

<b>Hernandez v 823 Second Ave., LLC</b>
2026 NY Slip Op 31709(U)
March 4, 2026
Supreme Court, Queens County
Docket Number: Index No. 706238/2020
Judge: Claudia Lanzetta
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: Hon. CLAUDIA LANZETTA  
Justice

IA PART 16

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RAFAEL MACHUCA HERNANDEZ,

Index No.: 706238/2020  
Motion Submitted: 5/6/24  
Motion Seq.: 004

Plaintiff,

-against-

823 SECOND AVENUE, LLC,

Defendant.

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823 SECOND AVENUE, LLC,

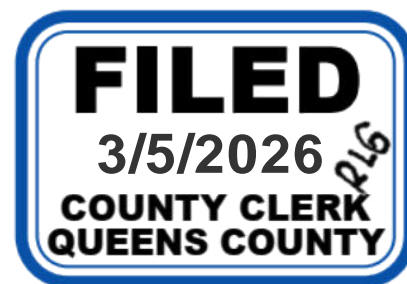
Third-Party Plaintiff,

-against-

P. R. CREPE LTD,

Third-Party Defendant.

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The following EF numbered papers read on the motion by third-party defendant P. R. Crepe Ltd. (“third-party defendant”) for summary judgment dismissing the third-party action against it; and for summary judgment in favor of 823 Second Avenue, LLC (“defendant”) in the main action thereby dismissing plaintiff Rafael Machuca Hernandez’s (“plaintiff”) complaint in its entirety and rendering the third-party action moot; and on the cross-motion by defendant for summary judgment dismissing all claims asserted against it, or in the alternative, for summary judgment on its contractual and common-law indemnification claims against the third-party defendant.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion; Affidavits; Exhibits .....	EF 108-30
Answering Affidavits; Exhibits .....	EF 135-41
Reply Affidavits; Exhibits .....	EF 142-44
Notice of Cross-Motion; Affidavits; Exhibits .....	EF 145-61
Answering Affidavits; Exhibits .....	EF 162-63, 165-71
Reply Affidavits; Exhibits .....	EF 172-74

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

### Background

This action stems from a slip and fall on stairs at 248 East 44<sup>th</sup> Street, New York County (“premises”). Those premises were owned by the defendant, and at the time of the alleged accident, the ground floor and basement were leased to third-party defendant, who used the premises to operate a coffee shop/restaurant. Plaintiff was employed by third-party defendant at the time of the alleged accident. Plaintiff commenced this action to recover damages for personal injuries from defendant. Defendant subsequently commenced a third-party action against third-party defendant.

### Timeliness

The court will first address the branches of the third-party defendant’s motion and defendant’s cross-motion as to the issue of timeliness.

The third-party defendant argues that its motion is timely and that it has demonstrated good cause for filing beyond the deadline set in the court’s order dated June 22, 2023 (“Order”). It contends that a further deposition of plaintiff, necessitated by plaintiff’s subsequent wrist surgery allegedly related to the accident, was essential to its motion. The third-party defendant further asserts that although the deposition concerned damages, it bore on the issues raised in its summary judgment motion. The parties conducted plaintiff’s additional deposition on October 25, 2023, and the transcript became available on November 8, 2023. The third-party defendant filed its motion on that same date.

The defendant contends that its cross-motion is timely because the third-party defendant seeks dismissal of both the main action and the third-party action and raises issues of common-law and contractual indemnification. Defendant asserts that its cross-motion likewise seeks summary judgment on those same indemnification claims and therefore mirrors the relief sought in the main motion. Defendant further adopts the third-party defendant’s arguments on this issue.

In opposition, the plaintiff argues that both the third-party defendant’s motion and defendant’s cross-motion are untimely pursuant to the Order. He asserts that the Order entered on June 26, 2023, extended the time to move for summary judgment to 120 days from the date of entry, not from service with notice of entry. Plaintiff calculates that the 120-day period expired on October 24, 2023, and therefore contends that the motion and cross-motion are untimely. Plaintiff further argues that defendant and third-party defendant cannot establish good cause based on the need for a further deposition. He maintains that they waited more than two months after the Order, to schedule a further deposition and that this delay does not justify filing late summary judgment motions.

“Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the

note of issue, except with leave of court on good cause shown” (CPLR 3212 [a]). Further, “good cause in CPLR 3212(a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy” (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). “Absent a ‘satisfactory explanation for the untimeliness,’ constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits . . . However, an untimely motion or cross-motion for summary judgment may be considered by the court where a timely motion was made on nearly identical grounds” (*Gomez v Tilden Estates, LLC*, 241 AD3d 791, 793 [2d Dept 2025]; quoting *Brill*, 2 NY3d at 652, and *Wittenberg v Long Is. Power Auth.*, 225 AD3d 730, 732 [2d Dept 2024]; see *Dojce v 1302 Realty Co., LLC*, 199 AD3d 647, 649-650 [2d Dept 2021]).

Here, the Order granted the parties an extension of 120 days from the date of entry—June 26, 2023—to move for summary judgment. The 120-day period to file summary judgment motions expired on October 24, 2023. The third-party defendant filed its motion on November 8, 2023, and defendant filed its cross-motion on March 15, 2024.

Notwithstanding the above, plaintiff’s further deposition concerning his wrist surgery allegedly related to the subject accident occurred on October 25, 2023, and the transcript became available on November 8, 2023, the same date the third-party defendant filed its motion. Under these circumstances, the court finds that the third-party defendant established good cause for the delay, as the additional deposition bore on the issues raised in its motion (see *Panfilow v 66 E. 83rd St. Owners Corp.*, 217 AD3d 875, 878 [2d Dept 2023], citing *Brill*, 2 NY3d at 652).

Defendant, however, offers no good cause for the delay in filing its cross-motion on March 15, 2024. However, the cross-motion seeks relief on grounds identical to those raised by the third-party defendant (see *Gomez*, 241 AD3d at 793; *Wittenberg*, 225 AD3d at 732). In the interest of judicial economy, the court will adjudicate the merits of both these motions.

#### Issue of Liability

The court will next address the branches of third-party defendant’s motion for summary judgment in favor of defendant in the main action and the defendant’s cross-motion for summary judgment dismissing the claims asserted against it. In support of its cross-motion, defendant contends that it is an out-of-possession landlord that owed no duty to the plaintiff. It asserts that it neither retained nor exercised control over the diner or the subject location, and that the third-party defendant maintained exclusive possession of the ground floor and basement. Defendant relies on the testimony of Nicholas Tsiniias (“Tsiniias”), owner of P. R. Crepe Ltd, who stated that the third-party defendant operated the coffee shop/restaurant and occupied those areas for approximately 36 years. Tsiniias testified that no person affiliated with defendant could access the basement through the kitchen hatch without notifying the third-party defendant, and that only the third-party defendant had access to that space. Defendant further maintains that the lease imposed no contractual obligation on it to maintain or repair the area at issue, and that the third-party defendant assumed responsibility for such maintenance. It notes that, in January 2021, the third-party defendant replaced the staircase. Defendant also argues that, although the lease contained a right-

of-reentry provision, plaintiff's accident did not involve a structural defect or a statutory violation that would impose liability.

“An out-of-possession landlord is not liable for injuries that occur on leased premises ‘unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct’ to perform the relevant maintenance or repairs” (*Hope v Our Holy Redeemer R.C. Church*, 219 AD3d 595, 595 [2d Dept 2023], quoting *Cali Dev. Corp. v Church Side Realty, LLC*, 208 AD3d 451 [2d Dept 2022]; see *Washington v Jay St. Dev. Corp.*, 215 AD3d 717, 718-719 [2d Dept 2023]).

Here, the defendant established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it was an out-of-possession landlord which retained no control over the subject area of the premises where the plaintiff's alleged accident occurred, and did not assume any duty to maintain the subject area by contract or course of conduct, by submitting a copy of the lease, as well as Tsini's deposition, who had knowledge of the subject lease and the area where the alleged accident occurred (see *Hope*, 219 AD3d at 595; *Washington*, 215 AD3d at 718-719).

In opposition, plaintiff argues that defendant conceded that the basement was not part of the demised premises under the lease, although the third-party defendant used it for storage. Plaintiff contends that defendant retained the right to reenter the premises without notice and therefore owed a duty to maintain the basement and the subject staircase on the date of the accident. Plaintiff further asserts that defendant had notice of the alleged dangerous condition because its president and property manager periodically inspected the premises.

The court finds that plaintiff and the third-party defendant failed to raise a triable issue of fact (see *Hope*, 219 AD3d at 595; *Washington*, 215 AD3d at 718-719). Contrary to the plaintiff and the third-party defendant, Paul Irvine, defendant's property manager, testified that the defendant did not have possession of the basement. Additionally, Tsini's testified that the third-party defendant has operated the coffee shop/restaurant and occupied space at the premises for approximately 36 years, that the defendant could not access the basement without prior notice to the third-party defendant, and that the third-party defendant performed the repairs by replacing the subject staircase. Moreover, the “mere reservation of a right to reenter the premises for the purpose of inspection does not impose an obligation on a landlord to maintain the premises” (*Washington*, 215 AD3d at 719). There is no evidence that the defendant either knew or should have known of the alleged dangerous condition prior to the alleged accident (*id.*). Therefore, the court grants this branch of the third-party defendant's motion and the defendant's cross-motion for summary judgment.

Lastly, where a plaintiff cannot sustain negligence claims against a defendant, that defendant's claims for indemnification and contribution against other parties would also fail (see CPLR 1401). Inasmuch as there are no pending negligence claims remaining against the defendant, the defendant's third-party claims no longer remain viable (*id.*). In light of the above determination that there are no viable third-party claims, it is not necessary to address the defendant's or the third-party defendant's remaining arguments.

Conclusion

Accordingly, the defendant's cross-motion for summary judgment dismissing all claims asserted against it is granted, plaintiff's complaint is dismissed in its entirety. The third-party defendant's motion for summary judgment dismissing the third-party action is rendered moot and dismissed as a matter of law.

Dated: March 4, 2026  
Jamaica, New York

  
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Claudia Lanzetta, J.S.C.

