Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

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DIKEA KONTOS,

Plaintiff,

Index No.: 2145/02
Motion Date: 10/22/03
Motion Cal. No.: 19

-against-

KOAKOS SYLLOGOS "IPPOCRATES", INC.,
Defendant.

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The following papers numbered 1 to 10 read on this motion by defendant for summary judgment in its favor pursuant to CPLR § 3212 and dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Affidavit-Exhibits.....	5-7
Reply Affirmation.....	8-10

Upon the foregoing papers it is ordered that the motion for summary judgment is granted, for the following reasons:

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v County of Albany, 50 NY2d 247 (1980); Miceli v Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987). Finally, as stated by the court in Daliendo v. Johnson, 147 AD2d 312, 317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

The action herein stems from plaintiffs tripping and falling on February 3,2003, on the sidewalk located at or near the intersection of 23rd Avenue and 42nd Street, County of Queens, New York. Plaintiff was walking along the sidewalk, with two friends, when she tripped over a rock on the left corner of a tree well. As a result of her fall, she suffered

injuries and brought this action to recover damages.

Defendant has now moved for summary judgment on the grounds that plaintiff tripped on a portion of the public sidewalk located in front of its premises that it neither created, repaired or had any special use for. Defendant has submitted plaintiffs deposition testimony, which indicates she originally claimed to have tripped on a brick, but changed it to a rock and that she was not aware of any complaints being made about the subject dangerous condition and she has walked past this location prior to February 3,2003. Nor was she aware of any construction being done at this location. Deposition testimony of Ms. Tsouknidas indicates she was walking with plaintiff at the time of the incident and plaintiff tripped over a brick. This brick was in the soil and sticking out about two to three inches and she had never noticed this brick prior to the incident, however, it did appear to have been there for a long time. She also stated that she had never seen any repairs done on the tree or its surrounding bricks and did not know who maintained the tree. Defendant has also submitted photographs marked by plaintiff, that show plaintiff tripped in an area of the tree well, on a public sidewalk, that is now covered by bricks. Defendant has also submitted deposition testimony of George Fournaris, Vice-president of defendant corporation that indicates defendant has no employees, it never did any work on the tree or brick area and never received a complaint or citation concerning the subject bricks surrounding the tree.

Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner. There are, however, circumstances under which this general rule is inapplicable and the abutting landowner will be held liable. Liability to abutting landowners will generally be imposed where the sidewalk was constructed in a special manner for the benefit of the abutting owner, where the abutting owner affirmatively caused the defect, where the abutting landowner negligently constructed or repaired the sidewalk and where a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty. Martinez v City of New York and St. John's I Associates, 270 AD2d 235 (2d Dept 2000.)

Defendant's evidence has established that liability should not be imposed upon it and prima facie, its entitlement to judgment as a matter of law. As such, it became plaintiffs burden to show the existence of a factual issue sufficient to warrant a trial. Plaintiff has failed to meet that burden.

Plaintiff **opposes** this motion and argues that defendant has not produced sufficient

evidence to support this motion and that defendant did create the defective condition and maintained the subject tree. Plaintiff has submitted a copy of a citation issued by the city against the defendant for a broken sidewalk, photographs and an affidavit of Despina Livanou.

Contrary to plaintiffs claim, the citation from the City does not state defendant was liable for the condition of the tree well. Rather, it merely states that non-specified portions of the sidewalk adjacent to its premises needed to be repaired. Moreover, the photographs indicate an area of the tree well that is covered with brick, where the plaintiff allegedly tripped. This area is not on the sidewalk and a review of the photograph indicates any defective condition is not noticeable. In fact, scrutiny of the photo and consideration of all other relevant factors supports a finding that the alleged defect does not have any of the characteristics of a trap or snare, and is too trivial to be actionable as a matter of law. ***See,*** Nathan v City of New Rochelle, 282 AD2d 585 (2d Dept 2001.)

Finally, the affidavit of Despina Livanou is submitted without any explanation as to why plaintiff delayed in providing defendant with a last name and address for this witness, until after filing the Note of Issue. In fact, upon inquiry, plaintiffs counsel had informed defendant that this witness' last name was not known by plaintiff and the witness had moved to Greece. In any event, this affidavit contradicts plaintiff regarding the object tripped over and the fact that the bricks looked aged. Moreover, without any factual basis, Ms. Ivanou claims to have observed employees from defendant's establishment placing the subject bricks and maintaining the subject tree. Her affidavit, containing facts presented for the first time after the note of issue was filed, contradicting other witnesses, and relying upon speculations cannot raise a triable issue of fact. As such, plaintiff has not shown that defendant created the alleged defect, had any duty to maintain or repair the subject area, or was given a special use of the subject area. Therefore, summary judgment is granted. Tsvilin*g* v City of New York, 275 AD2d 367(2d Dept. 2000.)

Dated: October 24, 2003

ORIN R. KITZES, J.S.C.