

Tavera-Gomez v City of New York

2025 NY Slip Op 33606(U)

September 30, 2025

Supreme Court, New York County

Docket Number: Index No. 150396/2025

Judge: Ariel D. Chesler

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARIEL D. CHESLER PART 62M

Justice

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DELSI TAVERA-GOMEZ,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF EDUCATION, KIPP NEW YORK, INC. D/B/A KIPP
INFINITY SCHOOL

Defendant.

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INDEX NO. 150396/2025
MOTION DATE 03/31/2025,
04/02/2025
MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 26, 27, 28, 29, 30

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action, Plaintiff seeks damages for injuries allegedly incurred on January 16, 2024 due to a trip and fall on a sidewalk adjacent to 633 West 133rd Street in the County of New York, City and State of New York.

Motion Sequence 1:

In motion sequence 1, Defendant Kipp New York Inc. d/b/a KIPP Elementary School (“KIPP”) moves for an order dismissing the complaint and all crossclaims pursuant to CPLR 3211[a][1]. While the City Defendants do not oppose the motion, Plaintiff submits opposition.

Plaintiff alleges that the property was owned, maintained, controlled, and Occupied by KIPP. Based on its submissions, KIPP asserts that the property was exclusively owned and maintained by Defendants and another City entity, New York City Educational

Construction Fund (ECF). Thus, KIPP claims that it had no statutory or common law duty to maintain the sidewalk at issue in a reasonably safe condition.

In support of its motion, KIPP submits an affirmation from Carolyn Hack, President of KIPP, which is a charter school. Based on her own knowledge and review of files, Hack stated that the Department of Education (DOE) granted KIPP authority to co-locate in the New York City public school building located at 633 West 133rd Street beginning in the 2014-2015 school year. Hack added that KIPP does not “own, maintain, or lease the Building and has not entered into any agreements with New York City, the New York City Board of Education, the New York City Education Construction Fund, or any third-parties that require KIPP Infinity to maintain any portion of the Property or the Property's surrounding areas, including the sidewalk adjacent to the Property.”

Hack further explained that other schools are located in the property and that KIPP's occupation is limited to three floors inside the building, and that she believes the DOE retains full and exclusive ownership of the Property and all interior and exterior maintenance, including those areas occupied by KIPP Infinity, and the sidewalk maintenance and/or repairs, are overseen by DOE's Division of School Facilities.

Hack additionally stated that neither she nor her staff have authority to direct DOE or ECF staff to perform sidewalk maintenance or repairs, and that they have never maintained or repaired the sidewalk, nor do they have responsibility for doing so.

KIPP also attached as Exhibit E a printout from the New York City Department of Finance showing that the owner of the property is ECF.

KIPP argues that the documentary evidence establishes that KIPP did not own or control the property or have any maintenance obligations, and that the City Defendants and ECF are the only proper defendants in this action.

In opposition, Plaintiff contends that the documentary evidence and affirmation is not sufficient, that the documents do not address the issue of maintenance, cleaning or repair, and that discovery is necessary. More specifically, Plaintiff argues that the printout from the Department of Finance is not in admissible form, and that the Building Utilization Plan also provided by KIPP does not address issues of maintenance or cleaning. Plaintiff also maintains that Hack's affirmation is "bald and baseless."

CPLR § 3211(a) provides in pertinent part that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence". A 3211 dismissal is appropriate where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez*, 84 NY2d 83, 88 [1994]). A paper qualifies as documentary evidence if it is "unambiguous and of undisputed authenticity." (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]). An affidavit may be offered to support the authenticity of documentary evidence. (*Muhlhahn v. Goldman*, 93 AD3d 418, 418 [1st Dept 2012]).

It is the view of this Court that the documentary evidence and affirmation submitted by KIPP conclusively establish that KIPP did not own, control or maintain the property or sidewalk at issue. Indeed, it is clear that ECF and/or the City Defendants are responsible for the care and maintenance of the property and sidewalk. Thus, KIPP did not have any duty to maintain, repair or clean the sidewalk and is not a proper defendant in this matter (*see e.g. Cohen v. City of NY*,

119 AD3d 725, 726 [2d Dept 2014][City cannot be liable where it does not operate, maintain or control a property and another entity does]).

Contrary to plaintiff's contention, the Court may take judicial notice of the records from the NYC Department of Finance – a reliable governmental source - and plaintiff does not contest the accuracy of the information contained in the records (*see Gibson v U'SAgain Holdings, LLC*, 167 AD3d 536, 537 [1st Dept. 2018]; see also CPLR 4511). Hack's Affirmation is uncontested and explains KIPP's limited occupation of three floors and lack of duty, contractual or otherwise, to maintain the sidewalk. Nor is there need for further discovery on this issue. The Court has also considered plaintiff's remaining arguments and finds them unavailing.

Accordingly, KIPP's motion should be granted.

Motion Sequence 2:

In motion sequence 2, plaintiff seeks leave to amend the notice of claims. The motion is unopposed.

Plaintiff explains that the original notice of claim contained an incorrect date for the incident but that plaintiff testified to the correct date at the 50H Hearing. Plaintiff also notes that the Verified Complaint contains the correct date.

General Municipal Law §50-e (6) provides that “[a]t any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.”

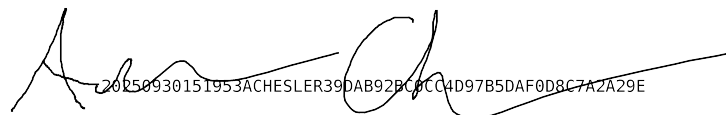
This Court has discretion to grant an application for leave to serve an amended notice of claim (*see Goodwin v New York City Hous. Auth.*, 42 AD3d 63 [1st Dept 2007]). In this case, the Court finds that it is warranted to permit plaintiff to correct a good faith error and that Defendants will not be prejudiced by this amendment. Therefore, the motion is granted.

Accordingly, it is hereby

ORDERED that Defendant KIPP's motion for dismissal of the complaint and all crossclaims pursuant to CPLR 3211[a][1] is granted; and it is further

ORDERED that plaintiff's motion to amend the notice of claims is granted.

This constitutes the Decision and Order of this Court.



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9/30/2025

DATE

ARIEL D. CHESLER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE