

Braccidiferro v BKTK Realty LLC

2025 NY Slip Op 31558(U)

April 28, 2025

Supreme Court, New York County

Docket Number: Index No. 153265/2020

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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INDEX NO. 153265/2020

MARK BRACCIDIFERRO,
Plaintiff, **MOTION DATE 03/25/2025,
03/25/2025**

- v -

MOTION SEQ. NO. 004 005

BKTK REALTY LLC, 1326 RESTAURANT, LLC, D/B/A
BEACH CAFÉ,
Defendants. **DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 145, 149, 151, 152, 155, 156, 157, 158, 159, 160, 164
were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 137, 138, 139, 140, 141, 142, 143, 144, 146, 148, 150, 153, 154, 161, 162, 163, 165
were read on this motion to/for JUDGMENT - SUMMARY.

INTRODUCTION

In this negligence action, plaintiff Mark Braccidiferro alleges he was injured when he slipped on a wet floor in the bathroom of defendant 1326 Restaurant, LLC, d/b/a Beach Café (“1326”), which leases its space from defendant BKTK Realty LLC (“BKTK”). BKTK moves pursuant to CPLR 3212 for summary judgment dismissing Braccidiferro’s claims as against it and for judgment in its favor on its cross-claim against 1326 for contractual indemnification (MOT SEQ 004).¹ Braccidiferro and 1326 both oppose the motion. 1326 also separately moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and BKTK’s cross-claims against it (MOT SEQ 005), which motion is opposed by both Braccidiferro and BKTK. For the reasons that follow, BKTK’s motion is granted in part and 1326’s motion is denied.

¹ BKTK also initially sought summary judgment on its breach of contract cross-claim for failure to procure insurance but withdrew that part of its motion in light of evidence submitted by 1326 in opposition demonstrating that 1326 did, in fact, procure the required additional insured coverage for BKTK (*see* NYSCEF Doc. No. 158 [Ins. Decl.], 168 [BKTK Reply] at ¶ 10).

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*see Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). However, if the proponent fails to make out its prima facie case for summary judgment, its motion must be denied regardless of the sufficiency of the opposing papers (*Alvarez*, 68 NY2d at 324; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue, and the court’s function on these motions is limited to “issue finding,” not “issue determination” (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503, 505 [2012]).

I. BKTK’s Motion (MOT SEQ 004)

BKTK’s motion is granted to the extent it seeks summary judgment dismissing Braccidiferro’s claims against it. “An out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it ‘(1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision’” (*DeJesus v Tavares*, 140 AD3d 433, 433 [1st Dept. 2016], quoting *Vasquez v The Rector*, 40 AD3d 265, 266 [1st Dept. 2007]). BKTK establishes its *prima facie* entitlement to summary judgment through the submission of the commercial lease for the subject premises, which demonstrates that it is an out-of-possession landlord with no duty to maintain or repair the bathroom where Braccidiferro’s accident allegedly occurred (*see Brocco v E. Metal Recycling Terminal LLC*, 211 AD3d 628, 629 [1st Dept. 2022]; *Kopetic v Port Auth. of New York & New Jersey*, 176 AD3d 530, 531 [1st Dept. 2019]).

In opposition, Braccidiferro fails to raise a triable issue of fact. While BKTK retains a right of re-entry under the lease, Braccidiferro’s accident “is alleged to have been caused by [a]

transient condition[]”—water on the bathroom floor—“and [Braccidiferro] fail[s] to point to any evidence that a significant structural or design defect was implicated” (*Brocco*, 211 AD3d at 629; see *Devlin v Blaggards III Rest. Corp.*, 80 AD3d 497, 497–98 [1st Dept. 2011] [out-of-possession owner entitled to summary judgment as “there is no evidence that the [wet bathroom floor] which caused plaintiff to slip constituted such a [significant structural or design] defect”]). Moreover, Braccidiferro’s allegation in his bill of particulars that defendants violated Administrative Code §§ 27-127, 27-128, and 28-301.1 cannot, as a matter of law, support his claims against BKTK. Administrative Code § 28-301.1 repeals and re-codifies former sections 27-127 and 27-128 (see *McLaughlin v Ann-Gur Realty Corp.*, 107 AD3d 469, 469 [1st Dept. 2013]), which former sections were merely general, nonspecific safety provisions “that cannot support a claim of liability against an out-of-possession landlord based on a significant structural defect” (*Ram v 64th St.-Third Ave. Assocs., LLC*, 61 AD3d 596, 597 [1st Dept. 2009]; see *Centeno v 575 E. 137th St. Real Est., Inc.*, 111 AD3d 531, 531 [1st Dept. 2013]; *Kittay v Moskowitz*, 95 AD3d 451, 452 [1st Dept. 2012]).

