

**Kim v City of New York**

2018 NY Slip Op 34495(U)

July 31, 2018

Supreme Court, Bronx County

Docket Number: Index No. 20692/2018E

Judge: Mitchell J. Danziger

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 3



-----X  
SUSAN J. KIM,

Index No: 20692/2018E

Plaintiff(s),

**DECISION/ORDER**  
**Present:**  
**HON. MITCHELL J. DANZIGER**

-against-

THE CITY OF NEW YORK and TRIBORO BRIDGE  
& TUNNEL AUTHORITY d/b/a/ M.T.A. BRIDGES  
AND TUNNELS,

Defendant(s),

-----X

Recitation as Required by CPLR §2219(a): The following papers  
were read on this Motion for Summary Judgment

Papers Numbered

Notice of Motion with Affirmation of Support and in Support with Exhibits....	<u>1</u>
Affirmation in Opposition.....	<u>2-3</u>
Reply Affirmation.....	<u>4</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

TRIBORO BRIDGE & TUNNEL AUTHORITY d/b/a/ M.T.A. BRIDGES AND TUNNELS (hereinafter “Triborough Bridge and Tunnel Authority”) moves for summary judgment and dismissal of all claims and cross claims against them herein, as they do not own or maintain the subject location.

The instant action arose from alleged personal injuries sustained by Susan J. Kim (“plaintiff”), on May 19, 2017 at approximately 7:30 p.m., when plaintiff was operating a motor vehicle on the Hutchinson River Parkway in the vicinity of the Whitestone Bridge. While operating the vehicle, plaintiff’s vehicle fell into a defective and uneven roadway comprised of broken, cracked, dilapidated, missing, and pitted roadway, without warning signs, cones, or ropes advising the public of the unsafe conditions.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of

law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 [1986]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v. DiStefano*, 16 A.D.3d 637, 638 [2d Dep't 2005]). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact. Moreover, when deciding a summary judgment motion, the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Knepka v. Talman*, 278 A.D.2d 811, 811 [4th Dep't 2000]).

C.P.L.R. §3212(b) requires that a motion for summary judgment must be supported by an affidavit, pleadings, and other available proof, such as depositions and other written admissions, by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

Further, C.P.L.R. §3212(f) states, "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." When additional discovery may be

needed to clarify an issue, such as the deposition of a witness, a motion is found to be premature (*Baghban v. City of New York*, 33 N.Y.S.3d 695, 696 [1st Dep't 2016]; *Figueroa v. City of New York*, 5 N.Y.S.3d 62, 64 [1st Dep't 2015]). This then allows for the parties to conduct discovery.


Here, Triborough Bridge and Tunnel Authority submits an affidavit of Charles LaBarbera, Acting Facility Engineer, as of December 4, 2017. LaBarbera avers that the subject location is not within the jurisdiction of the Triborough Bridge and Tunnel Authority, nor is it maintained, inspected or repaired by Triborough Bridge and Tunnel Authority. However, LaBarbera's affidavit does not provide sufficient evidence to meet movant's initial burden, as he did not hold his position at the time of the incident and his affidavit does not specify the source of his knowledge on the matter. Further, the City of New York, and plaintiff have not had a chance to depose LaBarbera or review any of the records concerning the use, maintenance, and/or repair of the road at issue. Therefore, the motion for summary judgment is premature.

Accordingly, based on the foregoing, motion is denied, without prejudice to renew upon completion of discovery, pursuant to C.P.L.R. §3212(f).

This constitutes the decision and order of the Court.

Dated:

7/31/17  
Bronx, New York

  
HON. MITCHELL J. DANZIGER, J.S.C.