

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Weiss v. Fran Corp.

2026 NY Slip Op 02147 (N.Y. Ct. App. 2026) · No. 2024-08765 · Decided April 8, 2026

SUMMARY

The Appellate Division, Second Department, reversed an order denying the defendant's CPLR 3211(a) motion and dismissed a personal-injury complaint arising from a pedestrian accident at an allegedly darkened intersection. The court held that the contractor owed no tort duty to the plaintiff under the Espinal exceptions because its alleged failure to restore illumination did not launch an instrument of harm and its contract did not entirely displace the Town's duty to maintain the premises safely.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Cheryl E. Chambers, J.P.; Deborah A. Dowling, J.; James P. McCormack, J.; Susan Quirk, J.
JURISDICTION	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
DECIDED	April 8, 2026
DOCKET	2024-08765
DISPOSITION	reversed
PROCEDURAL POSTURE	The defendant appealed from an order of the Supreme Court, Rockland County, denying its CPLR 3211(a) motion to dismiss a personal-injury complaint.
STANDARD OF REVIEW	On a CPLR 3211(a)(7) motion, the complaint is liberally construed, its factual allegations are presumed true, and the plaintiff receives the benefit of every favorable inference. When evidentiary material is submitted and considered without converting the motion to one for summary judgment, the court determines whether the plaintiff has a cause of action; dismissal is appropriate only when a material fact alleged by the plaintiff is not a fact at all or no significant dispute exists regarding it.

PRECEDENTIAL VALUE	Published intermediate appellate decision; precedential under New York law, subject to correction before publication in the Official Reports.
PARTIES	Fran Corp. v. Moyshe Weiss

TOPICS

duty of care negligence personal injury motions to dismiss contracts

PRACTICE AREAS

torts civil procedure personal injury contracts

QUESTIONS PRESENTED

1. Whether the complaint stated a cognizable negligence claim against a contractor that had contracted with the Town to repair a street light but had no contractual privity with the injured pedestrian.
2. Whether the alleged negligent failure to restore illumination constituted the launching of an instrument of harm under the Espinal exceptions.
3. Whether the contractor's agreement entirely displaced the Town's duty to maintain the intersection safely.

HOLDINGS

1. A contractual obligation, standing alone, does not create tort liability to a third party; a contractor assumes a duty of care only if it launches a force or instrument of harm, the plaintiff detrimentally relies on continued performance, or the contractor entirely displaces the other party's duty to maintain the premises safely.
2. The alleged negligent failure to restore illumination to an already darkened intersection was, at most, a failure to act as an instrument for good and did not constitute the launching of an instrument of harm sufficient to impose a duty of care on Fran Corp.
3. Fran Corp.'s contractual undertaking was not a comprehensive and exclusive property-maintenance obligation that entirely displaced the Town's duty to maintain the premises safely.

KEY QUOTATIONS

“On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” ([*1])

“Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party” ([*2])

“The defendant's purported negligence in failing to restore illumination to a darkened intersection amounts to, at most, a failure to act as an “instrument for good, which is insufficient to impose a duty of care” upon the

*defendant in the absence of contractual privity with the plaintiff” ([*2])*

FACTUAL BACKGROUND

Weiss was struck by a motor vehicle while crossing at an intersection in the Town of Ramapo. He alleged that an unilluminated street light contributed to the accident and that Fran Corp., which had contracted with the Town to repair the light, negligently repaired it before the accident. Fran Corp. submitted its contract with the Town in support of its motion to dismiss.

PROCEDURAL HISTORY

Moyshe Weiss sued Fran Corp. for personal injuries sustained when a motor vehicle struck him as a pedestrian. The Supreme Court denied Fran Corp.'s motion to dismiss, and the Appellate Division reversed and granted the motion.

DISPOSITION

reversed

CASES CITED

- Clevenger v. Yuzek, 222 A.D.3d 931, 934 (2d Dep't 2023)
- Pergament v. Government Employees Insurance Co. (GEICO), 225 A.D.3d 799, 800 (2d Dep't 2024)
- Espinal v. Melville Snow Contractors, 98 N.Y.2d 136, 138, 140-141 (2002)
- Valdez v. M.A. Angeliades, Inc., 222 A.D.3d 911, 911-912 (2d Dep't 2023)
- Leon v. Martinez, 84 N.Y.2d 83, 87 (1994)
- Church v. Callanan Industries, 99 N.Y.2d 104, 112 (2002)
- Espeleta v. Synergy Resources, Inc., 172 A.D.3d 1320, 1321 (3d Dep't 2019)
- Santos v. Deanco Services, Inc., 142 A.D.3d 137, 142 (2d Dep't 2016)
- Palka v. Servicemaster Management Services Corp., 83 N.Y.2d 579, 588 (1994)
- Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 167-170 (1928)
- Anderson v. Jefferson-Utica Group, Inc., 26 A.D.3d 760, 761 (3d Dep't 2006)

OPINION

Weiss v. Fran Corp. 2026 NY Slip Op 02147

PER CURIAM.

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uncorrected and subject to revision before publication in the Official Reports.</p> </div> <div>
<p>Moyshe Weiss, respondent,</p> <p>v</p> <p>Fran Corp., etc., appellant.</p> </div>
<p>Supreme Court of the State of New York, Appellate Division, Second Judicial Department</p>
<p>Decided on April 8, 2026</p> <p>2024-08765, (Index No. 35209/23)</p> <p>Cheryl E.
Chambers, J.P.</p> <p>Deborah A. Dowling</p> <p>James P. McCormack</p> <p>Susan Quirk,
JJ.</p> <div> <p>Barry McTiernan & Moore LLC, New York, NY (Laurel A. Wedinger and
Courtney Chadwell of counsel), for appellant.</p> <p>Goldstein & Goldstein, P.C.,
Brooklyn, NY (Benjamin S. Goldstein of counsel), for respondent.</p> [*1]
<p>DECISION & ORDER</p> <p>In an action to recover damages for personal injuries, the
defendant appeals from an order of the Supreme Court, Rockland County (Sherri L. Eisenpress,
J.), dated June 4, 2024. The order denied the defendant's motion pursuant to CPLR 3211(a) to
dismiss the complaint.</p> <p>ORDERED that the order is reversed, on the law, with costs, and
the defendant's motion pursuant to CPLR 3211(a) to dismiss the complaint is granted.</p> <p>The
plaintiff commenced this action to recover damages for personal injuries he sustained as a
pedestrian when he was struck by a motor vehicle at an intersection in the Town of Ramapo. The
complaint alleged, among other things, that a street light at the subject intersection was not
illuminated at the time of the accident, and that the malfunction of the street light contributed to
the happening of the accident. The complaint further alleged, inter alia, that the defendant had
entered into a contract with the Town pursuant to which the defendant was obligated to repair the
street light, and had performed a negligent repair of the street light prior to the accident.</p>
<p>The defendant moved pursuant to CPLR 3211(a) to dismiss the complaint. In support of its
motion, the defendant submitted, among other things, a copy of its contract with the Town. The
plaintiff submitted an attorney affirmation in opposition to the motion. The Supreme Court denied
the motion, and the defendant appeals.</p> <p>"On a motion to dismiss pursuant to CPLR
3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to
be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to
determine only whether the facts as alleged fit within any cognizable legal theory" (<i>Clevenger
v Yuzek</i>, 222 AD3d 931, 934 [internal quotation marks omitted]; <i>see</i> <i>Pergament v
Government Empls. Ins. Co. ["GEICO"]</i>, 225 AD3d 799, 800). "Where evidentiary material is
submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and
the motion is not converted into one for summary judgment, the question becomes whether the
plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been
shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can
be said that no significant dispute exists regarding it, dismissal shall not eventuate" [*2]

Clevenger v Yuzek, 222 AD3d at 934).
"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138). Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see id.* at 140). However, a party that enters into a contract to render services may be said to have assumed a duty of care, and thus, be potentially liable in tort to third persons, where (1) the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see id.*).
Here, the defendant demonstrated, as a matter of law, that it owed no duty of care to the plaintiff (*see id.* at 138; *Valdez v M.A. Angeliades, Inc.*, 222 AD3d 911, 911-912). Contrary to the plaintiff's contention, even if the allegations in the complaint are accepted as true and the plaintiff is accorded the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87), the facts alleged do not establish that the defendant launched an instrument of harm, as the defendant is not alleged to have "created or increased the risk [to the plaintiff] beyond the risk which existed even before [the defendant] entered into [its] contractual undertaking" (*Church v Callanan Indus.*, 99 NY2d 104, 112). The defendant's purported negligence in failing to restore illumination to a darkened intersection amounts to, at most, a failure to act as an "instrument for good, which is insufficient to impose a duty of care" upon the defendant in the absence of contractual privity with the plaintiff (*Espeleta v Synergy Resources, Inc.*, 172 AD3d 1320, 1321 [internal quotation marks omitted]; *see Church v Callanan Indus.*, 99 NY2d at 112; *Santos v Deanco Servs., Inc.*, 142 AD3d 137, 142). Moreover, the contract submitted by the defendant in support of its motion conclusively demonstrated that the defendant's contractual undertaking was "not the type of 'comprehensive and exclusive' property maintenance obligation" that would "entirely absorb" the Town's duty "to maintain the premises safely" (*Espinal v Melville Snow Contrs.*, 98 NY2d at 141, quoting *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588).
Accordingly, the Supreme Court should have granted the defendant's motion pursuant to CPLR 3211(a) to dismiss the complaint (*see Moch Co. v Rensselaer Water Co.*, 247 NY 160, 167-170; *Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 761).
The defendant's remaining contention is academic.
CHAMBERS, J.P.,
DOWLING, MCCORMACK and QUIRK, JJ., concur.
ENTER:
Darrell M. Joseph
Clerk of the Court

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