

**Kim v T&R Props., LLC**

2007 NY Slip Op 32825(U)

August 28, 2007

Supreme Court, Queens County

Docket Number: 0013320/2005

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

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JUDY KIM,

Plaintiffs,

- against -

T&R PROPERTIES, LLC, THE CITY OF NEW  
YORK, CIMIAR REALTY, LLC and FIRST  
MANAGEMENT CORP.,

Defendants.

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Motion Seq. No. 2

The following papers numbered 1 to 12 read on this motion by defendant T&R Properties, LLC for summary judgment dismissing the complaint and any cross-claims as against it.

Papers  
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition to Motion-Exhibits.....	5-7
Affirmation in Opposition to Motion-Exhibits.....	8-10
Reply Affirmation.....	11-12

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by T&R for summary judgment, pursuant to CPLR 3212, dismissing the complaint and any cross-claims against it is granted.

In order to obtain summary judgment, the movant must make a prima facie showing that it is entitled to said relief, by tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). T&R has met its burden.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon an uneven section of the public sidewalk abutting the premises 200-14 44<sup>th</sup> Avenue in Queens County on March 16, 2004.

Plaintiff alleges that the location was in front of 200-14 in her complaint and her bill of particulars. Moreover, she testified in her deposition that she knows that the accident occurred in front of 200-14 (transcript, p. 23). T&R moves for summary judgment upon the ground that it was not the owner of 200-14, but rather, of the property next door, 200-12.

A property owner is not liable for repairing and maintaining abutting public property unless the owner actually created the defective condition or caused it through some special use, or unless an ordinance or statute charges the abutting owner with the responsibility to repair and maintain the public property and specifically imposes liability upon the owner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2<sup>nd</sup> Dept 1999]).

The New York City Administrative Code §§19-152 and 7-210 places the duty to repair sidewalks upon the abutting property owners, and §7-210 specifically imposes liability upon abutting property owners for any injuries resulting from their breach of that duty.

Thus, T&R can only be liable to plaintiff if it was the owner of the property abutting the location where plaintiff allegedly tripped and fell or if it actually created the condition through a special use or otherwise.

Annexed to the moving papers is an affidavit of Theodore Davantzis, one of the owners of T&R. Davantzis avers that at no time was either he, his wife or T&R the owner of 200-14 44<sup>th</sup>, but rather, T&R was the owner of the adjoining premises 200-12 44<sup>th</sup> Avenue. Annexed to the moving papers is a copy of the deed to 200-14, dated December 20, 2000, together with the recording page, dated January 19, 2001, indicating that the owner of said premises was Cimiar Realty, LLC. Even though the deed and recording page are uncertified, the recording page is admissible, since plaintiff also annexes to her opposition papers a copy of the recording page. Moreover, counsel for Cimiar and First Management concedes, in his affirmation in opposition, that the owner of 200-14 was Cimiar.

Plaintiff in her opposition, annexes a print-out of an ACRIS search result for the block and lot corresponding to 200-14, and said result indicates that the premises were conveyed by Li-Na Homes Inc. to T&R by deed recorded on August 13, 1999 in reel 5344, page 421. However, plaintiff's counsel concedes that it appears that there was a recording error with the City Register concerning the block and lot number of the subject property and that Cimiar is the true owner of 200-14. In this regard, an uncertified copy of the deed to 200-12 annexed to the moving papers, indicating that the owner of 200-12 was T&R, shows that it was the deed recorded

in reel 5344, page 421 on August 13, 1999.

Plaintiff opposes the instant motion on the ground that Cimiar denied ownership of the property in its answer and that discovery remains outstanding which may reveal facts currently unknown to plaintiff. Plaintiff's opposition fails to raise an issue of fact. Counsel's mere expression of hope that further discovery might reveal something helpful to plaintiff's case is not a basis for denying the motion for summary judgment (see Jorbel v. Kopko, 31 AD 3d 612 [2<sup>nd</sup> Dept 2006]). Moreover, even though Cimiar denied ownership of the subject premises in its answer, it has admitted, through its counsel in its opposition, that it was the owner of the subject premises.

Cimiar and First Management, in their opposition, merely posit the entirely speculative argument that since they have not had a chance to depose plaintiff and T&R, they do not know whether T&R made a special use of the accident location. In this regard, no triable issue of fact has been presented as to whether T&R created the defect or made some special use of the subject area. Since T&R had no duty to repair and maintain the sidewalk that did not abut its premises, it was plaintiff's and/or Cimiar's and First Management's burden to show evidence that T&R created the defect or caused it through some special use (see Pratt v. Villa Roma Country Club, Inc., 277 AD 2d 298, 299[1<sup>st</sup> Dept 2000]). The argument of counsel that since they have not had a chance to depose plaintiff and co-defendants, they do not know whether T&R made a special use of the subject sidewalk is entirely conjectural and fails to raise an issue of fact.

Similarly, the argument of counsel for Cimiar and First Management that since they have not had a chance to depose plaintiff or review plaintiff's transcript, they do not know the exact location of the accident, is also both speculative and irrelevant. Plaintiff, in her deposition taken by plaintiff's counsel and counsel for T&R, stated categorically that she fell in front of 200-14 and knows that she did because she saw the address on the building. Said location is the basis of her complaint. Indeed, counsel for plaintiff, in his affirmation in opposition, affirms that the location of the accident was in front of 200-14. Since plaintiff continues to allege that she fell in front of 200-14, to the extent that T&R has demonstrated that it was not the owner of said property, it is entitled to summary judgment dismissing the underlying complaint which is premised upon the allegation that T&R was the owner of 200-14.

T&R has shown proof, in the form of the affidavit of Davantzis, that T&R was at no time the owner of 200-14 44<sup>th</sup> Avenue. Neither plaintiff nor Cimiar and First Management have offered any competent proof to rebut movant's prima facie showing. Indeed,

counsel for Cimiar and First Management concedes that Cimiar was the owner of 200-14 and plaintiff's counsel concedes that Cimiar is apparently the owner and that the records of the City Register indicating that T&R was the owner appear to be in error. Plaintiff's and Cimiar's contention that discovery is not complete and facts may be uncovered which they do not yet know is speculative. Therefore, the opposition papers fail to raise an issue of fact so as to defeat the granting of summary judgment.

Therefore, no basis of liability lies against T&R based upon §§19-152 and 7-210 of the Administrative Code.

In the absence of any statute imposing liability upon T&R for failing to repair and maintain the sidewalk abutting the demised property, the only grounds for liability against it would be if it actually created the defective condition or caused it through a special use. The moving papers fail to raise any question of fact that T&R either created the alleged defective sidewalk condition or caused it through a special use of the sidewalk.

Therefore, since T&R has submitted proof, in admissible form, that it was not the owner of the abutting premises, it has demonstrated that it is not liable for plaintiff's injuries allegedly sustained as a result of tripping and falling upon the defective sidewalk, as a matter of law.

Accordingly, the motion is granted and the complaint and any cross-claims are dismissed as against T&R.

Dated: August 28, 2007

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KEVIN J. KERRIGAN, J.S.C.