

Espiinal v Lilbern Realty Co., Inc.
2026 NY Slip Op 30519(U)
February 9, 2026
Supreme Court, Kings County
Docket Number: Index No. 527432/2022
Judge: Rupert V. Barry
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At an IAS Term, Part 13, of the Supreme Court of the State of New York, held in and for the County of Kings, at the courthouse at 360 Adams Street, Brooklyn, NY on the 9th day of February 2026.

P R E S E N T:

HON. RUPERT BARRY, J.S.C.

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MECALY ESPIINAL,

Cal No.: 31 (MSQ No.: 4)
Cal No.: 32 (MSQ No.: 5)
Cal No.: 33(MSQ No.: 7)
Index No.: 527432/2022

Plaintiffs,

DECISION & ORDER

-against-

LILBERN REALTY CO., INC. and GRAHAM QSR LLC,

Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of Plaintiff’s motion for summary judgment as to liability against both Lilbern Realty Co. Inc. (hereafter “LILBERN”), Graham QSR, LLC (hereafter “GRAHAM”), and striking LILBERN’S affirmative defenses of comparative fault [MSQ No.: 4], and LILBERN’s motion for an order granting summary judgment dismissing Plaintiff’s complaint along with all cross-claims by GRAHAM against LILBERN [MSQ No.: 5], and granting summary judgment to LILBERN on its contractual and common law indemnification claims against GRAHAM [MSQ No.: 5], and GRAHAM’s motion for summary judgment dismissing Plaintiff’s complaint and dismissing all crossclaims by LILBERN against GRAHAM, and granting summary judgment to Defendant GRAHAM on its crossclaims against LILBERN [MSQ No.: 7]: NYSCEF Doc. Nos.: 83 – 98; 127 – 129; 181; 99 – 116; 130 – 132; 167 -173; 148 – 155; 133 – 136; 141; 155 – 166; 174 – 175.

Upon due consideration of the papers filed in these matters, and after oral arguments, this Court’s decision is as follows:

That part of Plaintiff’s motion seeking summary judgment as to liability against LILBERN is **granted**.

That part of Plaintiff’s motion seeking the striking of LILBERN’s affirmative defenses of comparative fault is **denied**.

That part of Plaintiff's motion seeking summary judgment against GRAHAM is **denied**.

That part of Plaintiff's motion seeking to strike GRAHAM's affirmative defenses is **denied**.

That part of LILBERN's motion seeking summary judgment dismissing Plaintiff's complaint is **denied**.

That part of LILBERN's motion seeking to dismiss all crossclaims against it by GRAHAM is **granted**.

That part of GRAHAM's motion seeking dismissal of all cross-claims against it by LILBERN is **denied**.

That part of GRAHAM's motion seeking summary judgment dismissing Plaintiff's complaint it is **granted**.

That part of LILBERN'S motion for contractual indemnification against GRAHAM is **granted**.

That part of LILBERN'S motion for common law indemnification against GRAHAM is **denied**.

Background:

This is a negligence action to recover monetary damages for personal injuries allegedly sustained by Plaintiff as the result of an alleged trip-and-fall that occurred on May 21, 2022, on the sidewalk abutting Dunkin Donuts, 13 Graham Avenue, Brooklyn, N.Y. (hereafter "the Premises"). The incident occurred between 8:00 p.m. and 9:00 p.m.

The property in question is owned by LILBERN. GRAHAM is a tenant that leased the premises to a sub-tenant that operated the Dunkin Donuts Store. Plaintiff argues that GRAHAM and LILBERN failed to remedy the sidewalk defect even though they were given ample notice.

Duty, Breach, Proximate Cause, and Notice re: Defendant LILBERN:

Plaintiff states that she tripped and fell on the sidewalk outside of the building owned by LILBERN and leased to GRAHAM. LILBERN argues that due to their out of possession status and its leasing agreement with GRAHAM, it is not liable for Plaintiff's injuries.

The Administrative Code of the City of New York § 7-210 (hereafter "§ 7-210") imposes a nondelegable duty on real property owners in New York City "abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition" (*Shannon v Astoria 2101, LLC*, 240 AD3d 639 [2d Dept 2025] [*internal citation omitted*]). Section 7-210, however, does not subject landowners to strict liability for personal injuries resulting from incidents on abutting sidewalks. Section 7-210 should be read to impose a duty and standard of care that accords with traditional tort principles of negligence and causation (*see Xiang Fu He v Troon Mgt, Inc.*, 34 NY3d 167, 171 [2019]). Therefore, even with § 7-210, a plaintiff moving for summary judgment in a negligence action "on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Cashwell v Stop & Shop Supermarket Co., LLC*, 219 AD3d 795, 795-796 [2d Dept 2023] [*internal citations omitted*]).

In the instant case, § 7-210 imposes a duty on the landowner LILBERN for the benefit of Plaintiff. This Court therefore finds that LILBERN, in not repairing the damaged sidewalk abutting its premises, breached the duty, imposed by § 7-210, it owed to Plaintiff. Additionally, based on the deposition testimony and photographs of the site where the alleged accident took place, this Court also finds that evidence proffered by Plaintiff made a *prima facie* showing that the defective condition was the proximate cause of Plaintiff's alleged trip-and-fall and injuries.

Next, a plaintiff moving for summary judgment must also put forward a *prima facie* showing that the property owner either created the defect or had actual or constructive notice of the defective condition at the accident site. The evidence submitted demonstrated that the defective condition at the premises existed for years prior to the accident and that LIBERN had actual notice of the defect¹ (*see Velasquez v Pro Park, Inc.*, 173 AD3d 1246, 1247 [2d Dept 2019]).

Comparative Fault:

¹ See February 26, 2025, EBT of Dale Newman, President of LILBERN at pgs 20 – 23.

A plaintiff is not required to show freedom from comparative fault to establish entitlement to summary judgment on liability (*Pezzolla v Family Fruit 2, Inc.*, 220 AD3d 897, 898 [2d Dept 2023]). “Nevertheless, a plaintiff moving for summary judgment dismissing a defendant's affirmative defense of comparative negligence may seek to establish freedom from comparative fault as a matter of law” (*id.* at 898).

This Court does not find that Plaintiff has presented sufficient to show as a matter of law that she is free of comparative fault. Accordingly, that part of Plaintiff's motion that seeks to strike LILBERN's affirmative defenses of Plaintiff's comparative fault is denied.

LIABILITY re Defendant GRAHM:

This Court now address GRAHAM's liability to Plaintiff. There are three situations in which a party who enters into a contract with a party could be “potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launches a force or instrument of harm" (*H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (see *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]), and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (see *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 589 [1994])” (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002])

With these precepts in mind, this Court concludes that Plaintiff's claim fails as a matter of law. There has not been a showing by Plaintiff that GRAHAM "launches a force or instrument of harm" (*Moch*, 247 NY at 168). Further, Plaintiff does not allege in its complaint that she detrimentally relied on the continued performance of GRAHAM that it would maintain the premises safely. Nor, in light of § 7-210, can Plaintiff show that the contracting party has entirely displaced the other party's duty to maintain the premises safely (see *Palka*, 83 N.Y.2d at 589). Accordingly, this Court finds that GRAHAM owed no duty of care to Plaintiff and therefore cannot be held liable in tort.

Contractual and/or Common Law Indemnification:

In the December 1, 1991, lease agreement between LILBERN and GRAHAM (hereafter “First Lease”), GRAHAM agreed to indemnify and hold LILBERN harmless from any claims if they were not caused by LILBERN (*see* NYSCEF Doc. No.: 106, section 5.03). In section 9.01 of the First Lease, GRAHAM agreed to keep the premises in good “... condition as may be required by all legal requirements ...” (*see* NYSCEF Doc. No.: 106). The relevant lease agreement on the issue of contractual indemnification in the First Lease; for, if GRAHAM is not contractually obligated to keep the premises’ sidewalk in good repair, LILBERN would not be entitled to contractual indemnification. The Second and Third Leases are not between LILBERN and GRAHAM and have not direct bearing on the resolution of this issue.²

This Court finds that LILBERN’s non-delegable duty to maintain the property does not negate GRAHAM’S contractual obligation to indemnify the landlord for their failure to maintain the premises in a condition. This Court finds that LILBERN has made its prima facie showing of entitlement to summary judgment against GRAHAM, and GRAHAM has failed to produce proof demonstrating the existence of material issues of fact requiring a trial on issue. On the other hand, this Court also finds that LILBERN is made its prima facie showing of entitlement to summary judgment as to common law indemnification against GRAHAM.

Accordingly, it is

² Pursuant to Section 5.03 of the First Lease, GRAHAM agreed to indemnify and hold LILBERN harmless from any claims if they are not caused by the negligence of LILBERN. Pursuant to Sections 6.01 and 6.04 of the First Lease, GRAHAM agreed to carry insurance for the benefit of LILBERN. Pursuant to Section 9.01 of the First Lease, sidewalk repairs are the responsibility of GRAHAM.

Pursuant to Section 8.5 of the Second Lease, sidewalk repairs are the responsibility of GRAHAM. Pursuant to Section 9.2(e) of the Second Lease, GRAHAM agreed to perform all its obligations as tenant of the First Lease and agreed to indemnify Third Dunkin Donuts Realty, Inc. (hereafter “DB”) for any violations by LILBERN. Further, in Section 10.0 and 10.2 of the Second Lease, DB agreed to maintain insurance for the benefit of GRAHAM and agreed to name LILBERN as an additional insured.

Pursuant to Section 10.4 of the Second Lease, DB is responsible for repair of the sidewalk only to the extent that damage is caused by DB’s alterations or use of the premises. Pursuant to Section 10.7 of the Second Lease, DB is required to indemnify GRAHAM only insofar as a loss is caused by DB’s negligence.

Pursuant to Section 11(c) of the Third Lease, GRAHAM agreed to maintain insurance for the benefit of DB. Pursuant to Section 11(e) of the Third Lease, GRAHAM agreed to hold DB and any other party claiming an interest in the premises harmless and to indemnify them. Pursuant to Section 11(f) of the Third Lease, GRAHAM agreed to keep the premises, including the “walkways,” in good repair. In Addendum 26(a) of the Third Lease, GRAHAM agreed to perform the obligations of DB under the Second Lease. Further, pursuant to Addendum 26(d) of the Third Lease, the rights of the prime landlord under the Second Lease are rights of DB with respect to the premises.

ORDERED that, Plaintiff's motion seeking summary judgment as to liability against LILBERN (MSQ No.: 4) is **GRANTED**, it is further,

ORDERED that, that part of Plaintiff's motion seeking summary judgment as to liability against GRAHAM (MSQ No.: 4) is **DENIED**. It is further

ORDERED that, that part of Plaintiff's motion seeking to strike LILBERN's affirmative defenses of comparative fault (MSQ No.: 4) is **DENIED**. It is further

ORDERED that, that part of Plaintiff's motion seeking to strike GRAHAM's affirmative defenses (MSQ No.: 4) is **DENIED**. It is further

ORDERED that, that part of LILBERN's motion seeking summary judgment dismissing Plaintiff's complaint against it (MSQ No.: 5) is **DENIED**. It is further

ORDERED that, that part of LILBERN's motion seeking dismissal of all crossclaims against it by GRAHAM is (MSQ No.: 5) is **GRANTED**. It is further

ORDERED that, that part of GRAHAM's motion seeking dismissal of all crossclaims against it by LILBERN is (MSQ No.: 5) is **DENIED**. It is further

ORDERED that, that part of GRAHAM's motion seeking summary judgment dismissing Plaintiff's complaint against it (MSQ No.: 7) is **GRANTED**. It is further

ORDERED that, that part of LILBERN'S motion for contractual indemnification against GRAHAM is (MSQ No.: 5) **GRANTED**. It is further

ORDERED that, that part of LILBERN'S motion for common law indemnification against GRAHAM is (MSQ No.: 5) **DENIED**. It is further

ORDERED that, all applications not specifically addressed herein are denied.

This constitutes the decision and order of this Court.

R. V. BARRY
HON RUPERT V. BARRY, J.S.C.