Pournazarian v City of New York
2007 NY Slip Op 32827(U)
August 13, 2007
Supreme Court, Queens County
Docket Number: 0015724/2005
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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IRAN POURNAZARIAN,

Plaintiff,

- against -

CITY OF NEW YORK, TOV CATERERS,INC. AND JAY DEE BAKERY

Defendants.

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Index Number: 15724/05

Motion Date: 07/31/07

Motion Cal. Number: 26

Motion Seq. No. 3

The following papers numbered 1 to 4 read on this motion by defendant Tov Caterers, Inc. for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4

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

Motion by Tov for summary judgment, pursuant to CPLR 3212, dismissing the complaint and any cross-claims against it is granted, there appearing no opposition.

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]). Tov has met its burden.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon raised bricks in a tree well section of the public sidewalk abutting the commercial premises at 97-22 63rd Road, Rego Park in Queens County on April 23, 2004.

Herbert Lazar, proprietor of Tov, testified in his deposition that Tov is a commercial tenant of 97-22 63rd Road. He stated that he is not responsible for maintenance to the sidewalk and has never undertaken any repairs to the sidewalk in front of the store. He testified that the landlord repaired the sidewalk a few years ago. He also testified that the tree well was installed in the 1990s by the City and he has never seen anyone do any kind of maintenance or repair to it. He never undertook any type of maintenance of the well with regard to moving any of the bricks. He just swept and kept it clean.

An abutting property owner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the homeowner created the defective condition or caused it through some special use, or unless a statute charges the homeowner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the homeowner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

Property owners in the City of New York are required to repair and maintain at their own expense the public sidewalks abutting their premises, pursuant to §19-152 of the Administrative Code of the City of New York. However, a violation of that section, prior to September 14, 2003, could not form the basis of liability against them for injuries sustained by pedestrians. In the absence of any statute making property owners liable for injuries to pedestrians, liability for defective public sidewalks remained exclusively upon the City.

The Administrative Code was amended in 2003 to add §7-210, which transferred liability from the City to property owners, except owners of one to three-family homes that are either wholly or partially owner-occupied and used exclusively for residential purposes.

Sections 19-152 and 7-210, however, do not impose liability upon tenants. Those sections expressly state that responsibility to repair and maintain the public sidewalk and liability for the breach of that duty rest upon the owner of the abutting real property. "Nothing in the Administrative Code permits an out of possession landowner the right to assign and/or delegate its obligations under the Code to the tenant in possession" (Castillo v. Bangladesh Society, Inc., 2006 NY Slip Op 51130(U), *2 [Supreme Court, Queens County]). Moreover, it is clear from the language of §§19-152 and 7-210, as well as the legislative history of these sections, that the term "owner" was intended to have its ordinary meaning and not include lessees.

Pursuant to §19-152, the "owner" of the abutting property bears the responsibility of repairing defective sidewalk flags. In contrast, §16-123 requires the "owner, lessee, tenant, occupant, or other person having charge of any building or lot. . . abutting . . . the sidewalk" to remove snow, ice, dirt or other material from the sidewalk and gutter. However, §7-210 imposes tort liability only upon the "owner" for failure either to repair defects in the sidewalk or remove snow, ice and debris from the sidewalk. If the City Council had intended to include lessees or tenants within the scope of §§19-152 and 7-210, it would have specifically so provided.

Indeed, the intention of the City Council to impose liability only upon the actual owner and not tenants or lessees may be gleaned from the Report of the Committee on Transportation that adopted §7-210. Commenting upon the exemption from that section of one to three-family residential premises wholly or partially owner-occupied, the Report stated, "This exception for such properties is out of recognition of the fact that small property owners who reside at such property have limited resources and it would not be appropriate to expose such owners to exclusive liability with respect to sidewalk maintenance and repair" (emphasis added) (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193).

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

In the absence of any statute imposing liability upon Tov 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. Neither plaintiff nor the City appeared to rebut Lazar's testimony that Tov did not cause any repairs to be done to the subject tree well or sidewalk and, thus, did not create the defect, or that it was not contractually responsible to repair and maintain the tree well (see Nilsen v. City of New York, 28 AD 3d 625 [2nd Dept 2006]; Bachman v. Town of North Hempstead, 245 AD 2d 327 [2nd Dept 1997]). Moreover, there is no issue of any special use (id.).

Therefore, since Tov has submitted proof, in admissible form, that it neither installed, repaired nor maintained the tree well, nor had any contractual obligation to do so, it has, thus, demonstrated that it is not liable for plaintiff's injuries allegedly sustained as a result of tripping and falling upon the defective tree well in front of the subject premises, as a matter of law.

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

Dated: August 13, 2007

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KEVIN J. KERRIGAN, J.S.C.