

**Chassen-Allman v D'Avanzo**

2023 NY Slip Op 34958(U)

October 18, 2023

Supreme Court, Queens County

Docket Number: Index No. 710590/2019

Judge: Mojgan C. Lancman

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**Short Form Order**

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN IAS Part 20

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DANIELLE CHASSEN-ALLMAN,

Plaintiff,

-against-

Index No.: 710590/2019

Motion Seq. No.: 6

Motion Date: 2.15.2023

Motion Cal. No.: 4

GERALD D'AVANZO, LORRAINE D'AVANZO,  
CLEMENT DeGREGORIO, FRANCES DeGREGORIO  
and KAVYA OPTIMO II INC. d/b/a OPTIMO CANDY  
& GROCERY STORE, SWAMI HARI PARSAD CORP.,  
SHERI HARI GROCERY INC., KANUBHAI M. PATEL,  
and LALJIBHAI K. PATEL,

Defendants.



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The papers bearing NYSCEF Doc. Nos. 67-75, 92-94, 97-98, 101-103, 107 and 112-113 were read on the motion made by the defendant Kavya Optimo II Inc. s/h/a Kavya Optimo II d/b/a Optimo Candy & Grocery Store (“Kavya”) for summary judgment.

The plaintiff, Danielle Chassen-Allman (the “Plaintiff”), filed this cause seeking to recover damages for personal injuries allegedly sustained in an accident that occurred on March 28, 2019 (the “Accident”). In essence, the Plaintiff contends that she tripped and fell due to a newspaper stand or display (the “Stand”).

Presently before the Court is Kavya’s motion for an Order granting summary judgment dismissing the complaint and the cross-claims of the defendants Gerald D’Avanzo (“Gerald”), Lorraine D’Avanzo (“Lorraine”), Clement DeGregorio (“Clement”) and Frances DeGregorio (“Frances”) (collectively, the “Co-Defendants”). For the following reasons, the motion is granted in part and denied in part.

**I. Factual Background**

The Accident occurred at 74-29 Metropolitan Avenue, Queens, New York (the “Premises”). Lorraine, Clement and Frances owned the Premises, which was operated by Kavya as a candy and grocery store.

It should be noted that Gerald, who was an owner of the Premises, passed away before this cause was commenced. The complaint and all cross-claims were thus previously dismissed as to him (*see* NYSCEF Doc. No.: 34).

The deposition testimony of the parties that is material to this motion is set forth below.

#### **A. The Plaintiff's Deposition Testimony**

Although the Plaintiff gave contradictory testimony, it is nonetheless clear that she was familiar with the Premises because she was a regular patron of Kavya prior to the Accident. Here, she initially testified that she went to the Premises "maybe four, five times a month" for thirteen years. Under subsequent questioning, the Plaintiff stated that she patronized Kavya at least once a month for "at least two to three years, something like that."

The Plaintiff was in the Premises with her husband and daughter on the date of the Accident. The Plaintiff was walking from the back to the front of the Premises when the Accident occurred. The Plaintiff alleges that she tripped and fell over the Stand, which she described as being made of wood. The Stand measured approximately six feet in length and its width was that of a typical newspaper. The Plaintiff conceded that she did not know which foot came into contact with the Stand first.

The Plaintiff was aware of the Stand before the Accident. Here, she had observed same on visits to the Premises prior to the Accident. She also observed the Stand upon entering the Premises on the date of the Accident.

The Plaintiff never complained to anyone in the Premises about the Stand prior to the Accident. She is unaware of complaints made by anyone about same.

