

Gramazio v Ting's Intl. Corp.

2014 NY Slip Op 30518(U)

March 3, 2014

Supreme Court, New York County

Docket Number: 106362/11

Judge: Doris Ling-Cohan

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: JUDGE DORIS LING-COHAN
Justice

PART 34

Index Number : 106362/2011
GRAMAZIO, ENID
vs.
TING'S INTERNATIONAL CORP.
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
 Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1, 2
 Answering Affidavits — Exhibits _____ | No(s) 3, 4, 5
 Replying Affidavits _____ | No(s) 6, 7, 8

Upon the foregoing papers, it is ordered that this motion is for summary judgment
by defendant J+J Flowers Inc. and Eun J. Choi
is granted in accordance with the attached
memorandum decision.

(consolidated for deposition with motion
sequence numbers 006, 007 + 008)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

MAR 06 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/3/14

[Signature], J.S.C.

JUDGE DORIS LING-COHAN

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: 1AS PART 36

-----X
ENID GRAMAZIO,

Plaintiff,

Index No.: 106362/11
DECISION/ORDER

-against-

TING'S INTERNATIONAL CORP., KINZER
ASSOCIATES, INC. and ARTURO HERNANDEZ,
member and partner of KINZER ASSOCIATES, INC.,
A&S ART FRAMING # 11, BOBBY SADIQI, J&J
FLOWER, INC., and EUN J. CHOI,

Motion Seq. No.:
005, 006, 007, 008

Defendants.

-----X
HON. DORIS LING-COHAN, J.S.C.:

In this personal injury/negligence action, defendants move separately for summary judgment to dismiss the complaint (motion sequence numbers 005, 006, 007 and 008). These motions are consolidated for disposition, as follows.

BACKGROUND

On October 30, 2010, plaintiff Enid Gramazio (Gramazio) was injured when she slipped and fell in front of premises known as 772 and 774 9th Avenue in the County, City and State of New York (the 772 building and the 774 building, respectively). Defendant Ting's International Corp. (Ting) owns the 772 building. Defendant Arturo Hernandez (Hernandez) owns the 774 building, and defendant Kinzer Associates, Inc. (Kinzer) is the 774 building's management company. Corporate defendants A&S Art Framing # 11 (A&S), and J&J Flower, Inc. (J&J) are tenants of the 774 building, and individual defendants Bobby Sadiqi (Sadiqi) and Eun J. Choi (Choi) are their respective owners.

At her deposition, Gramazio stated that her accident was caused when the toe of her left shoe got caught in a crack in the sidewalk, which caused her to fall forward and sustain injuries

to her left knee, both wrists and head. *See* Notice of Motion (motion sequence number 005), Exhibit H, at 19-20, 23-24, 36, 45-47, 70-72, 91. Gramazio identified a photograph of the sidewalk crack in which her shoe became caught. *Id.* at 20-22, 25, 70-72; Exhibit I. She described the crack as “raised and approximately two inches deep.” *Id.* at 31, 75. She initially described its location as “between the steps and the framing store, I think,” and later stated that it was in front of the 772 building. *Id.* at 32, 72-73. She also noted that “the man in the frame store” brought her a bottle of water and helped her to walk home after the accident. *Id.* at 32-34.

Ting was also deposed by its president, Henry Ting, who did not recognize the photograph of the sidewalk crack in which Gramazio’s shoe became caught, but acknowledged that the 772 building had a three step stoop leading to the entrance of its residential portion. *See* Notice of Motion (motion sequence number 008), Exhibit F at 19-20, 34-35. Henry Ting also stated that Ting had never contracted for or made any repairs to the sidewalk in front of the 772 building. *Id.* at 21. However, Henry Ting did indicate that “the City” had made repairs to the sidewalk in front of the 772 building “before 2010,” and that Ting had paid for those repairs. *Id.* at 21. Henry Ting further stated that Kinzer had made repairs to part of the sidewalk on front of the 774 building and a small portion of the sidewalk in front of the 772 building in 2011. *Id.* at 23-24, 29-32. However, Henry Ting could not identify the photograph of the area of the sidewalk where Gramazio fell, or state whether it was part of the area that Kinzer subsequently repaired. *Id.* at 19; 27-31. Henry Ting finally stated that he had no knowledge of Gramazio’s accident. *Id.* at 42.

