

**Guzman-Lopez v Broadway Spanish Baptist Church  
Inc.**

2024 NY Slip Op 30143(U)

January 10, 2024

Supreme Court, New York County

Docket Number: Index No. 156583/2016

Judge: Leslie A. Stroth

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LESLIE A. STROTH PART 12**

*Justice*

-----X	<b>INDEX NO.</b>	<u>156583/2016</u>
ELADIA GUZMAN-LOPEZ,	<b>MOTION DATE</b>	<u>08/01/2023,</u> <u>08/01/2023</u>
Plaintiff,	<b>MOTION SEQ. NO.</b>	<u>004 005</u>
- v -		

BROADWAY SPANISH BAPTIST CHURCH INC., BARTA  
TRADING CORP., THE CITY OF NEW YORK

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 139, 141, 142, 143, 148 were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 140, 144, 145, 146, 147 were read on this motion to/for JUDGMENT - SUMMARY

This is a premises liability action to recover for personal injuries that Eladia Guzman-Lopez (plaintiff) allegedly suffered when she tripped and fell on a raised sidewalk flagstone adjacent to the property located at 7-15 Hamilton Place, New York, New York (subject premises) on August 27, 2015.

Defendant Broadway Spanish Baptist Church Inc. (the Church) owns the subject premises. On the date of the accident, Barta Trading Corp. (Barta), a furniture store, rented a portion of the subject premises from the Church on a month-to-month basis governed by the terms of an expired lease.

Barta moves for summary judgment dismissing plaintiff's claims against it because it did not create the alleged defective condition or make special use of the sidewalk for a special use, nor did terms of the expired lease displace the Church's duty to maintain the sidewalk (motion

sequence no. 004). Barta further moves to dismiss the church's cross-claims for indemnification and contribution, maintaining that it is not liable for plaintiff's injuries in the absence of negligence. Plaintiff and the Church oppose the motion.

The Church also moves for summary judgment dismissing plaintiff's complaint against it, arguing that if any such defect existed causing plaintiff's accident, it was a trivial defect that is insufficient to impose liability on the Church (motion sequence no. 005). Plaintiff opposes.

### **I. Alleged Facts**

Plaintiff testified at her deposition that on August 27, 2015, she tripped on a raised sidewalk flagstone at the subject property when she and her husband were on their way to the furniture store. Plaintiff further testified that she was walking on the right side of the sidewalk prior to her fall when her right foot tripped on the mis-leveled sidewalk. She said that she only saw that the sidewalk was mis-leveled after her fall, describing the defect as one sidewalk flagstone raised by more than an inch. At her deposition, she authenticated photographs of the sidewalk defect taken by her husband on the night of the accident. Referring to the photographs, she marked an "X" on the mis-leveled sidewalk where she alleges that she fell.

In its answer, the Church admits ownership of the subject property. Hazma Barta, Barta's President, testified at his deposition that at one time there was a lease between the Church and Barta. *See* NYSCEF doc. no. 116. However, he notes such lease expired in 2004, no new lease was executed, and Barta and the Church have continued on a month-to-month basis on the same terms as under the original lease. Mr. Barta testified that Barta has no duties related to the subject sidewalk, that it did not hire anyone to maintain the subject sidewalk, and that Barta only cleaned the sidewalk and shoveled the snow in order to run its business. Mr. Barta noted that he made complaints to the City of New York (the City) for the condition of the sidewalk approximately two

approximately two to three times between 2012 to 2015, complaining of tree roots coming up and making the sidewalk uneven. He testified that the sidewalk he complained about was not fixed at any time prior to plaintiff's accident in August 2015. Mr. Barta also testified that he unloaded merchandise and placed advertising on the sidewalk.

Pursuant to the expired lease, Barta was not responsible for structural repairs to the sidewalk abutting the subject premises. Paragraph 4 of the expired lease reads, in pertinent part:

Tenant shall, throughout the term of the lease, take good care of the demised premises and the fixtures and the appurtenances therein, and the sidewalks adjacent thereto, and [a]t its sole cost and expense, *make all non-structural repairs therein* as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty... *See* NYSCEF doc. no. 117 (emphasis added).