While inside the Premises on the date of the Accident, the Plaintiff had no difficulties seeing. Nonetheless, the Plaintiff did not see the Stand in the moments before the Accident. In her words:

Q. Where were your eyes looking at the time that you fell?

A. Straight ahead.

Q. Did you notice the wooden box [the Stand] before you fell?

A. No.

Upon other questioning, the Plaintiff's testimony was that she did not know where she was looking when she tripped:

Q. Let me ask you this: Which direction were your eyes facing at the time of the accident?

A. Straight.

Q. What were you looking at, at the time that you tripped on the wooden piece [the Stand]?

A. I don't remember.

Q. So you could have been looking at the beer, you could have been looking at the front door, you don't know; right?

A. No, I don't know.

## **B. The Deposition Testimony of Kavya by Sanjay Patel**

Kavya was deposed by Sanjay Patel (“Patel”), its manager at the time of the Accident. He did not witness the Accident. The Stand is approximately four feet long and two feet wide. The Stand has been at the Premises since Kavya leased the Premises, which he indicated was around 2017. In the six month period prior the Accident, there had been no complaints relative to the Stand. There were also no accidents during this period involving the Stand.

## **C. The Deposition Testimony of the Co-Defendants by Clement**

The co-defendants, the owners of the Premises, were deposed by Clement. He testified that no patron ever complained about the Stand and that no violations were issued before the Accident relative thereto.

## **II. Discussion**

### **A. The Branch of the Motion for Summary Judgment Dismissing the Plaintiff's Complaint**

“A landowner has a duty to maintain its premises in a reasonably safe manner. However, there is no duty to protect or warn against conditions that are open and obvious and not inherently dangerous. To obtain summary judgment, a defendant must establish that a condition was both open and obvious and, as a matter of law, was not inherently dangerous” (*Ferruzzi v Village of Saltaire*, \_\_\_ AD3d \_\_\_, 2023 NY Slip Op 04578 [2d Dept 2023] [internal quotation marks and citations omitted]).

Where a display rack or stand is open and obvious and not inherently dangerous, summary judgment dismissing the complaint is warranted (*Nannariello v Kohl's Dep't Stores, Inc.*, 161 AD3d 1089 [2d Dept 2018]; *Kaufmann v Lerner N.Y., Inc.*, 41 AD3d 660 [2d Dept 2007]; *Schwartz v Kings Third Ave. Pharmacy, Inc.*, 116 AD3d 474 [1st Dept 2004]; *Speirs v Dick's Clothing & Sporting Goods, Inc.*, 268 AD2d 581 [2d Dept 2000]).

“Here, the evidence submitted by [Kavya] in support of its motion, including a transcript of the plaintiff's deposition testimony and photographs of the accident site, demonstrated, *prima facie*, that the [Stand] ... was both open and obvious, and not inherently dangerous. The [P]laintiff's testimony established, *inter alia*, that she was aware of the [Stand] and that she had [walked passed it] ... without incident shortly prior to her [A]ccident” (*Ferruzzi v Village of Saltaire*, \_\_\_ AD3d \_\_\_, 2023 NY Slip Op 04578).

The Plaintiff's action is also doomed by the following facts: (1) that she did not see the Stand immediately before the Accident and that she does not know where she was looking when she tripped (*see Calise v Costco Wholesale Corp.*, 124 AD3d 815 [2d Dept 2018]); (2) that while

in the Premises, the Plaintiff had no difficulties seeing (*see Pwangsunthie v Marco Realty Associates, L.P.*, 136 AD3d 502 [2d Dept 2016]); (3) that the Stand was readily observable by one employing the reasonable use of their senses and that there was nothing that obstructed the view thereof (*see Pipitone v 7-Eleven, Inc.*, 67 AD3d 879 [2d Dept 2009]); (4) that the Plaintiff was aware of the stand for years prior to the Accident; and (5) that Kavya did not receive any complaints relative to the Stand prior to the Accident (*Philips v Paco Lafayette LLC*, 106 AD3d 631 [1st Dept 2013]).

In opposition, the Plaintiff relies upon the affidavit of Harold Krongelb (“Krongelb”), a professional engineer. As explained below, his conclusions are belied by the record, including the deposition testimony of the Plaintiff and photographs, and are speculative and conclusory.