Kinzer was deposed by one of its principals, Debra Kinzer, who acknowledged that Hernandez is the 774 building’s owner, that Kinzer is its managing agent, that A&S and J&J are the commercial tenants of the 774 building, and that Sadiqi and Choi are their respective

proprietors. *See* Notice of Motion (motion sequence number 008), Exhibit G at 8-10, 15-18. She produced copies of their respective leases. *Id.*; Exhibits L, M. Debra Kinzer also stated that the adjacent 772 building has a three step stoop leading to its entrance, but that the 774 building has no steps and its entrance is at street level. *Id.*; Exhibit G at 20-21. Debra Kinzer further stated that Kinzer had contracted for repairs to the sidewalk in front of the 774 building in the summer of 2011. *Id.* at 26-29. She denied, however, that any of Kinzer's commercial tenants had ever made any prior complaints about the condition of the sidewalk in front of the 774 building, and noted that the owners of the 772 building never made any repairs to the sidewalk in front of it. *Id.* at 30, 32-34, 37-41.

A&S was deposed by its manager, Sadiqi, who stated that he observed Gramazio fall in front of the 772 building. *See* Notice of Motion (motion sequence number 006), Exhibit C at 9-11. Sadiqi also identified the photograph of the sidewalk crack that Gramazio's shoe became caught in, and stated that it was located in front of the 772 building. *Id.* at 12-14, 21. Sadiqi further stated that he had never made any complaints about the condition of the sidewalk prior to Gramazio's accident, but that he called to tell them that the sidewalk was "unlevel" after Gramazio's accident, which resulted in Kinzer contracting to have part of the sidewalk replaced. *Id.* at 18-22, 30. Sadiqi also stated that Kinzer did not perform any repairs to the portion of the sidewalk that was portrayed in the picture of the location where Gramazio tripped. *Id.* at 29.

J&J was deposed by its owner, Choi, who stated that she did not observe Gramazio's accident, but learned about it from Sadiqi. *See* Notice of Motion (motion sequence number 005), Exhibit N at 8, 12-13. Choi also identified the photograph of the crack where Gramazio's shoe became caught, and stated that it was not in front of her store in the 774 building. *Id.* at 13-14.

Kinzer has also presented an expert's affidavit from surveyor Szczepan Roguski

(Roguski), who inspected the site of Gramazio's accident, as well as the photograph of the sidewalk crack in which her shoe became caught, and concluded that her accident took place "in front of building 772, at least 2.28 feet away from the property line with building 774." *See* Notice of Motion (motion sequence number 008), Exhibit N (Rogusky Affidavit), ¶ 7, Exhibits 1, 2, 3.

Gramazio initially commenced this action, by filing a summons and complaint that named the City of New York (the City), Ting, Kinzer and Hernandez as defendants. *See* Notice of Motion (motion sequence number 005), Exhibit A. Thereafter, Kinzer and Hernandez impleaded A&S and Sadiqi, J&J and Choi. *Id.*, Exhibit B. Gramazio filed an amended summons and complaint that sets forth one cause of action for negligence. *Id.*, Exhibit D. J&J and Choi filed an answer to the amended complaint that includes a cross claim for contribution against Ting, A&S and Sadiqi. *Id.*, Exhibit E. A&S and Sadiqi also filed an answer to the amended complaint that includes a cross claim against all of the co-defendants for indemnification and contribution. *See* Notice of Motion (motion sequence number 006), Exhibit B. Ting relies on the answer to the original complaint, which includes a cross claim against Kinzer and Hernandez for contribution and indemnification. *See* Notice of Motion (motion sequence number 007), Exhibit D. Kinzer and Hernandez similarly rely on the answer that they filed to the original complaint, which includes a cross claim against Ting for contribution and indemnification. *Id.*, Exhibit C. The City filed a motion for summary judgment to dismiss the complaint as against it (motion sequence number 003) which was granted by a decision of this court (Engoron, J.) dated June 22, 2012, therefore, the City is no longer a party to this action. *See* Notice of Motion (motion sequence number 008), Exhibit B.