In addition, paragraph 3 of the lease reads, in pertinent part: "Tenant shall make no changes in or to the demised premises of any nature without Owner's prior written consent." *Id.* Furthermore, with regard to indemnification issues, paragraph 48 of the rider to the lease reads as follows:

Tenant will indemnify and save Landlord harmless from and against all damages, liabilities, claims, costs and expenses, including reasonable attorneys' fees, arising out of the use of the demised premises or any work or thing done, or any condition created by Tenant or its employees, agents or contractors *solely when caused by negligence or breach of an obligation by Tenant. Id.* (emphasis added).

The Church produced Fanny Feliz for deposition, who has been a member of the Church for 30 years and a member of the Board of the Church for 20 years. Ms. Feliz affirmed that members of the Church's Board of Directors routinely inspected the subject sidewalk approximately three times per week and did not notice any substantial defects to the subject sidewalk in August 2015 or anytime in the preceding two years. Ms. Feliz also testified that in 2013, the Church hired an outside entity to replace the entire sidewalk adjacent to its property.

## II. Analysis

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989) (quoting

*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Once a party has submitted competent proof demonstrating that there is no substance to its opponent's claims, the opponent, in turn, is required to "lay bare [its] proof and come forward with some admissible proof that would require a trial of the material questions of fact on which [its] claims rest." *Ferber v Sterndent Corp.*, 51 NY2d 782, 783 (1980).

#### **A. Barta's Motion for Summary Judgment on Plaintiff's Negligence Claims**

Administrative Code of City of NY § 7-210, provides in pertinent part that "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 § 19-152 further specifies an owner's responsibilities regarding sidewalk maintenance. In addition, in the absence of a lease that entirely displaces the owner's duty to maintain a sidewalk, a tenant is liable only if it "...created the defective condition, negligently made repairs, or used the sidewalk for a special purpose." *Berkowitz v Dayton Construction, Inc.*, 2 AD3d 764 (2d Dept 2003); *see also Abramson v Eden Farm, Inc.*, 70 AD3d 514 (1st Dept 2010); *Collado v Cruz*, 81 A.D.3d 542 (1st Dept 2011); *Biondi v County of Nassau*, 49 AD3d 580 (2d Dept 2008).

As a tenant, Barta is not subject to liability under the Administrative Code; rather, the Church, as owner, is responsible for maintaining the sidewalks adjacent to its property. *See Leary v Dallas, BBQ*, 91 AD3d 519 (1st Dept 2012); *Collado v Cruz*, 81 AD3d 542 (1st Dept 2011). Further, the lease between Barta and the Church had expired as of the date of the accident.

Assuming that Barta is a holdover tenant, the terms of the original lease were in effect at the time of the accident. However, the expired lease does not displace the Church's duty to maintain the sidewalk. Specifically, the lease does not require Barta to make structural repairs to the sidewalk. Additionally, the Church itself undertook the repair of the sidewalk in 2013.

The arguments of plaintiff and the Church in opposition are unavailing. Plaintiff and the Church argue that Barta made special use of the sidewalk by displaying and storing merchandise, placing advertising on the subject sidewalk, and unloading merchandise. In support of its position, plaintiff submits summonses issued to Barta from the NYC Environmental Control Board for obstructing pedestrian access. However, it is Barta's burden to demonstrate that "this alleged 'special use' *caused or contributed to the defect.*" *Hernandez v Ortiz*, 165 AD3d 559, 560 (1st Dept 2018) (citation omitted, emphasis added); *see also Santana v City of New York*, 282 AD2d 208, 209 (1st Dept 2001). In the case at bar, neither plaintiff nor the Church argue that the advertising or merchandise unloading actually caused the alleged mis-leveling of the sidewalk that caused plaintiff's accident, nor does the record support such theory. As such, plaintiff has failed to raise a question of fact as to Barta's liability based upon the doctrine of special use.

Plaintiff alternatively argues that Barta owes a separate duty to plaintiff to provide a safe means of ingress and egress, citing to *Perkins v 85 Kenmare Realty Corp.*, 2014 NY Slip Op 31100(U) (Sup Ct, NY County, 2014). However, plaintiff cites to no controlling appellate law to support such position, and the Court declines to adopt the reasoning of the court in *Perkins* (2014 NY Slip Op 31100[U]), which is factually distinguishable and not binding precedent.

Plaintiff also argues that the mis-leveled sidewalk on which she fell is a non-structural defect for which Barta is responsible per the terms of the expired lease.<sup>1</sup> However, the case to

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<sup>1</sup> The Church does not claim that the alleged defect is a non-structural claim.

which plaintiff cites for this proposition is inapposite. In *Morel v City of New York*, 192 AD2d 428 (1st Dept 1993), the lease between the entities clearly provides that the tenant was responsible for maintenance of the sidewalk outside the store, unlike here. To fix the raised sidewalk flagstone would constitute a permanent and non-removable structural change. *Contra Vassi v Salem House Condominium Bd.*, 30 Misc 3d 1233(A) (Sup Ct, NY County 2011), *judgment entered sub nom. Vassi v The Salem House Condominium Bd.* (Sup Ct, NY County 2011).

Further, the First Department has held in an analogous situation, that a defective concrete slab on a public sidewalk constituted a structural repair. *Cucinotta v City of New York*, 68 AD3d 682, 683 (1st Dept 2009); *see also Berkowitz v Dayton Const., Inc.*, 2 AD3d 764, 765 (2d Dept 2003) (“[Tenant] correctly contends that it was not required under the lease to repair the alleged defect, a raised sidewalk slab, as such a defect is structural”). Therefore, Barta met its burden of establishing that the lease and rider did not shift responsibility for the structurally defective raised sidewalk flagstone from the Church to Barta.

Barta has demonstrated by admissible evidence that it is entitled to judgment as a matter of law dismissing plaintiff’s negligence claims against it, and, in turn, neither the Church nor plaintiff have come forward with any proof that would require a trial of any material questions of fact as to Barta’s alleged negligence. Thus, Barta’s motion for summary judgment for dismissal of plaintiff’s negligence claims against it is granted.

#### **B. Barta’s Motion for Summary Judgment on the Church’s Cross-Claims for Indemnification and Contribution**

As noted *supra*, the expired lease between the Church and Barta contains an indemnification provision which directs that the Church may be entitled to contractual indemnification only when there is negligence or a breach of an obligation by Barta. *See* NYSCEF doc. no. 117 at Rider, ¶ 48. As discussed herein, the record does not raise any triable issues of fact

with respect to whether the condition of the sidewalk was due to any acts of negligence on Barta's part. See *Cucinotta v City of New York*, 68 AD3d 682, 684 (1st Dept 2009). Moreover, there has been no shift in responsibility for the alleged defect from the Church to Barta.

Barta therefore is entitled to summary judgment dismissing the Church's cross claims for common-law and contractual indemnification against it insofar as those claims are premised on the indemnification provision of the rider to the lease. See *Berkowitz v Dayton Const., Inc.*, 2 AD3d 764, 765 (2d Dept 2003).

### C. The Church's Motion for Summary Judgment on the Plaintiff's Negligence Claims

As previously discussed at length, the Church, as owner of the subject premises, is liable for plaintiff's injury if such injury is caused by the Church's failure "...to maintain such sidewalk in a reasonably safe condition." Administrative Code § 7-210. However, "trivial" sidewalk defects are not actionable as a matter of law. *Fayolle v E. W. Manhattan Portfolio L.P.*, 108 AD3d 476 (1st Dept 2013). Pursuant to Administrative Code § 19-152(a)(4), a substantial defect exists on a sidewalk if one flagstone is raised half an inch or more above the adjacent flagstones.<sup>2</sup>

