

**Rappaport v DS & D Land Co., L.L.C.**

2014 NY Slip Op 33643(U)

September 2, 2014

Supreme Court, New York County

Docket Number: 105442/10

Judge: Richard F. Braun

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This opinion is uncorrected and not selected for official publication.

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

Hon. RICHARD F. BRAUN

PRESENT: J.S.C.  
Justice

PART 23

Index Number : 105442/2010  
RAPPAPORT, ROBERTA  
vs.  
DS & D LAND et al.  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 3/13/14  
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  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 2, 3  
Replying Affidavits \_\_\_\_\_ No(s) 4

Upon the foregoing papers, it is ordered that this motion is granted to the extent of  
awarding defendants Joydo Mon Works summary  
judgment dismissing Plaintiff's Amended Verified  
Complaint and all cross claims against that Defendant,  
and it is further

ORDERED that the Clerk shall enter  
judgment accordingly, and the remaining claims  
are severed and shall continue.

This constitutes the decision and  
order of the Court. See separate Opinion.

**FILED**

SEP 04 2014

COUNTY CLERK'S OFFICE  
NEW YORK

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SEP 03 2014  
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NYS SUPREME COURT - CIVIL

Dated: New York, New York, August 27, 2014

ENTER: [Signature], J.S.C.

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

- 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: IAS PART 23**

-----X

ROBERTA RAPPAPORT,

Index No. 105442/10

*Plaintiff,*

**OPINION**

-against-

THE DS & D LAND COMPANY, L.L.C.,  
OXFORD NEWS, INC. and MALLSHIRI, INC.,  
MANHATTAN SKYLINE MANAGEMENT CORP.,  
MURRAY HILL MANOR COMPANY, LP,  
MURRAY HILL MANOR POOH, LLC, MHM  
REALTY LLC & TORPEDO IRON WORKS.

*Defendants.*

-----X

THE DS & D LAND COMPANY, L.L.C.,

Third-Party Plaintiff,

-against-

MALLSHIRI, INC. and OXFORD NEWS, INC.,

**FILED**

SEP 04 2014

Third-Party Defendants.

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**COUNTY CLERK'S OFFICE  
NEW YORK**

**RICHARD F. BRAUN, J.:**

This is a negligence action. Defendant Oxford News, Inc. (Oxford) moves for summary judgment dismissing plaintiff's complaint, third-party complaint, and all cross claims against that defendant. Defendants The DS & D Land Company, L.L.C. (DS&D), Manhattan Skyline Management Corp. (Skyline), Murray Hill Manor Company, LP (ManorLP), Murray Hill Manor Pooh, LLC (ManorLLC), and MHM Realty LLC (MHM) move for summary judgment dismissing plaintiff's complaint and all cross claims against those defendants. Defendant Torpedo Iron Works (Torpedo) moves for summary judgment dismissing plaintiff's complaint and all cross claims against that defendant.

On August 25, 2009, plaintiff fell on the outside steps in front of 504 3<sup>rd</sup> Avenue a/k/a 166 East 34<sup>th</sup> Street, New York, New York (premises or property). The metal on which plaintiff tripped was a protruding tab portion of a handrail. Plaintiff sustained injuries including a right elbow fracture. Oxford leases a store located on the property. DS&D is the fee owner of the subject premises. ManorLP is the ground tenant. ManorLLC is one of the principals of Manor LP. MHM is the corporate entity who is the landlord of the subject premises and is responsible for its operation and maintenance. Skyline is the managing agent of the property. Torpedo is a contractor, retained by Skyline, that did work on the handrails at the stairway. Third-party defendant Mallshiri, Inc. is the prior tenant and is in default.

Oxford contends that it should be granted summary judgment because Oxford did not maintain, repair, or control the stairway. Rather, it was conceded by two Skyline employees that Skyline did maintain, repair, or control the stairway. Owner defendants oppose Oxford's motion, asserting that Oxford was responsible for the property. Oxford contradicts this with deposition testimony and documentary evidence.

Torpedo contends that it owed no duty to plaintiff and that there is no evidence that Torpedo created the specific condition that allegedly caused plaintiff's fall. Torpedo argues that it did not do any work on the subject handrail where the metal piece was sticking out. With respect to Torpedo as a contractor, Torpedo argues that there is no evidence that Torpedo engaged in any affirmative act of negligence.

DS&D, Skyline, ManorLP, ManorLLC, and MHM contend that they were not negligent, that Oxford was responsible, and that the owner was an out of possession landlord. Based on documentary evidence, MHM is the landlord.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Horizons Invs. Corp. v Breceovich*, 104 AD3d 475 [1<sup>st</sup> Dept 2013]; *see Hoover v New Holland North America, Inc.*, 23 NY3d 41, 56 [2014]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1<sup>st</sup> Dept 2006]; *see Hoover v New Holland North America, Inc.*, 23 NY3d 41, 56 [2014]). The party moving for summary judgment has the initial burden on the motion (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Jaroslavicz v Prestige Caterers*, 292 AD2d 232, 233 [1<sup>st</sup> Dept 2002]; *see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 137-138 [1<sup>st</sup> Dept 2012]).