Krongelb’s contention that the Stand was a tripping hazard because it was not readily observable due to its height is flatly contradicted by the record, including photographs and the Plaintiff’s testimony (*see S.P. v St Barnabas Hospital*, 180 AD3d 583 [1st Dept 2020]). Here, the Plaintiff testified that she was long aware of the Stand and that she had no difficulties seeing while she was in the Premises.

Krongelb’s conclusions also ignore the Plaintiff’s admission that she does not know where she was looking when she tripped. Thus, the sole proximate cause of the Accident is the Plaintiff’s inattentiveness. For example, in *Outlaw v Citibank, N.A.*, 35 AD3d 564, 565 [2d Dept 2006], it was held as follows with respect to proximate cause: “[i]n addition to alleging that the defendant had a defective stair, the plaintiff also alleged that the defendant was negligent in failing to provide sufficient lighting over the staircase upon which she fell. However, the plaintiff testified that, at the time of her fall, she was looking straight ahead and did not see the light patch before her fall. Consequently, no matter what the lighting condition, it was not a proximate cause of her fall.”

Lastly, even if there was a violation of the New York City Building Code or the National Safety Counsel’s standards, as Krongelb suggests, any alleged violation does not raise a triable issue of fact since it is not a proximate cause of the Accident (*see Secchi v Waldbaum, Inc.*, 270 AD2d 329 [2d Dept 2000]).

The Plaintiff’s remaining opposition arguments are without merit on both the facts and the law.

## **B. The Branch of the Motion for Summary Judgment Dismissing the Cross-Claims**

Preliminary, the branch of the motion to dismiss Gerald’s cross-claims is denied as academic because this cause was previously dismissed as to him (*see* NYSCEF Doc. No.: 34).

Lorraine, Clement and Frances assert a cross-claim for common law indemnification against Kavya. To establish this claim, they “must prove not only that ... [they were] not negligent, but also that the proposed indemnitor was responsible for negligence that contributed to the accident” (*Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 756 [2d Dept 2018] [internal quotation marks and citations omitted]). The cross-claim for common law indemnification is dismissed because, as explained above, Kavya was not negligent (*see id.*).

Lorraine, Clement and Frances also interpose a contribution claim against Kavya. “Contribution is generally available as a remedy when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe to the injured person. The critical requirement for apportionment by contribution under CPLR article 14 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” (*Trump Village Section 3, Inc. v New York State Housing Finance Agency*, 307 AD2d 891, 896 [1st Dept 2003]). The contribution claim is dismissed because Kavya was not negligent (*see Padron v Granite Broadway Dev. LLC*, 209 AD3d 536, 537 [1st Dept 2022]).

Lastly, Lorraine and Clement seek contractual indemnification against Kavya. The indemnification clause contained in the lease between the subject parties states, in relevant part, as follows:

61. Indemnity. Notwithstanding any other covenants, terms or provisions of this lease to the contrary, Tenant will protect, indemnify and save harmless Landlord from and against all liabilities, obligations, claims, damages, penalties, causes of action, judgments, costs and expenses (including, without limitations, reasonable attorneys' fees and expenses) imposed upon or incurred by or asserted against Landlord, unless caused solely by the willful act or gross negligence of Landlord, by reason of the Demised Premises during the term or this Lease including but not limited to:

- a) Any accidents or injury or death of persons or loss of or damage to property occurring on or about the Demised Premises or any part thereof or the adjoining sidewalks, curbs, vaults and vault space, if any, streets or ways,
- b) Any use or condition of the Demised Premises of any part thereof or the adjoining sidewalks, curbs, vaults and vault space, if any, streets or ways, any use of demised premises which are in violation of any statutes or ordinances,
- c) Any failure on the part of Tenant to perform or comply with any of the terms of this Lease, or
- d) Any negligence or tortuous act on the part of Tenant or any of its agents, contractors, subleases, licenses or invitees is brought against Landlord by reason of any such occurrence, Tenant, upon request of Landlord, will at Tenant's expense defend such action, suit or proceeding with counsel designated by Landlord.

The insurance procurement clause states as follows:

40. Insurance. Tenant agrees to maintain throughout the term of this Lease, with responsible insurance companies (i) comprehensive general liability insurance against all claims, demands or actions for injury to or death of person or property to the minimum limits of liability equal to \$ 1,000,000 for bodily injury (or death) to each person and \$2,000,000 for bodily injury (or death) for any one occurrence or accident, as well as \$1,000,000 for property damage, including products liability and independent contractors' coverage, with broad form endorsement, arising from, related to, or in any way connected with the conduct and operation of Tenant's business in the demised premises, or

caused by actions or omissions to act, where there is a duty to act, of Tenant, its employees, agents, servants and contractors, which insurance shall name Owner and its agents as additional insureds ...

Various sections of the indemnification provision are factually inapplicable. Here, Section 61 (b) is inapplicable because Kavya did not violate any statute or ordinance; Section 61 (c) is inapplicable because Kavya did not fail to perform or comply with term of the lease; and Section 61 (d) is inapplicable because Kavya, its agents, contractors, subleases, licenses or invitees did not commit any negligent or tortious act.

The issue is thus whether Lorraine and Clement are entitled to the benefit of the broad indemnification provision of Section 61 (a), which requires Kavya to indemnify Lorraine and Clement from, *inter alia*, injury to a person that occurred on or about the Premises. For the following reasons, they are not.

Preliminarily, Section 61 is legally invalid. Here, the indemnification clause is inapplicable only if Lorraine and Clement commit a willful act or gross negligence. The provision thus purports to indemnify Lorraine and Clement for their sole negligence. This is impermissible (*see* GBL § 5-323; *Port Parties, Ltd. v Mdse. Mart Props., Inc.*, 102 AD3d 539 [1st Dept 2013]).

Nonetheless, “[t]he Court of Appeals, in *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153 [1977] and *Great N. Ins. Co. v. Interior Constr. Corp.*, 7 NY3d 412 [2006], established an exception to General Obligations Law § 5–321. Parties to a lease agreement may execute a provision requiring the tenant to indemnify the landlord from the landlord's own negligence. However, the lease must also contain an insurance provision allocating the risk of liability to third parties because courts do not, as a general matter, look unfavorably on agreements which, by requiring parties to carry insurance, afford protection to the public. Accordingly, the Court of Appeals reasoned that when an indemnity clause is coupled with an insurance procurement provision, a tenant is obligated to indemnify the landlord for its share of liability, and such agreement does not exempt the landlord from liability to the plaintiff, but allocates the risk to a third party through insurance. Insurance procured by the tenant in satisfaction of the indemnity clause provides the injured plaintiff with adequate recourse for the damages suffered” (*see Bessios v Regent Associates, Inc.*, 214 AD3d 554, 555 [1st Dept 2023] [internal quotation marks, brackets and certain internal quotation marks omitted]).

“[T]here is no evidence in the record that insurance was purchased by [Kavya] ... on behalf of ... [Lorraine and Clement]. Accordingly, ... the indemnification provision, which requires ... [Kavya] to indemnify ... , ... [Lorraine and Clement] without the commensurate protection afforded by insurance coverage, is void and unenforceable” (*id.*, 214 AD3d 554, 556 [citations omitted]; *see Port Parties, Ltd. v Mdse. Mart Props., Inc.*, 102 AD3d 539). The contractual indemnification claim is thus dismissed.

### III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that Kavya's motion for summary judgment is granted in part and denied in part; and it is further,

ORDERED, that Kavya is granted summary judgment dismissing the Plaintiff's complaint; and it is further,

ORDERED, that Kavya is granted summary judgment dismissing all cross-claims asserted against it by Lorraine, Clement and Frances; and it is further,

ORDERED, that Kavya's motion as to Gerald is denied as academic.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York  
October 18, 2023



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MOJGAN C. LANCMAN, J.S.C.

