

**Betancourt v ARC NYC123 William, LLC**

2023 NY Slip Op 34151(U)

August 31, 2023

Supreme Court, Bronx County

Docket Number: Index No. 32752/2018E

Judge: Andrew Cohen

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 4**

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**ALEX BETANCOURT,**

**Plaintiff,**

**DECISION AND ORDER**

**Index No. 32752/2018E**

**-against-**

**ARC NYC123 William, LLC &  
OPEN KITCHEN 123 LLC,**

**Defendants.**

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**The following papers were considered on the motions (#005 & #006) for summary judgment:**

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion, annexed Exhibits and Affidavits and Memorandum of Law.....	1, 2
Answering Affidavits and Exhibits and Memorandum of Law.....	3, 4, 5, 6
Reply Affirmation.....	7

**Upon the foregoing papers, it is ordered that Defendant Open Kitchen’s motion #5 for summary judgment is denied.**

Plaintiff Alex Betancourt commenced this action after allegedly being caused to trip and fall in the doorway of a restaurant located on premises operated by defendant Open Kitchen 123 LLC, (hereinafter “Open Kitchen,”) due to rainy and slippery conditions and placement of the floor mats. (Betancourt Tr. at 6). Plaintiff sustained injuries as a result of the accident and stated that there was moderate rainfall at the time when he tripped (*Id.* at 39). At the time of this accident, there was one mat placed horizontally in front of the first set of interior doors. There was a second mat laid out vertically several feet away from the first one, leaving a gap in between the first and second mat (*Id.* at 35).

Open Kitchen moves pursuant to CPLR 3212 for an order granting summary judgment, dismissing Plaintiff’s complaint on the grounds that the alleged negligent placement of mats does not create a triable issue of fact. Co-defendant ARC NYC123 William LLC, hereinafter “ARC,” owns the premises in question and cross-moves pursuant to CPLR 3212 against codefendant

Open Kitchen for an order of indemnification. Additionally, ARC makes a separate motion pursuant to CPLR 3212 for an order dismissing plaintiff's complaint on the grounds that ARC is and out-of-possession landlord with no control of the day-to-day maintenance operations of demised premises.

In moving for summary judgment, the movant must make prima facie showing of entitlement as to eliminate any material issues of facts. (*Winegrad v New York Uni. Med. Ctr.* 64 N.Y.2d 851 [1985].) Open Kitchen relies on *Espinal v. Melville Snow Constrc.* (*Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]), arguing that they do not owe a duty to the Plaintiff. However, *Espinal* is inapplicable in this case, since in that case the defendant, a snow removal company, did not have an "open and comprehensive agreement" that made them responsible for all cleanliness of the premises, whereas in this case, the terms of the lease between ARC and Open Kitchen (hereinafter "lease") clearly state that Open Kitchen is responsible for all cleanliness of their premises. Accordingly, Open Kitchen fails to demonstrate that it did not owe a duty of care to the plaintiff.

In opposition to Open Kitchen's motion, Plaintiff argues that Open Kitchen did not establish as a matter of law that they did not create or have constructive notice of the dangerous condition, citing *Topchieva v. Lovett Co.* (*Topchieva v Lovett Co., LLC*, 120 AD3d 413 [1st Dept 2014]). Plaintiff also opposes ARC's motion contending that there is a question of fact as to whether ARC can be held liable since the terms of ARC's lease with Open Kitchen make ARC responsible for maintenance. This court finds that there is a question of fact as to whether Open Kitchen lacked constructive notice and that there is no ambiguity in the lease agreement as to whether Open Kitchen was responsible for the general cleanliness and maintenance of the demised premises. Accordingly, summary judgment to Open Kitchen is denied and summary judgment to ARC is granted.

Here, defendant Open Kitchen has not presented sufficient evidence as to eliminate all material issues of fact that it lacked constructive notice. The manager of the restaurant, Mr. Choi, could not remember when the last time the premises had been inspected for slipping hazards, or if the premises would be routinely inspected for slipping hazards (Choi. Tr. at 28-29). Constructive notice can be inferred where the defendant can offer no evidence to show when the

area of the alleged hazardous condition was last inspected. (*Guerreor v Duane Reade, Inc.*, 112 AD3d 496 [1st Dept. 2013]).

The reasonable care standard does not require a restaurant to cover all of its floors with mats to prevent a person falling on tracked-in moisture, nor does it require a defendant to place a specific number of mats in specific places (*Pomahac v TrizecHahn 1065 Ave. of the Ams. LLC*, 65 AD3d 462 [1st Dept 2009]). However, a court needs to consider all of the circumstances regarding a defendant's maintenance efforts and scrutinize the circumstances in ascertaining whether the defendant exercised reasonable care in remedying a dangerous condition. (*Id.* at 464).

While Open Kitchen argues that a defendant is not required to continually mop the floor from tracked-in liquid when there is a Storm-in-Progress, that does not mean there is no duty to routinely inspect the premises for slipping hazards. (*DeCongelio v Metro Fund, LLC*, 183 AD3d 449, 450 [1st Dept 2020]). Thus, Open Kitchen fails to demonstrate that it lacked constructive notice, since they could have known of a dangerous condition if they had routinely inspected their floor for slipping hazards. Accordingly, Open Kitchen's motion for summary judgment is denied.

Turning to ARC's motion to dismiss Plaintiff's claims against them, the court finds that ARC has presented sufficient evidence showing they were an out-of-possession landlord, and as such was not responsible for the maintenance of Open Kitchen's premises. When a landlord submits sufficient evidence showing they were not contractually obliged to maintain the premises and establish that they neither caused or created the hazardous condition, then this establishes they were out-of-possession landlord, and as such entitles them to summary judgment. (*Arias v Sanitation Salvage Corp.*, 199 AD3d 554 [1st Dept 2021]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011]).

According to the lease, ARC was not responsible for overseeing the cleanliness of the premises. Additionally, Mr. Anderson, ARC's representative, testified at his deposition that they were not responsible for overseeing the day-to-day activities of Open Kitchen (Anderson Tr. at 14-21).

In opposition, Open Kitchen argues that it was the landlord's responsibility under lease provision 4.1 to "operate and maintain the building systems and the public portion of the premises, premises...both structural and nonstructural, and the exterior and interior." However, section 2.2 of the lease is unambiguous and states that the tenant is responsible for "keep[ing] sidewalks and or plaza areas adjacent to the premises clean and free from any garbage, snow, and ice." Thus, the "maintenance" referred to in section 4.1 could not have meant the same kind of maintenance that is talked about in section 2.2, which makes the immediate cleanliness of the premises and surroundings area the responsibility of the tenant. Accordingly, this court grants summary judgment to ARC, Plaintiff's complaint against it.

In regard to ARC's cross-motion for indemnification, ARC is entitled to indemnification from Open Kitchen for their defense of this action. A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the entire agreement. (*Wood v Lefrak SBN LP*, 111 AD3d 532 [1st Dept 2013]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401 [1st Dept 2005]).

Open Kitchen's argument that the tenant needs to be found negligent in order for the landlord to seek indemnification is rejected. Section 35.1 of the lease is unambiguous and states that

"Tenant shall indemnify and save the indemnities harmless from and against all claims of whatever nature...arising from or in connection with any act, omission, or negligence of Tenant or Tenant's agents..."

The broad language of the lease makes clear that the tenant is obligated to indemnify the landlord for all claims that arise of regardless of their nature (*Id.* at 402). While that can include negligence, the lease provision states that indemnification is not limited to a finding of negligence. The indemnification provision uses the language "any act or omission or negligence." Thus, an intent for Open Kitchen to indemnify ARC can be clearly implied from the language and purpose of the entire agreement, and as such Open Kitchen is required to indemnify ARC.

Accordingly, it is hereby

ORDERED, that the motion for summary judgment by defendant Open Kitchen is denied; and it is further

ORDERED, that the cross motion for contractual indemnification by defendant ARC NYC123 William is granted; and it is further

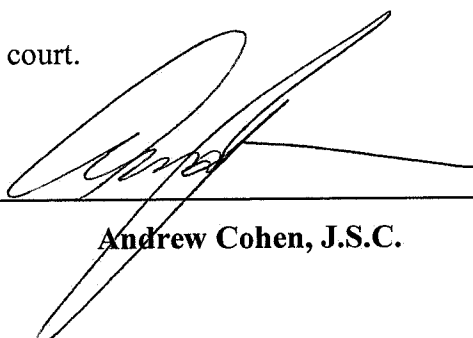
ORDERED, that the motion for summary judgment by defendant ARC NYC123 William is granted; and it is further

ORDERED, that the clerk of the court shall enter judgment accordingly; and it is further

ORDERED, that movants shall serve a copy of this decision with notice of entry within 45 days.

This constitutes the decision and order of the court.

Dated: 8/31/2023

  
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Andrew Cohen, J.S.C.