

Cruz-Chacha v Queens Broadway, LLC

2025 NY Slip Op 35281(U)

April 23, 2025

Supreme Court, Queens County

Docket Number: Index No. 724097/2020

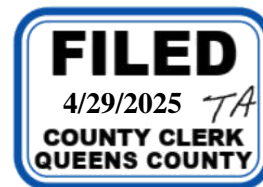
Judge: Karina E. Alomar

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: Honorable **KARINA E. ALOMAR**
Justice

IA PART 23

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CARLOS H. CRUZ-CHACHA,

Plaintiff,

Index No.: 724097/2020

Motion Date: 03/06/2025

Motion Seq. No.: 1

-against-

QUEENS BROADWAY, LLC,

Defendant.

-----X

QUEENS BROADWAY, LLC,

Third-Party Plaintiff,

-against-

GLOBER MARKET, INC.,

Third-Party Defendant.

-----X

The following numbered papers 38 to 79 read on this motion by defendant/third party plaintiff Queens Broadway LLC (hereinafter "Queens LLC) for an order: (1) pursuant to CPLR §3212 dismissing plaintiff's complaint; or (2) pursuant to CPLR §3212 granting summary judgment as against third-party defendant for common law contribution, common law indemnification, contractual indemnification and breach of contract for failure to procure insurance, and attorney's fees

PAPERS	NUMBERED
Notice of Motion, Memorandum of Law, Affidavit, Exhibits.....	EF No: 38 -53
Affirmation in Opposition, Memorandum of Law, Exhibits.....	EF No: 55 -64
Affirmation in Opposition, Exhibits.....	EF No: 65 - 76
Affirmation in Reply.....	EF No: 77 - 79

Upon the foregoing cited papers, it is hereby ordered that Queens LLC's motion for an order: (1) pursuant to CPLR §3212 dismissing plaintiff's complaint; and (2) pursuant to CPLR §3212 granting summary judgment as against third-party defendant for common law contribution, common law indemnification, contractual indemnification and breach of contract for failure to procure insurance, and attorney's fees, is decided as follows:

Plaintiff commenced the instant action on December 11, 2020, to recover for personal injuries allegedly sustained as the result of a slip and fall accident which occurred at 82-33 Broadway, Elmhurst, NY 11373 a/k/a 82-31 Broadway/8306 Vietor Avenue, Elmhurst, NY 11373, on July 23, 2020 during the scope of his employment with third-party defendant Globber Market Inc. It is alleged that Queens Broadway owns the premises and Globber Market leased

and operated the premises from Queens Broadway where the plaintiff's alleged incident occurred.

On February 2, 2021, Queens LLC commenced the third-party action as against Globber Market LLC for common law contribution, common law indemnification, contractual indemnification and breach of contract for failure to procure insurance, and attorney's fees. On June 4, 2021, Globber Market filed an Answer to the Third-Party Summons and Complaint. On December 15, 2021, and February 17, 2022, a Compliance Conference was held. Plaintiff was deposed December 9, 2022, and March 15, 2023. On May 25, 2023, Susan Wan was deposed on behalf of Queens Broadway and on May 30, 2023, Mark Pak was deposed on behalf of Globber Broadway.

Now, defendant Queens Broadway seeks an Order pursuant to 3212 granting summary judgment to Queens Broadway dismissing plaintiff's complaint in its entirety, and granting summary judgment to Queens Broadway on the Third-Party Complaint against Third-Party Defendant Globber for common law contribution, common law indemnification, contractual indemnification and breach of contract for failure to procure insurance and directing the Clerk to enter judgment in Queens Broadway's favor, and directing Globber Market to issue payment for Queens Broadway's reasonable attorney fees, cost and disbursements, at an amount to be calculated at an inquest, plus statutory interest pursuant to CPLR 5001.

In support of its motion, defendant/third-party plaintiff Queens Broadway, LLC, submits, inter alia, the deposition transcripts of plaintiff, Susan Wan of Queens Broadway, Mark Pak of Globber Market, the pertinent lease agreement and photographs.

Deposition testimony of Plaintiff, Carlos H. Cruz-Chacha

Plaintiff testified that at the date and time of the accident, he was employed by third-party defendant, Globber Market. He stated that prior to his accident, he worked for Globber Market for approximately three years, seven days a week, for twelve hours a day, from 7:00 p.m. to 7:00 a.m. Plaintiff explained that his duties included filling the sodas, replenished the grocery shelves and rearranged the shelving. He further indicated that he did not report to a manager, however, he stated that he received instruction from the store owner and the cashier.

He testified that on the date of the accident, he was working a twelve-hour shift, and the accident occurred at 2:00 a.m. Cruz-Chacha further stated that at the time of the incident the only other person working was the cashier, Vincente. Plaintiff also indicated that he would typically work with one other person in the store at night, and the owners during the day. Moreover, he stated that he was the only individual replenishing the shelves at night.

Plaintiff averred that prior to the accident, he was in the basement pulling out some things to bring the up to replenish the stock prior to customers entering. He further explained that he accessed the basement through the left-most aisle in the store. Furthermore, he indicated that there is only one entrance to the store and as you enter the store and keep walking straight forward from the entrance, the right most aisle with the beer fridge which was considered the first aisle where the accident occurred. Additionally, he averred that on the date of the accident, he estimated that he walked in the right most aisle in the area where the accident occurred about three times without experiencing any issue.

Plaintiff testified that the accident occurred in the first aisle while he was carrying tuna cans. He also said that he was in a rush putting the things that needed to be moved, and he was

moving those boards, so he tripped, and his foot got stuck in there. Then, he averred that he did not see the boards, but that they were lifted and all placed on the floor, and did not know whether the boards were part of the floor or were on top of the floor.

Plaintiff was questioned as to what his understanding of what caused him to trip was, and he replied that it was a board and did not see the board that he tripped on when he was walking before the accident. He also averred that he did not have a recollection of the board moving prior to the accident, and did not have an opportunity to look at the board he believed that he tripped over after the fall. Then, plaintiff also stated that the wooden board was raised at all the times prior to the accident, but he did not make any complaints. Moreover, he averred that he has no recollection of any repairs being made to the floorboards in the area where he fell and was not aware of any other employee of Globber Market tripping and falling in the same area prior to his accident and was not aware of any complaints from customers or employees in connection with the floorboards.

Deposition testimony of Susan Wan of Queens Broadway

Susan Wan testified that she is one of the partners of Queens Broadway, LLC, owner of the store front property located at 82-33 Broadway, Elmhurst, New York. She further confirmed that the other partners include her mom, brother, sister-in-law and her former spouse. She was asked, "Now from the time that you purchased the property in November of 2022 up until April 6th of the year 2019, did you do any work to that property?" She replied that, she installed a new roof and repaired the sidewalk cement.

Moreover, she stated that Queens Broadway has never owned any business that occupied the property between November 2002 and April of 2019, the property was always leased. She further confirmed that the present tenant is Mr. Pak, associated with Globber Market. Additionally, she stated that when Queens Broadway purchased the property, Mr. Pak was also the tenant through the company, Pak Fruit and Vegetable Inc. She also explained that the name of the store changed when they signed a new lease in 2009 and then renewed that lease in 2019. She also stated that when she bought the property, she inspected the premises which was used as a deli by Globber Market. She further explained that she was unaware if Globber Market did any renovations to the property during their tenancy.

Wan referenced the lease that she signed with Globber in 2019, which indicated that it did not have to notify her as to cosmetic renovations, but if the renovations involved AC or plumbing, then she would have to be notified. Wan indicated that she did not do any changes or renovations to the floor between 2002 and 2019. She also stated that the lease provides for her to have access to the premise during business hours, however, she only goes there once a month to collect rent from Mrs. Pak or one of her sons and did not notice any uneven floorboards.

Wan averred that she did not become aware of the incident until she was contacted by the building attorney. She then stated that she called Mrs. Pak who informed her that one of her night workers was drunk and fell, and could not get up, and walked away. Moreover, she stated that Mrs. Pak was informed of this by the night shift manager who saw him fall. Wan averred that the Pak's sold Globber Market in December of 2022 and Aadhya Food, Inc., now occupies the premises and Queens Broadway has a lease with the new occupant.

Deposition testimony of Mark Pak of Globber Market

Mr. Pak testified that Adam Pak was the president of Globber Market from 2020 to 2022, and he is his older brother. Additionally, Su Cha Pak, is the Vice President and is his mother. He confirmed that Adam Pak sold Globber Market in December of 2022. He averred that from July 2020 to December 2022, the Market was a convenient store and was open twenty-four hours a day and consisted of four aisles. He confirmed that during the day, they would have three workers present and at night there was two workers. Mark Pak stated that Adam Pak would be present at the store during the day, managed the register, took orders, and organized the shelves and managed the day-to-day duties of the store. Mr. Pak also stated that Ms. Pak worked in the store in the morning on the register and managed the day-to-day operations. He also stated that his duties from June 2020 to December 2022, included working as a cashier and box boy.

He confirmed that Herman Gilde Rojas worked with him from June 2020 to December 2022 as the nighttime supervisor. His duties included managing the register, making bouquets and setting up products on the shelves at night. Mr. Pak explained that from 2009 to December 2022, Globber Market did not complain about any structural defects, water leaks, air conditioning issues, to anyone at Queens Broadway. Moreover, he stated that he did not complain about the condition of the floor at Globber Market from 2009 to December 2022. Pak also noted that he could not recall if anyone at Globber Market did any maintenance or renovations to the premises. Additionally, he stated that prior to July 23, 2020, he did not notice any of the wooden floorboards move in certain ways or notice any of the floorboard shake up and down or become loose.

On the date of the incident, he stated that Mr. Rojas told him that the plaintiff fell, and he believed that he was intoxicated at the time of the incident. He stated that he approached the plaintiff to ask him what happened, but plaintiff kept his distance and did not tell him anything. Mr. Pak averred that plaintiff appeared to be imbalanced and he called an ambulance for the plaintiff. However, he stated that plaintiff did not get in the ambulance, as he already left the premises.

Lease Agreement between Queens Broadway, LLC and Globber Market Inc.

The lease was entered into on April 6, 2019, between Queens Broadway and Globber Market. In pertinent part, Section 4 of the lease indicates that Globber must take care of the premises and make all non-structural repairs.

Section 4 of the Lease provides in pertinent part:

“Tenant shall, throughout the term of this lease, take good care of the demised premises and fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto 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, excepted.”

Article 13 of the Lease provides:

Owner or Owner's agents shall have the right ... to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws... ."

In addition, Section 8 indicates in pertinent part:

Glober Market at "sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury...effective from the date Tenants enters into possession and during the term of this lease. Such insurance shall be in an amount and with carriers acceptable to the Owner." Moreover, that Glober "indemnify, save harmless Owner against from all liabilities, ligations, damages, penalties, claims costs and expenses..." *Id* Also, "In case any action or proceeding is brought against Owner by reason of any such claim, Tenant, upon written notice from Owner, will at Tenant's expense, resist or defend such action or proceeding by Counsel..." *Id*

The Rider to the Lease, Section 61(b)(iii) states in pertinent part:

"b) The Tenant will indemnify and save the Landlord harmless from and against any and all liabilities, obligations, damages penalties, claims, costs, charges and expenses including reasonable attorney's fees, which may be imposed upon or incurred by or asserted against the Landlord by reason of any of the following occurring during the terms of this Lease: (ii) All fines, suits, proceedings, claims, demands and actions or any kind or nature whatsoever brought by anyone whomsoever arising or growing out of or in any wise connection with the Tenant's use, operation and maintenance or the Demised Premises' (iii) Any accident, injury, or damage to any person or property occurring in the Demised Premises or any part thereof;"

Section 76 of the Rider states in pertinent part:

The Tenant shall indemnify and save harmless the landlord from and against all claims for damages of whatever nature arising from any accident or injury or damage whatsoever, caused to any person or to the property of any person occurring during the term of this Lease in, on or about the Demised premise. This extends to "any claims for damages for whatever nature occurring outside or within the building and claim to have resulted from any action or omission on the part of the Tenant's contractor, licensees, agents, invitees, visits servants or employees." *Id*

Tender Demand

A formal tender demand for Globber Market was issued on January 5, 2021, requesting that Globber acknowledge and fulfill its obligation in accordance with the lease by defending and indemnifying Queens Broadway in this action. According to movant's Exhibit L, on January 22, 2021, Globber Market through its insurer, Utica First Insurance, issued a denial of Queens Broadway's tender. On December 20, 2024, Queens Broadway issued a formal re-tender demand to Globber requesting that it fulfill its obligations in accordance with the terms of the lease.

In support of its motion, counsel for Queens Broadway indicates that it is an out of possession landlord of the subject premises and bears no liability in this matter, and there is no evidence or allegations that the condition which allegedly caused plaintiff to slip constituted a significant structural or design defect that was contrary to specify statutory provision. Moreover, Queens Broadway takes the position that they had no actual or constructive notice of the alleged dangerous condition as an out of possession landlord. Pursuant to the Lease Agreement in effect on the date of loss, Globber Market was required to: (i) maintain and repair the premises; (ii) defend and indemnify Queens Broadway; and (iii) procure insurance naming Queens Broadway as an additional insured. It is Queens Broadway's position that Globber Market failed to fulfill their obligations and, as a result, Queens Broadway is entitled to summary judgement on the Third-Party Complaint against Globber Market. In addition, Queens Broadway asserts that plaintiff was unable to identify the cause of his accident, amounting to speculation and insufficient to make a prima facie case.

In opposition to the motion, plaintiff submits, inter alia, the affirmation of Dr. Jeffrey Ketchman, P.E.

Dr. Ketchman states that he is a specialist in the area of accident reconstruction and safety and has more than forty years of experience in research, development, engineering and manufacturing of industrial, consumer, aerospace and military production. He acknowledged that he was provided with photographs produced to Queens Broadway, plaintiff's Bill of Particulars and deposition transcript.

He further stated that he was informed that after the accident, Queens Broadway renovated the floor at the premises and was unable to inspect the floor as it was at the time of the accident. Based on his review of the documents provided, he opined that a defect in the floor caused plaintiff's injury, and that it was a structural defect. Moreover, he stated that floorboards could not sink approximately three inches without the defect being structural.

Counsel for plaintiff takes the position that contrary to movant's characterization of plaintiff being unable to identify the condition that caused his injury, this is contradicted by his deposition testimony. Additionally, the argument that defendant is a landlord out-of-possession and as such summary judgment should be granted, is untrue. Counsel maintains that there was still an obligation to repair the defect, that was structural in nature, that caused plaintiff's injuries. Moreover, plaintiff's counsel asserts that defendant had at least constructive notice of the collapsing floor, as a reasonable inspection of the premises would have been to discern that the floor was falling apart.

In further opposition, counsel for third-party defendant, Globber Market opposes the portion of the motion seeking summary judgment to Queens Broadway on the Third-Party complaint against the Third-Party defendant for common law contribution, common law indemnification, contractual indemnification and breach of contract and in support of

defendant/third-party plaintiff, Queens Broadway motion for summary judgment dismissing plaintiff's complaint.

Counsel for Globber Market argues that Queens Broadway's motion for summary judgment against third-party defendant seeking contribution and common law indemnity must fail as these claims against employers are barred by Workers' Compensation Section 11. He asserts that given the Queens Broadway has failed to allege the lack of Workers' Compensation benefits against plaintiff's employer (Globber), they have failed to assert a cause of action against Globber, and the Third-Party complaint and all crossclaims must be dismissed. Moreover, counsel takes the position that it is undisputed that plaintiff was an employee of Globber at the time of the accident and filed for and received Workers' Compensation benefits, and did not sustain a grave injury.

A defendant who moves for summary judgment in a slip and fall action has the initial burden to demonstrate that it neither created the hazardous condition, nor had actual or constructive notice of the existence of the defective. *See Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518 (1st Dept 2010). The burden then shifts to the plaintiff to raise a triable issue of fact as to the creation or notice of the defect. *Id.* Further, the basic elements of negligence which must be proven to recover damages are that (1) defendant owed plaintiff a cognizable duty of care, (2) the defendant failed to discharge that duty, and (3) plaintiff suffered damages as a proximate result of defendant's failure. *See Distribuidora Nacional de Disco, Inc. v Rappaport*, 92 AD2d 559 (2d Dept 1983) and *Donohue v Copiague Union Free School Dist.*, 64 AD2d 29 (2d Dept 1978).

For a defendant to be held liable in tort, it must have owed the injured party a duty of care (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 611 NYS2d 817 [1994]), the existence of which is a question of law (*Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 13, 929 NYS2d 620 [2d Dept 2011]). "Control is the test which measures generally the responsibility in tort of the owner of real property" (*Ritto v Goldberg*, 27 NY2d 887, 889, 317 NYS2d 361 [1970]). The duty of care is premised on the landowner's exercise of control over the property, as "the person in possession and control of property is best able to identify and prevent any harm to others" (*Gronski v County of Monroe*, 18 NY3d 374, 379, 940 NYS2d 518 [2011], *quoting Butler v Rafferty*, 100 NY2d 265, 270, 762 NYS2d 567 [2003]).

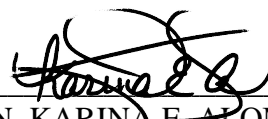
It is well settled that, "[a]n out-of-possession landlord generally will not be responsible for injuries occurring on its premises unless the landlord 'has a duty imposed by statute or assumed by contract or a course of conduct'" (*Healy v Bartolomei*, 87 AD3d 1112, 1113 [2d Dept 2011], *quoting Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18 [2d Dept 2011]). In such case, only a significant structural or design defect that is contrary to a specific statutory safety provision will support imposition of liability against the landlord (*Quinones v 27 Third City King Rest.*, 198 AD2d 23, 24 [1st Dept 1993]; *Levy v Daitz*, 196 AD2d 454 [1st Dept 1993]).

The issue here based on the parties' respective arguments and contradictory positions, is whether the defect precipitating plaintiff's fall was structural or non-structural in nature. Additionally, there also material questions of fact as to whether the landlord created or had actual or constructive notice of the alleged defect.

Accordingly, defendant/third-party plaintiff Queens Broadway, LLC's motion for summary judgment is denied in its entirety.

This is the decision and Order of the Court.

Dated: April 23, 2025



HON. KARINA E. ALOMAR, J.S.C.

