

<b>Kumar v PI Assoc., LLC</b>
2014 NY Slip Op 33450(U)
May 23, 2014
Supreme Court, Queens County
Docket Number: 26568/2011
Judge: Rudolph E. Greco
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr.  
Justice

IAS PART 32

**ORIGINAL**

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BHANMATTIE RAJKUMAR KUMAR,

Index No.: 26568/2011

Plaintiff,

Motion Date: April 4, 2014

-against-

Cal. No.: 104

Seq. No. 12

**FILED**

PI ASSOCIATES, LLC, CAPITAL ONE BANK and  
PRETTY GIRL,

JUN 05 2014

Defendants.

COUNTY CLERK  
QUEENS COUNTY

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The following papers numbered 1 to 6 read on this motion by defendant PI Associates, LLC for an Order pursuant to CPLR § 4401 directing a verdict in favor of defendant PI Associates, LLC against defendant Pretty Girl on its cross-claim for contractual indemnification.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-3
Opposing Affirmation, Memorandum of Law.....	4
Opposing Affirmation of Plaintiff.....	5
Reply.....	6

**FACTUAL BACKGROUND**

This matter arises out of personal injuries sustained by plaintiff who tripped on a sidewalk on November 19, 2011 on property abutting premises known as 136-21 Roosevelt Ave., Flushing, New York, owned by defendant PI Associates, LLC ("PI") and partially sublet to defendant Pretty Girl's ("PG") retail women's clothing store. Co-defendant Capital One Bank was discharged before trial as a matter of law. The case was tried on liability before a jury which rendered a verdict on February 13, 2014 finding comparative negligence of ten percent (10%) for the plaintiff Kumar, ten percent (10%) for landlord PI and eighty percent (80%) for defendant PG. The jury also decided that the condition causing plaintiff's fall was situated in front of the store leased to and operated by PG.

**PI'S LEGAL ARGUMENTS**

PI now seeks a directed verdict shifting its liability to PG based on the lease, admitted in evidence, which says:

Paragraph 30- “. . . Tenant shall, at Tenant’s own expense, make all repairs and replacements to sidewalks and curbs adjacent thereto . . .”

Paragraph 4- “Tenant shall, throughout the term of this Lease, take good care of the demised premises and the fixtures and appurtenances therein and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto . . .” (emphasis added).

#### PG’S LEGAL ARGUMENTS

PG argues that the lease contradicts itself citing the Rider which says:

Preamble- “Whenever the terms, covenants and conditions contained in the printed portion of this Lease shall be in conflict with any of the terms, covenants and conditions in the additional clauses 40 through 86 that follow, the additional clauses shall prevail and the contradictory or inconsistent provisions of the printed lease shall be deemed accordingly.”

Paragraph 68- “Repairs” (ii) “subject to the provisions of Paragraph 4 hereof, the Tenant shall . . . keep the sidewalk and curb in part of the demised premises free from dirt, rubbish, ice and snow.”

Paragraph 70- “Sidewalks” “. . . Tenant will continuously keep the sidewalk in part of the demised premises clean and free from garbage and debris. The Tenant agrees to arrange to sweep the sidewalk when reasonably necessary. The Tenant further agrees, at its sole cost and expense, to be responsible for the clearance and removal of snow which may accumulate on the sidewalk in front of the demised premises.”

PG further argues that:

- (a) The lease clearly states that PI as landlord is obliged to make all structural repairs to the premises. (Paragraph 68).
- (b) In the alternative, if Lease and Rider conflict then the Rider prevails. (Preamble).
- (c) Ambiguous contractual clauses, if any, should be resolved against the interests of the drafter PI. (In Re Will of Melnick, 94 A.D.3d 472, 942 N.Y.S.2d 45 [1st Dept. 2012]).
- (d) The indemnification sought by PI is required only where damages arising from the accident in question “. . . result from any omission on the part of the Tenant.” (*See S. Prendergast Affirmation in Support*, at Paragraph 27). Since PG was obligated only to keep the sidewalk clear and clean not to make structural repairs there is no omission *ergo* no indemnification.
- (e) The sidewalk damage in question, a missing piece of concrete, was structural in nature, (*see Cucinotta v. City of New York*, 68 A.D.3d 682, 892 N.Y.S.2d 352 [1st Dept.

2009)]; Berkowitz v. Dayton Const., Inc., 2 A.D.3d 764, 765, 769 N.Y.S.2d 730 [2d Dept. 2003]).

### PLAINTIFF'S LEGAL ARGUMENTS

- (a) The building owner PI has a non-delegable duty to maintain their sidewalk in a reasonably safe condition. (N.Y.C. Administrative Code § 7-210).
- (b) PI's duty is non-delegable despite any contractual claims of indemnification pursuant to the Lease, (*see Leary v. Dallas BBQ*, 91 A.D.3d 519 [1st Dept. 2012]).
- (c) Since the jury found PI negligent their liability for failing to maintain the sidewalk cannot be contracted away by their lease with PG.
- (d) Under these facts and the law this motion should have no effect on plaintiff's recovery in this case.

### FINDINGS OF FACT

In view of the foregoing and after careful reconsideration of the arguments of counsel and the evidence and credible testimony at trial and based upon the above cited authority this Court finds as follows:

The defendant PI Associates, LLC was at all times the owner and occupant of the commercial building at bar. PI was the author and promulgator of the Lease.

The sidewalk abutting their building was defective structurally in that it should have been patched or repaved; a fact which was readily noticeable prior to this accident.

The lease in question is at best ambiguous and subject to interpretation.

### CONCLUSIONS OF LAW

The duty for structural repair of the sidewalk is that of the property owner and non-delegable under the New York Administrative Code § 7-210(a): "It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition."

An ambiguous lease must be construed in a light unfavorable to the drafter.

Indemnification is especially improper where negligence rests solely upon a party seeking to evade its responsibility (a responsibility it assumed in the Lease with the other ground floor co-tenant and prior co-defendant Capital One Bank).

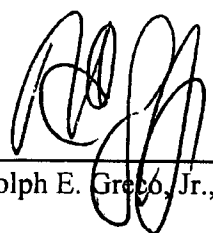
Consequently despite a great reluctance to overturn or modify a jury verdict, this Court finds the arguments of PI Associates, LLC to be unpersuasive and without merit. PI's motion for a directed verdict is denied.

The cross-motion of defendant Pretty Girl is granted to the extent that the verdict of eighty percent (80%) negligence of Pretty Girl is directed so that said finding is attributed to PI Associates, LLC bringing their total responsibility for comparative negligence to ninety percent (90%) and relieving defendant Pretty Girl of all liability in this action.

Plaintiff Kumar's cross-motion for a directed verdict is granted to the extent that this plaintiff shall have a judgment of liability against PI Associates, LLC for ninety percent (90%) and that Pretty Girl is relieved of any liability to plaintiff Kumar.

This matter shall be set down forthwith for a trial on damages due, if any, from defendant PI Associates, LLC to plaintiff Kumar.

Dated: May 23, 2014

  
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Rudolph E. Greco, Jr., J.S.C.

**FILED**  
JUN 05 2014  
COUNTY CLERK  
QUEENS COUNTY