On December 11, 2012, Gramazio filed a note of issue. *See* Notice of Motion (motion

sequence number 005), Exhibit F. Now before the court are the respective motions of J&J and Choi (motion sequence number 005), A&S and Sadiqi (motion sequence number 006), Ting (motion sequence number 007) and Hernandez and Kinzer (motion sequence number 008), each of which seek summary judgment to dismiss the complaint and all cross claims as against them.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which requires a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Additionally, pursuant to New York law, “the traditional common-law elements of negligence” are: “duty, breach, damages, causation and foreseeability.” *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept 2005).

J&J’s and Choi’s Motion

Gramazio’s negligence allegation constitutes a “premises liability” claim, regarding which the Court of Appeals has held that:

“It is well settled that a landowner has a duty to exercise reasonable care in maintaining his own property in a reasonably safe condition under the circumstances. The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk and the foreseeability of a potential plaintiff’s presence on the property.”

Galindo v Town of Clarkstown, 2 NY3d 633, 636 (2004) (internal citations omitted). Further,

with respect to the “sidewalk law,” the Appellate Division, First Department, recently noted that: “[The] Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk, [where] it was undisputed that the tenant did not create the condition or make special use of the sidewalk.” Under such circumstances, the owner, but not the tenant, has a duty to third parties. *Collado v Cruz*, 81 AD3d 542, 542 (1st Dept 2011).

Here, in their motion, J&J and Choi argue that they do not owe Gramazio a duty of care because they neither created the condition that caused her injury (i.e., the cracked, unlevel sidewalk segment), nor made any special use of the sidewalk where she was injured. *See* Notice of Motion (motion sequence number 005), Fichtelberg Affirmation, ¶ 15. Significantly, in the within submissions, there is no evidence that J&J and Choi either created the allegedly defective condition or made special use of the sidewalk.

In opposition to J&J and Choi’s motion for summary judgment, Gramazio asserts that J&J’s lease contains two provisions that make it responsible for making all necessary non-structural repairs and replacements to the sidewalk and curb adjacent to the leased premises. *See* Langsam Affirmation in Opposition, ¶¶ 32-34. However, Gramazio is incorrect, since Gramazio had offered no evidence that J&J or Choi either created the sidewalk crack or made any special use of the sidewalk. Thus, Gramazio has failed to establish any issue of fact as to whether J&J and Choi owed her a duty of care under the sidewalk law. Further, as will be discussed below, the evidence clearly indicates that Gramazio did *not* trip and fall in front of the 774 building, a portion of which J&J leases. Moreover, even if Gramazio had fallen in front of J&J’s rented premises, the Appellate Division, First Department, has repeatedly held that commercial leases with sidewalk care provisions do *not* create a duty of care that runs to pedestrians such as

Gramazio. *See e.g. Collado v Cruz*, 81 AD3d at 542, citing *Tucciarone v Windsor Owners Corp.*, 306 AD2d 162, 163 (1st Dept 2003). Therefore, as J&J and Choi failed to owe Gramazio a duty of care, their motion for summary judgment of dismissal of Gramazio's common-law negligence claim is granted.

A&S's and Sadiqi's Motion

A&S occupies another portion of the 774 building's commercial space, and therefore also has the same legal status as J&J vis-à-vis Gramazio. Further, there is no evidence that either A&S or Sadiqi created the allegedly defective condition or made a special use of the subject sidewalk. Accordingly, the court also grants A&S's and Sadiqi's motion for summary judgment of dismissal is granted for the same reasons summary judgment was granted in favor of J&J's and Choi.

