Bynum v Kedem Realty 415 LLC
2026 NY Slip Op 30387(U)
January 30, 2026
Supreme Court, Kings County
Docket Number: Index No. 509652/2024
Judge: Reginald A. Boddie
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At an IAS Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 30th day of January 2026.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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SHARON BYNUM,

Plaintiff,

-against-

KEDEM REALTY 415 LLC., FLIXBUS INC., and LPARK 31, LLC.,

Defendants.

Index No. 509652/2024

Cal. No. 1-3 MS 3-5

Decision and Order

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The following e-filed papers read herein:	NYSCEF Doc Nos.
MS 3	80-100, 141-146, 155-156, 172-173
MS 4	101-118, 151-154, 163-171, 174-175
MS 5	120-140, 147-150, 157-162, 176-177

The motion by plaintiff seeking summary judgment on the issue of liability and to strike defendants' affirmative defenses of comparative fault and culpable conduct (motion sequence 3), the motion by defendant Flixbus Inc. ("Flixbus") seeking summary judgment dismissing the complaint and the cross-claims asserted by its co-defendants (motion sequence 4), and the motion by defendants Kedem Realty 415 LLC ("Kedem") and LPark 31 LLC ("LPark") seeking summary judgment dismissing the complaint as against them, and for summary judgment on their cross-claim for contractual indemnification, including reasonable attorneys' fees and costs, against co-defendant Flixbus (motion sequence 5) are decided as follows:

Background

This action arises from an alleged trip-and-fall accident on August 12, 2023, where plaintiff claims she was injured after tripping on a broken and uneven sidewalk adjacent to the premises located at 415 Eighth Avenue and 300 West 31st Street in Manhattan. Defendant Kedem owns the property, defendant LPark leases and operates it as a parking facility, and defendant Flixbus utilized the site pursuant to a service agreement with LPark.

Plaintiff moves for summary judgment on the issue of liability and to strike defendants' affirmative defenses of comparative fault and culpable conduct, contending that defendants owed a nondelegable statutory duty under Administrative Code § 7-210 to maintain the sidewalk in a reasonably safe condition, had notice of the defective condition, and failed to repair it prior to the accident. Plaintiff further argues the defect was not trivial and that she was not comparatively negligent as a matter of law.

In opposition, Kedem and LPark argue that plaintiff has failed to establish, as a matter of law, where and how the accident occurred or that the alleged sidewalk condition caused her fall, and that triable issues of fact, including plaintiff's credibility and comparative negligence, preclude summary judgment. Flixbus likewise opposes plaintiff's motion, arguing that it owed no duty to plaintiff because it neither owned nor leased the property, did not assume responsibility for sidewalk maintenance, and was merely a user of the premises pursuant to a service agreement.

Flixbus separately moves for summary judgment dismissing the complaint and all crossclaims asserted against it, arguing that Administrative Code § 7-210 imposes sidewalk liability on abutting owners, not customers or users, that the special use doctrine is inapplicable, and that it neither caused nor created the alleged defect. Flixbus further seeks dismissal of the contractual and common-law indemnification claims asserted by Kedem and LPark.

In opposition, Kedem and LPark argues that Flixbus made special use of the sidewalk as the sole entrance and exit for its buses, that Flixbus's repeated bus traffic caused the deterioration of the sidewalk, and that LPark is entitled to contractual indemnification under the service agreement between LPark and Flixbus.

Kedem and LPark also move for summary judgment dismissing the complaint as against them and for summary judgment on LPark's crossclaim for contractual indemnification, including attorneys' fees and costs, against Flixbus (motion sequence 5). Kedem argues it is an out-of-possession owner that shifted sidewalk maintenance obligations to LPark under the lease, while LPark argues that the service agreement obligates Flixbus to indemnify it for claims arising from Flixbus's use of the premises.

Discussion

It is well established that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact (*T. Mina Supply v Clemente Bros. Contr. Corp.*, 194 AD3d 879, 881 [2d Dept 2021]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). Upon a motion for summary judgment, the court's function is one of issue finding rather than issue determination (*id. citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). "It is not the function of a court . . . to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505[2012] [citation omitted]).

Plaintiff's Motion for Summary Judgment (Motion Sequence 3)

Here, there are clear triable issues of fact as to the cause of plaintiff's fall. There is no accident report, no eyewitness testimony, and no contemporaneous documentation corroborating plaintiff's account of the incident. Although plaintiff testified that she took photographs of the sidewalk immediately after the accident using her phone, she produced only hard-copy photographs and, when asked to produce digital versions, represented that she "does not presently possess metadata." At plaintiff's deposition, it was further established that three of the four photographs relied upon by plaintiff were not taken by her, but instead were downloaded from Google Maps and were dated August 2022, more than one year prior to the alleged incident.

Plaintiff likewise fails to establish entitlement to dismissal of defendants' affirmative defenses of comparative fault and culpable conduct. Plaintiff testified that she walked along the subject sidewalk every day prior to the accident because her workplace was right next door, and that she had traversed the exact location numerous times before the incident. Plaintiff's continued traversal of a known condition raises a factual issue as to whether she exercised reasonable care under the circumstances on the day of the incident. It is for the jury to determine whether plaintiff's conduct contributed to the occurrence, in light of her prior familiarity with and successful navigation of the same sidewalk.

Accordingly, plaintiff's motion for summary judgment on liability and to strike defendants' affirmative defenses is denied.

Flixbus's Motion for Summary Judgment (Motion Sequence 4)

"By its terms, [s]ection 7-210 unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure"

(*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 171 [2019] [citation and internal quotation marks omitted]). Administrative Code § 7-210 thus imposes a nondelegable duty upon owners of real property abutting a sidewalk, but it does not impose such a duty upon mere users of the premises (*see id.*).