The Church argues that the complaint must be dismissed against it because plaintiff cannot prove that the raised sidewalk flag presented a significant enough hazard to impose liability onto the Church. See *Schwartz v Bleu Evolution Bar & Rest. Corp.*, 90 AD3d 488 (1st Dept 2011). The Church maintains that the only evidence regarding the subject sidewalk defect, plaintiff's deposition testimony and photographs produced by plaintiff taken on the day of the incident, are

<sup>2</sup> Administrative Code § 19-152(a)(4) reads:

The commissioner shall direct the owner to install, reinstall, construct, reconstruct, repave or repair only those sidewalk flags which contain a substantial defect. For the purposes of this subdivision, a substantial defect shall include any of the following:...a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch or where a sidewalk flag contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch or more in depth...

insufficient to demonstrate that the flagstone over which she allegedly tripped was raised over half an inch. At her deposition, plaintiff admits she never measured the sidewalk defect. Further, the Church argues that the photographs produced by plaintiff which depict the specific location of her trip and fall do not demonstrate the requisite height differential or any significant defects that can be considered a hazard. Further, Ms. Feliz testified at her deposition that members of the Church's Board of Directors inspected the subject sidewalk three times per week and did not notice any substantial defects in the two years leading up to and including the date of plaintiff's accident.

In opposition, plaintiff argues that her deposition testimony, in conjunction with the photographs of the accident site, demonstrate that the sidewalk defect which caused her fall was more than "trivial."<sup>3</sup> Plaintiff's deposition testimony recounts the defect as one sidewalk flag higher than the other, and she describes the raised sidewalk as "much more" than an inch. NYSCEF doc. no. 32 at 45, lines 17-19. Further, plaintiff maintains that the Church had notice of the sidewalk defect through the several weekly inspections performed by the Church's Board of Directors and through Mr. Barta's complaints made to the City regarding the condition of the sidewalk.

As owner of the subject premises, the Church owes a non-delegable duty to plaintiff. However, an issue of fact exists as to whether the Church breached such duty, in that the parties have presented conflicting evidence as to whether the raised sidewalk flag at issue constituted a substantial defect. Ms. Feliz testified that in the two years prior to plaintiff's accident, the Board of Directors never noticed any substantial sidewalk defects on the sidewalk. Mr. Barta contradicts her testimony, himself attesting that he made several calls to the City regarding the uneven sidewalk in front of the subject premises.

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<sup>3</sup> As plaintiff has made no motion or cross-motion for additional relief, the Court declines to review plaintiff's argument that she is entitled to summary judgment on liability.

Most notably, plaintiff’s descriptions and estimation of the raised sidewalk defect in her deposition testimony creates a triable issue of fact as to the whether the defective condition on the sidewalk was apparent. *See Rodriguez v NYCTA*, 76 AD3d 675 (2d Dept. 2010); *Batton v Elgahanyan*, 43 NY2d 898 (1978); *Salvia v Hauppauge Rte. 1 11 Assoc.*, 47 AD3d 791 (2d. Dept. 2008). Further, the photographs submitted at plaintiff’s deposition do not eliminate issues of fact on this point, as the photographs are extremely dark and provide little detail. In light of the conflicting deposition testimony proffered, the photographs do not provide a basis on which to grant summary judgment to the Church.

Therefore, the Church’s motion for summary judgment for dismissal of plaintiff’s negligence claims against it is denied, as material questions of fact exist that require a trial on the issues presented.

**III. Conclusion**

Accordingly, it is ORDERED that the motion of defendant Barta Trading Corp. for summary judgment dismissing the complaint against it is granted in all respects, and all claims and cross-claims against it are severed and dismissed; and it is further

ORDERED that the motion of defendant Broadway Spanish Baptist Church Inc. for summary judgment dismissing the complaint against it is denied.

The foregoing constitutes the decision and order of the Court.



LESLIE A. STROTH, J.S.C.

1/10/2024  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
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