Ting's Motion

As the owner of the 772 building, Administrative Code § 7-210 clearly makes Ting legally responsible for the upkeep of the sidewalk on which Gramazio fell. Nevertheless, in its motion, Ting argues that it owes Gramazio no duty of care because Kinzer, and not Ting, had "control" over the sidewalk. *See* Notice of Motion (motion sequence number 007), Kwan Affirmation, ¶¶ 16-25. Ting specifically argues that the post-accident repair work that Kinzer performed after Gramazio's accident shows that Kinzer possessed such "control." *Id.* However, none of the case law that Ting cites stands for the proposition that post-accident repairs to the sidewalk in front of a neighbor's building constitutes the exercise of "control" by the repairing party. Indeed, the majority of that case law is factually inapposite because it involved acts of subsequent repair to elevators or traffic control devices. *See e.g. Hughes v Cold Spring Constr. Co.*, 26 AD3d 858 (4th Dept 2006); *Watson v FHE Servs.*, 257 AD2d 618 (2d Dept 1999);

Fernandez v Higdon El. Co., 220 AD2d 293 (1st Dept 1995); *James v Stark*, 183 AD2d 873 (2d Dept 1992); *Klatz v Armor El. Co.*, 93 AD2d 633 (2d Dept 1983). Generally, in cases that involve pedestrians who have tripped and fell, the issue of “control” that typically exists is between the owner of the premises involved and a commercial tenant who had leased space in those premises. *See Del Vecchio v Danielle Assoc., LLC*, 94 AD3d 941 (2d Dept 2012); *Olivia v Gouze*, 285 AD 762 (1st Dept 1955), *affd* 1 NY2d 811 (1956). Here, however, Ting is alleging “control” of the sidewalk by Kinzer and its commercial tenants, who own and occupy the premises *adjacent* to Ting’s building (772). Gramazio unequivocally testified, however, that her accident occurred in front of the 772 building, and identified a photograph of the accident’s location. *See* Notice of Motion (motion sequence number 005), Exhibit H at 20-22, 25, 70-72; Exhibit I; Notice of Motion, (motion sequence number 008), Exhibit F at 19; 27-31. Moreover, the court’s review of the deposition testimony did not discover any witness statements that the portion of the sidewalk that Kinzer subsequently repaired included the portion where Gramazio fell. Finally, Henry Ting stated that Ting had paid for repairs to the sidewalk in front of the 772 building that the City of New York had performed prior to 2010, thereby undercutting his later claim that Kinzer had assumed “control” over that sidewalk. *See* Notice of Motion, (motion sequence number 008), Exhibit F at 21. Thus, the foregoing fails to establish that Kinzer and/or its tenants exercised “control” over the portion of the sidewalk in front of the 772 building, where Gramazio fell, as argued by Ting. Thus, there are no triable issues of fact, as to whether Kinzer and/or its tenants owed Gramazio a duty of care as landowners, and, therefore, Ting’s motion of summary judgment is denied in its entirety.

Kinzer’s and Hernandez’s Motion

In the final motion before the court, Kinzer and Hernandez argue that they are entitled to

summary judgment dismissing Gramazio's complaint as against them because her accident did not occur in front of the 774 building, and they therefore do not owe her any duty of care in her negligence claim. *See* Notice of Motion (motion sequence number 008), Katz Affirmation, ¶¶ 30-37. Gramazio responds with Ting's argument that there is an issue of fact as to whether Kinzer's later repairs to the sidewalk constitutes an exercise of "control" over that sidewalk which would give rise to the existence of a duty of care. *See* Langsam Affirmation in Opposition, ¶¶ 19-23. However, as was discussed above, the court has rejected that argument. As such, the court need not reach Gramazio's subsequent argument that Kinzer's expert's affidavit from Roguski is inadmissible because it was produced in violation of the rules of discovery. *Id.*, ¶¶ 24-26. Accordingly, the court concludes that Kinzer and Hernandez did not owe Gramazio a duty of care because her accident did not take place in front of their property (the 774 building), and grants their motion in full.

In view of its granting of motion sequence numbers 005, 006 and 008 with respect to Gramazio's complaint, all of the cross claims for contribution and indemnification that the defendants raised in their respective answers are dismissed.

DECISION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants J&J Flower, Inc., and Eun J. Choi (motion sequence number 005) is granted and the complaint is severed and dismissed as against those defendants with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendants A&S Art Framing #.1 and Bobby Sadiqi (motion sequence number 006) is granted and the complaint is severed