Here, it is undisputed that Flixbus neither owned nor leased the subject property. Rather, Flixbus utilized the premises pursuant to a service agreement with LPark that did not assign sidewalk maintenance or repair obligations to Flixbus. Accordingly, Flixbus owed plaintiff no statutory duty under Administrative Code § 7-210.

Plaintiff's contention that "Flixbus derived a special use from the sidewalk, insofar as they used it as a driveway for their buses to reach the vacant lot" is likewise unavailing. Under the special use doctrine, the "access and ability to exercise control over the special use are essential to the existence of a duty to repair and maintain" (*Kaufman v Silver*, 90 NY2d 204, 208 [1997]). "To recover from a tenant which occupies premises abutting a sidewalk under the theory that the tenant has a special use of the sidewalk, the tenant must be in exclusive possession and control of the alleged special-use area, and the plaintiff must demonstrate that the special use caused the defective condition which proximately caused his or her injuries" *(O'Toole v City of Yonkers*, 107 AD3d 866, 867 [2d Dept 2013] [citations omitted]).

Here, the record establishes that Flixbus had only limited, non-exclusive use of the premises, while LPark retained control and operation of the parking facility, and Kedem retained rights of access and use. As Flixbus lacked exclusive possession or control of the sidewalk or driveway area, no duty arose under the special use doctrine.

Notwithstanding the foregoing, triable issues of fact remain as to whether Flixbus caused or created the alleged sidewalk defect through its repeated bus operations. Kedem and LPark

submit a Forensic Analysis and Report prepared by Robert T. Fuchs of PJA Engineers, who concludes that the cracked and broken sidewalk conditions were "caused by long-term, repeated, and ongoing exposure to wheel loads imposed by buses traversing the sidewalk between the parking lot and roadway." The expert further concludes that "[s]uch damage indicates that the concrete sidewalk, underlying soil subgrade, or a combination thereof, is not capable of adequately supporting the wheel loads imposed by the buses."

Here, Flixbus fails to meet its prima facie burden of demonstrating entitlement to summary judgment. Flixbus does not submit a competing expert report disputing causation. Instead, it relies solely on a footnote in Kedem and LPark's report stating that "[e]xploratory work, such as sidewalk cores, ground penetrating radar (GPR), and soil borings, would be needed to evaluate the composition of the concrete and subgrade conditions." Flixbus contends that "[t]he footnote confirms that Mr. Fuchs has no actual knowledge to concrete or subgrade conditions but is merely guessing what caused the cracks."

Upon review of the record, the Court finds this argument unavailing. The referenced footnote does not render the expert's conclusions speculative, nor does it negate the expert's reasoned opinion, which is based upon inspection, analysis, and professional experience. Flixbus cites no authority supporting its contention that an expert's acknowledgment that additional testing could further refine an analysis, without more, undermines the admissibility or probative value of the opinion offered, or eliminates triable issues of fact as to causation.

Accordingly, Flixbus's motion for summary judgment dismissing the complaint and all crossclaims asserted against it is denied in its entirety.

Kedem and LPark's Motion for Summary Judgment (Motion Sequence 5)

Kedem is not entitled to summary judgment dismissing the claims against it, as Administrative Code § 7-210 imposes a nondelegable duty upon abutting property owners to maintain sidewalks in a reasonably safe condition (*see Xiang Fu He v Troon Mgt., Inc.*, supra, at 172). Neither is LPark entitled to summary judgment on its crossclaim for contractual indemnification against Flixbus, given the indemnification provision in their service agreement:

"9. Indemnity. User [Flixbus], for itself and for those claiming by or through User, hereby indemnifies and releases Operator [LPark], its officers, directors, trustees, board members, partners, employees, agents, mortgagees and contractors (and their respective officers, directors, partners, employees, agents, mortgagees, contractors, guests and invitees, subsidiaries, affiliates, successors, grantees and assigns) (collectively, the "Operator Indemnitees") from and against any and all liability, loss, claims, demands, liens, damages, penalties, fines, interest, costs and expenses (including, without limitation, reasonable attorneys' fees and litigation costs incurred by the Operator Indemnitees or any of them) in connection therewith and for damage, destruction or theft of property, loss of life, injury to persons or damage to property that may arise from or is directly or indirectly due to the use of the parking by User, or its employees or agents, **except to the extent arising from the negligence or willful misconduct of the Operator Indemnitees, or any of them**" (emphasis added).

At a minimum, the record raises triable issues of fact as to whether LPark's alleged failure to maintain or repair the sidewalk contributed to the existence of the defective condition. Here, the record contains evidence of long-standing sidewalk deterioration and issues of fact concerning notice and failure to repair. Whether Kedem breached its statutory duty and whether such breach was a proximate cause of plaintiff's injuries present triable issues of fact that preclude summary judgment.

Moreover, the competing evidence regarding the cause of the sidewalk defect, including testimony concerning pre-existing deterioration and repairs, as well as expert opinions attributing the condition to multiple potential causes, precludes a determination, as a matter of law, that the claimed loss arose solely from Flixbus's use of the premises.

Accordingly, the motion by Kedem and LPark is denied in its entirety.

Conclusion

Based on the foregoing, plaintiff's motion for summary judgment (motion sequence 3), defendant Flixbus' motion for summary judgment (motion sequence 4), and defendants Kedem and LPark's motion for summary judgment (motion sequence 5) are denied in their entirety. Any arguments not expressly addressed herein were considered and deemed to be without merit or unnecessary to address given the court's determination.

ENTER:

RAB

Honorable Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.