With respect to Oxford, Thomas Eschmann (Eschmann), the director of property management for Skyline, testified that he believed the responsibility for the stairs was with Oxford because the responsibility was incorporated into the lease. However, Eschmann was not able to identify any provision of the lease to verify his belief. Thus, his statement is conclusory. Eschmann's testimony is contradicted by the lease. Eschmann conceded that Oxford had not ordered the installation, supervised the work, or paid for any services related to the handrails.

The staircase where plaintiff fell leads to a public sidewalk or walkway in front of the Oxford News store. A party occupying property abutting a public sidewalk is not liable for the defect thereon, unless the party created the defect or made special use of the area (*see Kaufman v Silver*, 90 NY2d 204, 207 [1997]). The doctrine of special use does not apply to Oxford (*see Colon v Corporate Bldg. Groups, Inc.*, 116 AD3d 414 [1<sup>st</sup> Dept 2014]). Oxford has demonstrated that it did not create the defect (*see Thomas v Triangle Realty Co.*, 255 AD2d 153 [1<sup>st</sup> Dept 1998]).

Thus, Oxford has made a prima facie showing of entitlement to summary judgment based on its lease, which shows that Oxford was not a tenant of the subject property where the accident occurred. There is also considerable testimony that Skyline employees were the individuals that maintained the premises. The testimony on behalf of Skyline is contradicted by the lease and testimony from Skyline employee deponents.

With respect to DS&D, Skyline, ManorLP, ManorLLC, and MHM, while their expert opined that the tab did not create a tripping hazard, plaintiff's expert opined that the tab did create a tripping hazard. Relying on *Arteaga v City of New York* (101 AD3d 454 [1<sup>st</sup> Dept 2012]), DS&D, Skyline, ManorLP, and ManorLLC argue that an out of possession landlord is not responsible when the responsibility has been transferred to a tenant, unless the landlord assumes the responsibility. DS&D, ManorLP, and ManorLLC contend that they are "out of possession landlords without the right of re-entry" (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 569 [1987]). Based on an agreement, MHM is "the duly authorized landlord of all the residential and commercial leases to which the property is subject." MHM is the entity responsible for the area where the accident happened.

With respect to the landlord MHM, a landowner has a duty to maintain his, her, or its property in a reasonably safe condition (*see Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, at 141-142 [1<sup>st</sup> Dept 2000]). In addition to dealing with an obvious, outdoor condition, there is testimony that five months before the accident MHM had actual notice.

DS&D, ManorLP, and ManorLLC have made a prima facie showing of entitlement to summary judgment by demonstrating that they were not landlords and were not otherwise subject to liability for the area where the accident occurred. DS&D, ManorLP, and ManorLLC demonstrate

that MHM is the landlord responsible for the subject premises. There are issues of fact regarding MHM and Skyline's role regarding the allegedly defective condition. It is conceded that Skyline employees did inspections, maintenance, and directed repairs, so there are issues of fact as to whether they were negligent in not observing or in ignoring the protruding tab.

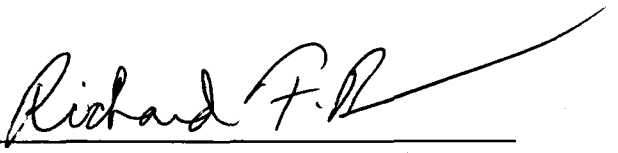
With respect to Torpedo, there is a lack of evidence that Torpedo created the specific condition that allegedly caused plaintiff's fall. Torpedo shows that it did not do any work on the subject handrail at the place where the metal piece was sticking out that allegedly caused plaintiff's accident. As stated in *Colon v Corporate Bldg. Groups, Inc.* (116 AD3d 414 [1<sup>st</sup> Dept 2014]): "Liability for a dangerous condition is generally predicated on ownership, control or a special use of the property." While a contractual obligation does not generally 'give rise to tort liability in favor of a third party' (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]), a contractor is potentially liable in tort to third persons, where "the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'" (*id.* at 140). Torpedo has shown that it did not engage in any act of negligence (see *Garcia v City of New York*, 99 AD3d 491, 492 [1<sup>st</sup> Dept 2012]). Torpedo established that it did not do any work at the bottom of the handrail.

Thus, Torpedo has made a prima facie showing of entitlement to summary judgment by demonstrating that it did not commit any act to create a defective condition. Plaintiff's opposition with respect to Torpedo is based on statements that are conclusory and speculative, not based on facts.

Accordingly, by separate August 27, 2014 decision and order, Oxford's motion was granted to the extent of awarding summary judgment to Oxford dismissing plaintiff's amended verified

complaint, the third party complaint, and all cross claims against Oxford. DS&D, Skyline, ManorLP, ManorLLC, and MHM's motion was granted to the extent of awarding summary judgment to DS&D, ManorLP, and ManorLLC dismissing plaintiff's amended verified complaint and all cross claims against those defendants. Torpedo's motion was granted to the extent of awarding summary judgment to Torpedo dismissing plaintiff's amended verified complaint and all cross claims against Torpedo. The remaining claims were severed and shall continue.

Dated: New York, New York  
September 2, 2014

  
RICHARD F. BRAUN, J.S.C.

**FILED**

SEP 04 2014

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