BKTK’s motion is denied, however, to the extent it seeks summary judgment on its contractual indemnity cross-claim against 1326. The lease for the subject premises includes an indemnification clause pursuant to which 1326, as Tenant, agrees to indemnify BKTK, as Owner, against “all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys’ fees paid, suffered or incurred as a result of . . . the carelessness, negligence or improper conduct of the Tenant” (NYSCEF Doc. No. 130 [Lease] at 36, ¶ 8).² A separate indemnification provision in the rider to the lease broadens the Tenant’s indemnification obligations, including by making the Tenant liable to indemnify the owner for “all claims, losses, damages or expenses (including reasonable attorney’s fees) or other liability” incurred as a result of not only “any act or omission of Tenant,” but also “any injury to person . . . sustained in or about the Demised Premises . . . unless due to the act, omission or negligence of Owner” (*id.* at 53, ¶ 53). Unlike the indemnification provision in the lease, though, the rider’s indemnification clause is silent as to whether indemnification is limited to amounts not reimbursed by insurance. BKTK contends that

² Citations to the subject lease are to the pages in the pdf exhibit e-filed on NYSCEF.

1326's indemnification obligation is not limited in this manner because, by its express terms, the rider controls whenever its terms conflict with the lease (*see id.* at 43). The court disagrees.

It is well settled that a contract should not be read to render any portion of it meaningless (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 39 [2018]), but should instead be construed "so as to give full meaning and effect to [its] material provisions" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]; *see Isaacs v Westchester Wood Works*, 278 AD2d 184, 185 [1st Dept. 2000] ["contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect"]). The lease expressly limits indemnification to amounts not reimbursed by insurance. The rider does not expressly state that indemnification is not so limited, but rather is simply silent as to this issue. Absent an express conflict between the relevant provisions of the lease and the rider—in which case BGTK is correct that the rider would control—the court must construe the contract "so as not to leave any provision without force and effect" (*Isaacs v Westchester Wood Works*, 278 AD2d at 185), and thus cannot read out of the agreement the lease provision limiting indemnification to amounts not reimbursed by insurance. Indeed, the lease and rider are easily harmonized by reading the rider as expanding the set of circumstances that trigger the Tenant's indemnification obligation while leaving undisturbed the limitation restricting indemnification to amounts not reimbursed by insurance.

So construed, BGTK fails to demonstrate its *prima facie* entitlement to summary judgment on the contractual indemnity cross-claim because it submits no evidence demonstrating it has incurred any costs or expenses not reimbursed by insurance and thus within the scope of 1326's indemnification obligation.

Therefore, BGTK's motion is granted to the extent it seeks summary judgment dismissing Braccidiferro's claims against it, and the motion is otherwise denied.

II. 1326's Motion (MOT SEQ 005)

Initially, 1326 submits no evidence and makes no independent argument in support of that part of its motion that seeks the dismissal of BGTK's cross-claims against it. As such, the motion is denied to the extent it seeks the dismissal of these cross-claims because 1326 fails to demonstrate its *prima facie* entitlement to summary judgment.

The motion is likewise denied to the extent it seeks summary judgment dismissing Braccidiferro's complaint. "A defendant seeking summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Sabalza v Salgado*, 85 AD3d 436, 437 [1st Dept. 2011]; see *Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 421 [1st Dept. 2011]). "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" (*Ross*, 86 AD3d at 421). A defendant demonstrates lack of constructive notice by "producing evidence of its maintenance activities and inspection of the area prior to the accident, and specifically that the dangerous condition cited by plaintiff did not exist when the area was last cleaned or inspected before plaintiff's fall" (*Smith v Montefiore Med. Ctr.*, 192 AD3d 609, 610 [1st Dept. 2021]; see *Sabalza*, 85 AD3d at 437-38; *Ross*, 86 AD3d at 421).

