

Katehis v City of New York

2015 NY Slip Op 30787(U)

April 17, 2015

Supreme Court, Queens County

Docket Number: 705406/2013

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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Basilike Katehis,

Plaintiff,

- against -

The City of New York, Terrence M. Higgins,
as Trustee of the Edward T. Rule
Irrevocable Living Trust, and Heavy
Construction Co., Inc.,
Defendants.

Index
Number: 705406/13

Motion
Date: 3/18/15

Motion
Cal. Number: 92

Motion Seq. No.: 1

FILED
APR 22 2015
COUNTY CLERK
QUEENS COUNTY

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The following papers numbered 1 to 7 read on this motion by
defendant, Terrence M. Higgins, as Trustee of the Edward T. Rule
Irrevocable Living Trust, for summary judgment.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... 1-4
Affirmation in Opposition-Exhibits..... 5-7

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

Motion by defendant Higgins for summary judgment dismissing
the complaint and all cross-claims against him as trustee is
granted.

Plaintiff allegedly sustained injuries as a result of tripping
and falling upon a raised sidewalk flag in front of 83-44 242nd
Street in Queens County on December 6, 2012.

The following facts are undisputed: The abutting property is
a one-family home occupied by Edward T. Rule, the son and sole
surviving heir of his father and former owner of the property who
died in 1983. Presumably, he acquired title to the premises either
through probate or intestacy. Rule has been living in the subject
premises since 1946. On November 5, 2010, Rule created an
irrevocable trust, pursuant to which he, as the grantor,
transferred title to the property as the corpus, or "trust estate"
thereof, to Higgins, as the trustee. The transfer was made via a
bargain and sale deed executed simultaneously with the execution of
the declaration of trust.

An abutting homeowner 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]).

Higgins has proffered un rebutted evidence in the form of his and Rule's affidavits in support of the motion that they never performed any work to or used the sidewalk in any way and, therefore, did not create the raised condition of the sidewalk, photographs of which annexed to the moving papers indicate that the identified defect was a raised sidewalk flag that was lifted by the force of tree roots from an immediately abutting curbside tree. Moreover, those same photographs, as well as the deposition testimony of plaintiff, establish that the defect did not abut the driveway or driveway apron of the property so as to raise any issue of fact concerning a special use of the sidewalk. Plaintiff's counsel's argument in opposition that summary judgment is premature because discovery is incomplete is without merit. The mere hope that the discovery process may yield evidence favorable to plaintiff is insufficient to warrant denial of summary judgment (see Goldes v City of New York, 19 AD 3d 448 [2nd Dept 2005]).

As to the remaining basis for liability alleged by plaintiff, the only statutory provision imposing liability upon property owners in the City of New York for failing to repair and maintain the public sidewalks abutting their property is §7-210 of the New York City Administrative Code, and that section specifically excludes owner-occupied residential premises of less than four families (see Admin. Code §7-210 [b]). Plaintiff alleges that Higgins is liable as the abutting property owner under §7-210.

Higgins contends that he is entitled to summary judgment upon the ground that the property falls under the exception to §7-210 in that the property is undisputably a single-family home that has been occupied by Rule for many decades. Plaintiff contends that the owner-occupancy exception to §7-210 does not apply because Rule transferred title to the property to Higgins and, therefore, the owner of the property on the date of the accident was not Rule but Higgins, who does not occupy the property. Higgins' counsel replies that although title was transferred to Higgins, Rule maintains a life tenancy in the property and is therefore considered to be the owner for purposes of §7-210, citing in support of this position the case of Yiu v Crevatas (33 Misc 3d 267 [Sup. Ct. Kings Co. 2011]).

The court in Yiu held that the grantor of a trust created by

her for her own benefit and who transferred title to her property to the trustee but remained in occupancy pursuant to a life estate was an owner for purposes of §7-210 entitling the defendant trustee, even though he was the title owner who did not occupy the property, to the protection of the exemption under §7-210.

The court noted that a life tenant is generally deemed to be an owner of the property entitled to all the benefits and burdens of ownership, including the obligation to pay taxes, citing, inter alia, Board of Educ. v Board of Assessors of County of Nassau (54 AD 2d 978, 978 [2nd Dept 1976], in which the Appellate Division, Second Department stated, "Thus, it has long been the law that the life tenant is an owner of the property and that he, rather than the remainderman, is responsible for payment of the property taxes levied during his lifetime". The court in Yiu also noted that a life tenant is responsible for making all ordinary repairs required to preserve the property (citing Matter of Gaffers, 254 App. Div. 448 [3rd Dept 1938]) and further noted that an owner for purposes liability under §§240 and 241(6) of the Labor Law includes life tenants and is not limited to fee owners (citing, inter alia, Kim v D & W Shin Realty Corp, 47 AD 3d 616 [2nd Dept 2008]). Using such cases as guidance, the court found that the stated public policy reason behind the exception to §7-210, namely, the protection of small property owners with limited resources from liability, would not be offended in that case where fee ownership was transferred to a trustee with a retention of a life estate, since such action was merely an estate planning device and not for commercial purposes.

