

**Walkuski v Loud**

2020 NY Slip Op 35482(U)

August 31, 2020

Supreme Court, Queens County

Docket Number: Index No. 707423/19

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

Short Form Order

**FILED**

NEW YORK SUPREME COURT - QUEENS COUNTY

**9/1/2020  
04:43 PM**

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

**COUNTY CLERK  
QUEENS COUNTY**

-----X  
Maria Walkuski, Index  
Number: 707423/19

Plaintiff,

- against -

Motion  
Date: 8/24/20

Stephen R. Loud and Brendan M. Loud as  
Co-Trustees of the Loud Family 2017  
Irrevocable Income Only Trust and The  
City of New York,

Motion Seq. No.: 1

Defendants.

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The following papers numbered E10-E16 read on this motion by  
defendants, Stephen R. Loud and Brendan M. Loud as co-trustees of  
The Loud Family 2017 Irrevocable Income Only Trust (hereinafter  
collectively, Loud), for summary judgment.

Papers  
Numbered

Notice of Motion-Affirmation-Exhibits.....	E10
Affirmation in Opposition.....	E11-12
Affirmation in Opposition.....	E13-14
Reply.....	E15
Reply.....	E16

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

Motion by Loud for summary judgment dismissing the complaint  
and all cross-claims against them is denied.

Plaintiff allegedly sustained injuries as a result of tripping  
and falling upon a raised sidewalk flag in front of 21-83 46<sup>th</sup>  
Street in Queens County on October 21, 2018.

Steven Loud avers in his affidavit annexed to the moving  
papers that the Trust has been the owner of the subject property  
since 2017, that it is a 2-family home and that he did not reside  
in the home on October 21, 2018 but that his parents, Mary Loud  
and Raymond Loud, resided in the home on October 21, 2018. He also  
avers that no repairs were ever done to the sidewalk and that they

did not make a special use of the sidewalk, but rather, the defect alleged, which was a slight rise in the sidewalk, was created by the roots of an abutting curbside tree. Loud's counsel contends that they have established a prima facie entitlement to summary judgment by submitting evidence, in the form of Loud's affidavit, that the abutting property is a 2-family home that was occupied on the date of the accident by Loud's parents and that they did not create the condition or cause it through a special use, and therefore, that they did not owe plaintiff any statutory duty of care under §7-210 of the Administrative Code or any common law duty of care.

Plaintiff's counsel, in opposition, contends, inter alia, that movants have failed to show evidence that the abutting property was owner-occupied, since it was admittedly owned by a trust on the date of the accident and not movants' parents, and therefore, their occupancy of the house did not satisfy the exception to liability set forth in §7-210(b) for owner-occupied premises.

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 [2<sup>nd</sup> Dept 1999]).

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]).

This Court agrees with plaintiff's counsel that since the property was not owned by the named occupants on the date of the accident but by the Trust, and the trustees themselves were not in occupancy on the date of the accident, that the Trust would not be exempt from liability under §7-210(b), but only to the extent that the occupants, who presumably were the settlors of the Trust, did not retain a life estate in the property when they transferred title to the Trust.

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 [2<sup>nd</sup> 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 [2<sup>nd</sup> 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 [2<sup>nd</sup> 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 (see Board of Educ. v Board of Assessors of County of Nassau, 54 AD 2d 978, 978 [2<sup>nd</sup> Dept 1976]; Matter of Gaffers, 254 App. Div. 448 [3<sup>rd</sup> Dept 1938]). The Second Department, in Board of Educ. (54 AD 2d at 978) 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".

Thus, it has been held that the grantors of a trust created by them for their own benefit and who transferred title to their property to the trustee but remained in occupancy pursuant to a life estate were owners 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 (see Yiu v Crevatas (33 Misc 3d 267 [Sup. Ct. Kings Co. 2011]).

This Court is also of the opinion that the grantor who continues to reside in the premises after the transfer of title to the trust may still be deemed an "owner" within the contemplation of §7-210(b) even absent the reservation of a life estate where the trust was set up for the grantor's benefit purely for estate planning and asset protection purposes and not for commercial purposes. This Court is informed in its opinion by the stated purpose of the City Council in enacting §7-210, which was 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 homeowners who reside in their 1-3 family homes and who transfer their property to a trust for purposes of estate planning and asset protection from the exemption under the statute merely because of the transfer of title. Thus, where the trust was merely an estate planning tool formed solely for the benefit of the grantors, or settlors, who continue to reside in the subject property as their home, and for the express purpose of preserving their home, then even if the deed and the declaration of trust do not reserve a life estate in the settlors, if it clearly provides that the trustee's actions with respect to the property are for the benefit of the settlors, then in the absence of any counter-indication of the City Council's intent, their occupancy of the property would satisfy the "owner-occupied" requirement of §7-210(b), as such interpretation is not incompatible with, but falls squarely within, the purpose of the exception.

Neither movants' counsel nor plaintiff's offers any analysis, or even mentions, the law regarding the transfer of property to a trust and the retention of a life estate in the settlor as they may relate to the "owner-occupancy" exemption of §7-210(b) of the Administrative Code. Movants' counsel fails to annex either a copy of the deed transferring the property to the Trust or a copy of the trust documents so as to demonstrate whether Loud's parents retained a life estate when they transferred the property to the Trust, or even if they, in fact were the settlors of the Trust, and what the purpose of the trust was. Although it seems likely that they were, this Court may not render a determination of the issue based upon its own mere presumption that Loud's parents were the settlors of the trust and grantors of title. Indeed, Stephen Loud, in his affidavit in support of the motion, does not aver that his parents were the settlors of the trust and the grantors of title, that they reserved any life estate in the property or that they created the trust for their benefit to protect their home.

Plaintiff's counsel, in his opposition, merely states that Loud is not entitled to the exemption because the property was owned by the Trust and thus not owner-occupied. In reply, Loud's counsel simply reiterates, with no analysis or exposition of the law, and without even addressing plaintiff's counsel's opposition, that the property was occupied by Loud's parents and therefore was owner-occupied.

Therefore, Loud have failed to proffer evidence that the subject property was owner-occupied so as to be entitled to the statutory exemption from liability. Consequently, having failed to

proffer any evidence that the Trust did not owe plaintiff any statutory duty of care to maintain and repair the sidewalk, the Court need not reach, and will not determine, the remaining bases for the motion and arguments of respective counsel.

Accordingly, the motion is denied.

Dated: August 31, 2020

**FILED**

  
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KEVIN J. KERRIGAN, J.S.C.

**9/1/2020**

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**COUNTY CLERK  
QUEENS COUNTY**