1326 submits the deposition testimony of its employee, Satyajit Singh, and one of its regular customers, non-party Chance Vought, both of whom were present in the restaurant at the time of the alleged accident, though neither actually observed Braccidiferro's fall. Singh testified that he observed that the subject bathroom was neat and clean when he arrived to work at 9:00 a.m., approximately two to three hours before Braccidiferro's alleged accident. Singh admitted, however, that he did not inspect the bathroom again until after the accident. Singh further testified that he did not observe anyone mopping or cleaning the bathroom that day and did not know of any complaints regarding the bathroom's condition prior to Braccidiferro's accident. Vought was likewise unable to testify regarding the bathroom's condition immediately prior to the alleged accident. Both Singh and Vought claimed, however, that they independently inspected the bathroom ten to fifteen minutes after the alleged accident and did not observe any slippery or wet condition.

Assuming, *arguendo*, that this testimony is sufficient to demonstrate, *prima facie*, that 1326 did not cause or create the hazardous condition alleged because no such condition existed, Braccidiferro's deposition testimony suffices to raise a triable issue of fact. Specifically, Braccidiferro testified that he slipped and fell immediately upon entering the bathroom, describing his foot sliding out from under him as if the floor were iced over. He further testified

that, immediately after his fall, he observed a significant amount of water on the bathroom floor with swirl patterns visible in it, and he could smell cleaning solution, leading him to believe that the slippery condition of the floor may have resulted from the bathroom having been recently mopped.

Further, 1326's submissions are insufficient to demonstrate, *prima facie*, that it lacked either actual or constructive notice. Neither Singh nor Vought observed the condition of the bathroom in the period immediately prior to the alleged accident. While Singh testified that he observed no slippery condition upon using the bathroom at 9:00 a.m. earlier that day, this does not establish that so slippery condition was subsequently created in the two to three hours prior to Braccidiferro's alleged fall. Singh's testimony that he was unaware of any complaints regarding the bathroom's condition prior to the alleged accident speaks only to his own personal knowledge but does not establish that none of 1326's other employees had actual notice of the hazardous condition alleged, especially given that Singh further testified that cleaning the bathroom would not have been his responsibility. Finally, these witnesses do not provide evidence regarding 1326's maintenance activities and inspection of the subject bathroom prior to the accident, except insofar as Singh's testimony may demonstrate that the bathroom was neither cleaned nor inspected for two to three hours prior to Braccidiferro's fall.

1326 nevertheless contends, with respect to constructive notice, that Braccidiferro cannot demonstrate that the alleged slippery condition of the bathroom was either visible and apparent or that it existed for a sufficient length of time to allow it to be discovered and remedied. These contentions are unavailing because "[a] defendant cannot satisfy its [*prima facie*] burden merely by pointing out gaps in the plaintiff's case" (*Sabalza*, 85 AD3d at 437-38). Moreover, as already discussed, Braccidiferro testified that there was a significant amount of water on the bathroom floor that would be both visible and apparent upon inspection. And "because [1326] did not meet its initial burden of showing that it lacked constructive notice of the alleged defective condition as a matter of law, the burden never shifted to [Braccidiferro] to demonstrate how long the condition existed" (*White v MP 40 Realty Mgmt. LLC*, 187 AD3d 561 [1st Dept. 2020]; *see Sabalza*, 85 AD3d at 438).

CONCLUSION

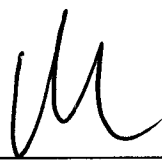
Accordingly, it is

ORDERED that defendant BKTk Realty LLC’s motion (MOT SEQ 004) is granted to the extent it seeks summary judgment dismissing plaintiff Mark Braccidiferro’s claims insofar as they are asserted against it, and the motion is otherwise denied; and it is further

ORDERED that defendant 1326 Restaurant, LLC, d/b/a Beach Café’s motion (MOT SEQ 005) is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

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|---------------------------------|--------------------------|----------------------------|--|-----------------------|--------------------------|-----------|
| <u>4/28/2025</u> DATE | | |  <hr/> LYNN R. KOTLER, J.S.C. | | | |
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | | |
| APPLICATION: | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | | |
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