

**Azmi v Mutual Redevelopment Houses, Inc.**

2023 NY Slip Op 32060(U)

June 22, 2023

Supreme Court, New York County

Docket Number: Index No. 152225/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 14

-----X

MARIAM AZMI,  
  
Plaintiff,  
  
- v -  
  
MUTUAL REDEVELOPMENT HOUSES, INC.,  
  
Defendant.

INDEX NO. 152225/2018  
  
MOTION DATE N/A  
  
MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

-----X

MUTUAL REDEVELOPMENT HOUSES, INC.  
  
Third-Party Plaintiff,  
  
-against-

Third-Party  
Index No. 595772/2020

KRISHNA KUMARI LLC  
  
Third-Party Defendant.

-----X

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 127, 128, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 164, 165, 166, 167, 168, 170, 171, 172, 173, 174, 194, 195, 196, 197

were read on this motion to/for JUDGMENT - SUMMARY.

The motion for summary judgment by Mutual Redevelopment Houses, Inc. (“Mutual) is denied and the cross-motion for summary judgment by Krishna Kumari LLC (“Krishna”) to dismiss the third-party complaint is granted to the extent that the cause of action for breach of contract is dismissed.

## Background

This case arises out of a slip and fall accident on November 2, 2017. Plaintiff was employed as a manager at a Dunkin' Donuts located in Manhattan. Mutual owned the building located at 269 8<sup>th</sup> Ave, and Krishna leased space in the building to operate the Dunkin' Donuts.

Plaintiff contends that she was walking in passageway from the Dunkin' Donuts to an electrical room (NYSCEF Doc. No. 103 at 51) when she slipped and fell. At the time of the accident, plaintiff was with "Anthony," who was there to inspect a gas leak and she was taking him to the gas room (*id.* at 60). She claims she did not know, initially, what caused her left foot to slip but that "when I was on the floor, when I tried to get up, my hands were on the floor, and I found there was – it was all greasy" (*id.* at 83).

Mutual now moves for summary judgment to dismiss the complaint and Krishna's counterclaim for indemnification. It insists that it did not create or cause the allegedly dangerous condition that purportedly caused plaintiff's accident. Mutual asserts it conducted monthly inspections and walkthroughs to ensure the cleanliness of the premises. It maintains that the majority owner of Krishna claimed he walked along this passageway at least four of five times in the days leading up to the accident (as there was an issue with the gas meter) without incident.

Mutual also seeks summary judgment on its claim for contractual indemnification against Krishna and seeks a defense for the instant action. It argues that the lease required Krishna to provide defense and indemnification to Mutual for a personal injury allegation like the one pursued by plaintiff. Mutual maintains that it is entitled to summary judgment on its third-party claim for breach of contract to the extent that Krishna argues it did not obtain an insurance policy naming Mutual as additional insured, a requirement under the lease.

Krishna cross-moves for summary judgment and argues that plaintiff's accident occurred on the basement floor of the premises, an area that was a common space and not within the purview of Krishna's leased space. It points out that the building had five commercial tenants. Krishna argues that Mutual was required to perform maintenance in the common hallway and cleaned this area. Krishna contends that because the accident did not occur "in or about" the demised premises, it is not required to indemnify Mutual for plaintiff's accident. It observes that plaintiff testified that the accident happened after walking along the passageway for about 30-40 steps (or two to three minutes).

With respect to the breach of contract claim, Krishna observed that Mutual admitted in the statement of facts attached to its motion that Krishna procured the required insurance coverage for Mutual.

In opposition to Mutual's motion, plaintiff claims that Mutual had a duty to ensure the premises were in a reasonably safe condition. Plaintiff contends that Mutual offered no testimony about the condition of the basement floor at the time of the accident. She argues that Mutual never offered any evidence about inspecting the passageway. Plaintiff further claims the greasy puddle on the floor was an ongoing issue as testimony indicates that some witnesses had seen the greasy puddles on the floor on prior occasions.

### **Discussion**

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers

(*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

### **Mutual's Claims against Plaintiff**

The Court finds that there are issues of fact that compel the denial of the branch of Mutual's motion that seeks to dismiss plaintiff's complaint. Mutual failed to establish as a matter of law that it lacked constructive notice of the dangerous condition.

"Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" that caused plaintiff's injury. A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Gomez v Samaritan Daytop Vil., Inc.*, 188 NYS3d 60, 62 [1st Dept 2023] [internal quotations and citations omitted]).

Plaintiff testified that she did not know how long the greasy condition that caused her to fall existed prior to the accident (NYSCEF Doc. No. 103 at 108). And Mutual did not submit any evidence to show when it has last cleaned the hallway prior to the accident. At Mutual's deposition, its witness admitted that Mutual hired porters who were responsible to clean the common areas (NYSCEF Doc. No. 104 at 21). And while Mutual's witness testified that a tenant would be responsible for cleaning up its own mess, nothing in this record definitively shows that Krishna created the dangerous condition and failed to clean it up (*id.* at 28). In fact, Mutual's witness asserted that the hallway would only be checked for cleanliness on a monthly basis (*id.*).

In other words, there are numerous issues of fact about the nature of the condition and how long it existed prior to the accident that compels the Court to deny Mutual's motion.

#### **Ms. Fatema**

The Court acknowledges that part of plaintiff's opposition included photographs from Farhin Fatema, a co-worker who allegedly took photos of the condition right after the incident. The Court previously precluded Ms. Fatema from testifying at trial on the ground that plaintiff should have disclosed this witness, the store manager at her workplace, well before the note of issue was filed. Plaintiff clearly knew about the existence of this witness.

In connection with this motion, the Court observes that the alleged hearsay statements of Ms. Fatema referenced by plaintiff in her affidavit in opposition were not dispositive. Plaintiff raised issues of fact through the deposition testimonies from the various party witnesses. Similarly, the Court did not consider the photographs allegedly taken by Ms. Fatema (NYSCEF Doc. No. 172) as plaintiff raised material issues of fact separate and apart from these photos.

### Contractual Indemnification

“[A]n agreement pursuant to which an obligation to indemnify is imposed must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances,” (*Tonking v Port Auth.*, 2 AD3d 213, 214, 768 NYS2d 311 [1st Dept 2003] [internal citations and quotations omitted]).

“In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

The Court denies Mutual’s motion for contractual indemnification as Mutual did not establish that it was free from negligence—namely, that it failed to prove as a matter of law that it did not create the greasy and slippery condition that allegedly caused plaintiff’s accident. Plaintiff testified that she did not know where the greasy condition came from, although she suspected that it could be either from the restaurant (another tenant at the location) or from the pipes (NYSCEF Doc. No. 103).

The fact is that no party could establish which entity caused the allegedly dangerous condition and this compels the Court to deny both Mutual’s motion and Krishna’s cross-motion for summary judgment to the extent it sought to dismiss the entire third-party complaint.

And Krishna also did not establish that it was free of negligence as a matter of law. At the deposition of its majority owner, Mr. Sekhar testified that it was Krishna’s obligation to maintain and repair the pipes that lead from the gas meter into the Dunkin’ Donuts store (NYSCEF Doc. No. 113 at 28). A fact finder could theoretically conclude that the dangerous

condition was caused by pipes that were Krishna’s responsibility to maintain. Krishna’s arguments about how appellate courts have interpreted the phrase “in or about the premises” are well taken, but does not absolve Krishna of possible liability for a condition it may have created. Put another way, even though the accident occurred in a common hallway shared with other tenants, it still may be liable under the indemnification provision of the lease if it caused the dangerous condition.

**Breach of Contract**

The Court dismisses the second cause of action alleged in the third-party complaint-- the failure to procure insurance-- because Mutual admitted that Krishna obtained the necessary insurance coverage naming Mutual as an additional insured in its statement of material facts (NYSCEF Doc. 98 at ¶15).

Accordingly, it is hereby

ORDERED that the motion for summary judgment by Mutual Redevelopment is denied; and it is further

ORDERED that the cross-motion by third-party defendant Krishna Kumari LLC is granted only to the extent the second cause of action in the third-party complaint for breach of contract is dismissed.

6/22/2023

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE