

Kelly v BPP St Owner, LLC
2026 NY Slip Op 31870(U)
April 29, 2026
Supreme Court, New York County
Docket Number: Index No. 162243/2023
Judge: Phaedra F. Perry-Bond
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PHAEDRA F. PERRY-BOND PART 35

Justice

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MELODEE KELLY,

Plaintiff,

- v -

BPP ST OWNER, LLC. D/B/A FIVE STUY CAFE, STPCV
SERVICES LLC, COOPER CAFE LLC

Defendant.

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INDEX NO. 162243/2023

MOTION DATE 09/24/2025, 09/04/2025

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 51, 52, 59, 60, 61, 62

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 48, 50, 53, 54, 55, 56, 57, 58

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, motion sequences 001 and 002 are consolidated for disposition and decided as follows:

- A. Defendant BPP St owner LLC d/b/a Five Stuy Café ("Five Stuy Café") and STPCV Services LLC ("STPCV") (collectively "Stuy Defendants") motion for summary judgment on its cross claims for contractual indemnification and breach of contract for failure to procure insurance ("Mot. Seq. 001") asserted against Defendant Cooper Café LLC ("Cooper Café") is denied.
B. Plaintiff's motion for summary judgment on the issue of liability against Defendants under the doctrine of res ipsa loquitur and dismissing defendant's affirmative defenses of comparative negligence and contributory negligence ("Mot. Seq. 002") is denied.

I. Background

On December 3, 2023, Plaintiff was at 5 Stuyvesant oval, New York, New York (the “Premises”), also known as Stuyvesant Café, and was ordering a cappuccino when a glass partition that was situated behind her allegedly fell on to her. Plaintiff was injured and now sues Defendants. The Premises are owned by BPP St Owner LLC (NYSCEF Doc. 43). The Premises are operated by Defendant Cooper Café (NYSCEF Doc. 41 at 9). Frank Traina, a part owner of Cooper Café, testified he was not aware of any prior issues with the seating divider (*id.* at 35). According to an accident report, the glass partition fell after one of Plaintiff’s friends leaned against it (NYSCEF Doc. 61). Now, Plaintiff moves for summary judgment against Defendants on the issue of liability, claiming the doctrine of *res ipsa loquitur* applies. Plaintiff also seeks dismissal of defendants’ affirmative defenses for culpable conduct, contributory negligence, and comparative negligence. Defendants oppose. The Stuy Defendants also move for summary judgment against Cooper Café on their crossclaims for contractual indemnification and for breach of contract for failure to procure insurance.

II. Discussion

A. Standard

“On a motion for summary judgment, the movant must make a prima facie showing by submitting evidence that demonstrates the absence of any material issues of fact. Once that initial showing has been made, the burden shifts to the opposing party to show there are disputed facts requiring a trial” (*Nellenback v Madison County*, 44 NY3d 329, 334 [2025] [internal quotations and citations omitted]). The movant’s burden is heavy, and the facts must be viewed in the light most favorable to the non-movant (*Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]).

“If the moving party fails to meet this initial burden, summary judgment must be denied ‘regardless of the sufficiency of the opposing papers’” (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014] quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). “It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact” but rather the Court’s function is to identify material triable issue of fact or point to the lack thereof (*Vega, supra* at 505 [2012]).

B. Plaintiff’s Motion

Plaintiff’s motion for summary judgment on the issue of liability is denied. *Res ipsa loquitor* gives rise to summary judgment “only in the rarest” of cases (*Morejob v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). This is not one of those rare cases. Plaintiff failed to establish that the instrumentality causing her harm was in Defendants’ exclusive control, a required element of *res ipsa loquitor* (see, e.g. *Bunn v City of New York*, 180 AD3d 550 [1st Dept 2020]; *Parris v Port of New York Authority*, 47 AD3d 460, 461 [1st Dept 2008]). The glass partition that fell on her was in a seating area open to the public, and there is some evidence indicating it may have fallen due to another person leaning too hard on the partition (*Zimble v Resnick 72nd St. Associates*, 79 AD3d 620 [1st Dept 2010]; *Bazne v Port Auth. of New York and New Jersey*, 61 AD3d 583 [1st Dept 2009]).

Plaintiff’s motion seeking dismissal of the affirmative defenses alleging comparative negligence or culpable conduct is also denied. “Comparative negligence is usually a jury question and should only be decided as a matter of law where there is ‘no valid line of reasoning and permissible inferences’ which could lead a rational jury to conclude that the plaintiff was negligent” (see *Charleston v City of New York*, 100 AD3d 471, 472 [1st Dept 2012]). Considering issues of credibility may not be resolved on a motion for summary judgment, and drawing all

reasonable inferences in favor of the non moving parties, the Court finds dismissal of the affirmative defenses as to comparative negligence inappropriate at this juncture (*see Prendergast v New York City Transit Auth.*, 220 Ad3d 583 [1st Dept 2023]). It remains to be seen what evidence and testimony will be adduced at the time of trial. If the record supports a finding that there is no line of reasoning through which the jury could find Plaintiff negligent, then Plaintiff may ask the trial court for a ruling excluding any charge as to comparative negligence and excluding any verdict sheet interrogatory as to comparative negligence (*see also Drummond v 450 Partners LLC*, 210 AD3d 494, 494 [1st Dept 2022] [comparative fault remains an issue for the factfinder at trial]).

C. Stuy Defendants' Motion

The Stuy Defendants' motion for summary judgment on their crossclaims for indemnification and breach of contract for failure to procure insurance are denied, without prejudice. "An indemnification clause does not apply to the mere assertion of claims" (*Healy v 169 E. 69th Street Corp.*, 189 AD3d 680, 681 [1st Dept 2020] quoting *JPMorgan Chase Bank, N.A. v Luxor Capital, LLC*, 101 AD3d 575, 575-76 [1st Dept 2012]). There has been no finding of negligence against any party, all that has been asserted at this point are claims of negligence, making summary judgment on these issues premature. If at the time of trial there is a finding of negligence against Cooper Café, the Stuy Defendants can renew their motion for summary judgment on their contractual indemnification claims.

The motion for summary judgment based on breach of contract for failure to procure insurance is also denied. The certificates of insurance show the Stuy Defendants were named as additional insureds but Cooper Café's insurer denied coverage based on its interpretation of the policy. Cooper Café is not liable for its insurer's policy determinations. At a minimum, the certificate of insurance, which the Stuy Defendants annex to their own motion papers (*see*

NYSCEF Doc. 44), raises an issue of fact as to whether Cooper Café procured adequate insurance and the declination of coverage is solely a result of its insurer’s coverage stance (see, e.g. *Ruisech v Structure Tone Inc.*, 208 AD3d 412, 417 [1st Dept 2022]).

Accordingly, it is hereby,

ORDERED that the motions for summary judgment are denied; and it is further

ORDERED that within ten days of entry, counsel for Cooper Café shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

4/29/26
DATE


HON. PHAEDRA F. PERRY-BOND, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE