Since there are factual issues as to whether the accident occurred, at least in part, because of a defective property condition

for which the Greenpoint Defendants would be responsible, the Greenpoint Defendants are not entitled to summary judgment in their favor. These factual issues also preclude the dismissal of the Greenpoint Defendants' contractual indemnification claims as against Pop Chart and Wellstone.<sup>3</sup>

Additionally, Wellstone, which has not addressed the merits of the Greenpoint Defendants' cross-claims for contribution and common-law indemnification, has failed to demonstrate its prima facie entitlement to dismissal of those claims (*see Pierrelouis v Kuten*, 207 AD3d 485, 487 [2d Dept 2022]; *Kolosovskiy v Vitale*, 7 AD3d 579, 579 [2d Dept 2004]; *see also Keller v Rippowam Cisqua Sch.*, 208 AD3d 654, 655 [2d Dept 2022]; *Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 981 [2d Dept 2021]), and its motion, in this respect, must thus be denied regardless of the sufficiency of the Greenpoint Defendants' opposition papers (*see Winegrad*, 64 NY2d at 853).

Accordingly, it is hereby

ORDERED, that Pop Chart's motion (Motion Seq. Nos. 2 and 5) seeking summary judgment dismissing the third-party complaint and all cross-claims against it is DENIED; and it is further

ORDERED, that Greenpoint Defendants' motion (Motion. Seq. No. 3) for summary judgment dismissing the complaint, cross-claims and counterclaims against them and summary judgment as to their contractual indemnification claims against Pop Chart and Wellstone is DENIED; and it is further

ORDERED, that Wellstone's motion (Motion Seq. No. 4) for summary judgment dismissing the complaint, cross-claims and counterclaims against it is DENIED.

This constitutes the decision and order of the Court.

  
\_\_\_\_\_  
Hon. Ingrid Joseph, J.S.C.  
Hon. Ingrid Joseph  
Supreme Court Justice

<sup>3</sup> The Greenpoint Defendant may also be entitled to indemnification from Pop Chart under sections 8 and 46 (d) of the lease with Pop Chart. Section 46 (d), like section 46 (c), does not allow recovery where the claim arises from the Greenpoint Defendant's negligence or willful misconduct, and section 8 only allows recovery where the owner is not reimbursed by insurance. With respect to section 8, Greenpoint Defendants have failed to demonstrate, prima facie, that they will not be reimbursed by insurance for this accident.