This Court concurs with the holding in Yiu to the extent that it extends the exception to liability under §7-210 to life tenants.

A life tenant is one who has a full and exclusive present possessory estate in real property for life (see United States v Baran, 996 F. 2d 25 [2nd Cir. 1993]). "The real substance of a life estate consists in the life tenant's right to exclude all others from the possession of the subject property for the duration of his or her own life" (Estate of Carey, 249 AD 2d 542, 544 [2nd Dept 1998] [internal citations omitted]). Thus, "the life tenant is the exclusive owner of the land during the lifetime of the life tenant" (1 Rasch, NY Law and Practice of Real Property [2nd ed], §6:13), subject, of course, to limitations on commission of waste or other acts that would adversely affect the future estate of the remainderman. Consequently, the life tenant is the owner responsible for payment of taxes and for the maintenance and repair of the property (Board of Educ., supra; Matter of Gaffers, supra).

Unlike the fact pattern in Yiu, however, in our case, Rule conveyed title to the subject property to Higgins, the trustee,

outright, without retaining a life estate. Although Higgins' counsel contends that the property was owner-occupied because Rule was a life tenant, the portion of the deed annexed to the moving papers does not reserve for Rule a life estate and the declaration of trust annexed to the moving papers does not contain any language setting forth a right by the grantor to occupy the property for his lifetime. The trust agreement also gives the trustee the power to make repairs. Conspicuously absent from the moving papers is any representation concerning who paid the real estate taxes on the property or inclusion as an exhibit of copies of real estate tax bills showing who was deemed to be the owner for payment of taxes.

Therefore, since Yiu was decided upon the basis that the grantor was the life tenant of the property and was therefore deemed to be the owner, that case is somewhat inapposite to the facts of the present matter. Nevertheless, this Court finds that the grantor of a trust set up for his benefit purely for estate planning and asset protection purposes and not for commercial purposes may be considered an "owner" within the contemplation of §7-210's exemption even absent the reservation of a life estate.

As noted by the Supreme Court in Yiu, §7-210 was enacted to protect small property owners. The intention of the City Council to exempt owners of one to three-family exclusively residential premises that are owner-occupied from liability under §7-210 for injuries resulting from a failure to maintain sidewalks reflects its desire not to expose ordinary homeowners who live in their homes and derive limited or no income from their homes to financial hardship as a result of the liability-shifting statute. Commenting upon said exemption, the Report of the Committee on Transportation that adopted §7-210 stated, inter alia, "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" (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193). Commercial property owners, owners of multiple dwellings of more than four families and owners who purchase one to three-family residential properties not for their personal residence but, presumably, merely for investment purposes are, thus, not the type of property owners contemplated by the City Council as meriting protection from liability under §7-210. It is the opinion of this court that the New York City Council did not intend to disqualify Rule from the exemption under the statute merely because of his transfer of the premises to a trustee pursuant to a living trust. The record on this motion indicates, and it is undisputed, that the trust was merely an estate planning tool formed solely for the benefit of Rule, who has resided in the

subject home since he was a child. Although the declaration of trust does not reserve a life estate in Rule and gives sweeping powers to the trustee, it provides that the trustee's actions with respect to the property are for the benefit of the grantor. The trustee must act in a manner consistent with the purpose of the trust. Although title to the property was transferred to the trustee, the purpose of doing so was to preserve the property for Rule. It would be a breach of the trustee's fiduciary duty to attempt to dispossess Rule or otherwise act adversely to his interests in the trust corpus, which is the property. However, the Court need not contemplate such a moot scenario. There is no issue concerning Rule's occupancy of the premises and that Higgins' only interest in the property is to preserve it for Rule who undisputably occupies it as his home. Indeed, he created the trust quite patently for the sole purpose of protecting his home.

Thus, although Rule may not be deemed the owner of the property for purposes of taxation, the application of the exception to §7-210 to exempt Higgins from liability based upon Rule's occupancy of the subject premises is not incompatible with, but falls squarely within, the purpose of the exception.

Therefore, it is the opinion of this Court that Higgins, as trustee, is exempt from liability under §7-210. Plaintiff has also failed to rebut Higgins' and Rule's averments that they did no work to the sidewalk and did not create the condition (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 in this case regarding a special use of the sidewalk (id).

Thus, Higgins has established his entitlement to summary judgment as a matter of law.

Accordingly, the complaint and all cross-claims are dismissed against Higgins.

The caption of this action is hereby amended to read as follows:

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Basilike Katehis,	Index
	Number: 705406/13
Plaintiff,	
- against -	
The City of New York, and	
Heavy Construction Co., Inc.,	
Defendants.	

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Serve a copy of this order with notice of entry upon the Clerk of the Court without undue delay.

Dated: April 17, 2015



KEVIN J. KERRIGAN, J.S.C.

FILED
APR 22 2015
COUNTY CLERK
QUEENS COUNTY