Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

WAN MEI LEE,

Plaintiff(s),

- against -

THE CITY OF NEW YORK and
COOPER INVESTORS, INC.,

Defendant(s).

----------X

Index Number: 19365/04

Motion Date: 10/31/06

Motion Cal. Number: 21

The following papers numbered 1 to 15 read on this motion by defendant Cooper Investors, Inc. for summary judgment dismissing the complaint and any cross-claims against it.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Memo of Law.....	5-6
Affirmation in Opposition-Exhibits.....	7-9
Memo of Law.....	10-12
Reply Affirmation-Exhibits.....	13-15

At the direction of Justice Leslie G. Leach, Administrative Judge, this case was reassigned from Justice Phyllis Orlikoff Flug to this Court on February 14, 2006, and the instant motion was received in chambers on said date.

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

Motion by Cooper for summary judgment dismissing the complaint and any cross-claims against it is denied.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon a raised portion of the public sidewalk adjacent to Cooper's premises located at 133-63 Roosevelt Avenue in Queens County on February 12, 2004.

Property owners in the City of New York are required to repair and maintain at their own expense the public sidewalks abutting their premises, pursuant to §19-152 of the Administrative Code of the City of New York. Furthermore, Administrative Code §7-210 imposes liability upon property owners for any injuries resulting from their failure to maintain and repair the public sidewalks abutting or adjoining their properties, except owners of one to three-family homes that are either wholly or partially owner- occupied and used exclusively for residential purposes.

Cooper moves for summary judgment on the grounds that plaintiff has failed to prove that Cooper had actual or constructive notice of the alleged sidewalk defect and that the alleged defect was trivial and, thus, not substantial enough to trigger liability pursuant to §7-210.

In order to obtain summary judgment, movant must make a prima facie showing that it is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Cooper has failed to meet its burden.

It was the initial burden of Cooper, as the movant for summary judgment, to establish the lack of actual or constructive notice of the alleged sidewalk defect (see Sagges v. Long Island Railroad, 259 AD 2d 537 2nd Dept 1999]).

Cooper contends that it did set forth evidence in admissible form of lack of notice by way of the deposition testimony of its vice president, Tina Lee, who testified that no complaints about the sidewalk were received prior to the accident, that no citations were issued to Cooper with respect to the sidewalk prior to the accident and that no repairs were conducted to the sidewalk from 1990 through 2004. This evidence, however, only addresses the issue of actual notice, not constructive notice.

Proof of lack of actual notice, alone, is insufficient to establish Cooper's initial burden (Park v. Caesar Chemists, Inc., 245 AD 2d 425 [2nd Dept 1997]). It was also incumbent upon Cooper to establish lack of constructive notice by showing that the alleged sidewalk defect was not visible or apparent for a sufficient period of time to have reasonably allowed Cooper, in the exercise of reasonable care, to remedy the defect (id; see Scala v. Port Jefferson Free Library, 255 AD 2d 574 [2nd Dept 1998]; see also Danielson v. Jameco Operating Corp., 20 AD 3d 446 [2nd Dept 2005]). Cooper has failed to proffer any evidence that the alleged defect either did not exist, was not visible or was

not apparent for a reasonably long enough time to have permitted it to remedy the defect.

Cooper also fails to establish that the defect was unsubstantial, or trivial, as it contends.

Pursuant to §19-152 of the Administrative Code, an adjacent property owner is only required to repair substantial defects. A substantial defect includes "a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch or where a sidewalk flag contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch or more in depth" (§19-152[a][4]). Cooper neither alleges nor proffers any evidence that the raised portion of sidewalk in question was less than one half inch in height. Indeed, Cooper proffers no evidence at all regarding the severity of the defect.

Finally, this Court notes that plaintiff's argument that notice is not a requirement under the sidewalk law is without merit. The cases cited by plaintiff stand for the precise opposite of the propositions for which they are offered.

Plaintiff cites Castillo v. Bangladesh Society, Inc. (2006 NY Slip Op 51130 [U] [Supreme Court, Queens County]) as holding that liability under the sidewalk law does not require notice. No such opinion was rendered in that case. Quite the opposite, the Court in that case held, inter alia, that "an out of possession landlord can be held liable for violations of a statute or Administrative Code provision provided he had notice of the condition . . . Inasmuch as defendant . . . submitted evidence which indicates that 1.4 inches of snow fell . . . questions of fact exist as to whether [defendant] may be charged with constructive notice of the icy condition which allegedly caused the plaintiff's fall" (citations omitted)(2006 NY Slip Op 51130 [U], *4).

Plaintiff also cites Gangemi v. City of New York (13 Misc 3d 1112 [Supreme Court, Kings County 2006])as supporting its contention that "the sidewalk law places an absolute duty upon owners of real property to take affirmative measures to ensure that the sidewalks abutting their property are in reasonably safe condition" (memo of law in opposition to motion, at 3). In fact, Gangemi states the reverse, holding, "This argument is without merit. The Sidewalk Law does not impose absolute tort liability upon landowners for injuries sustained on an abutting sidewalk . . . In order to prove a breach of duty in most slip/trip and fall cases, the plaintiff must show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition" (citations omitted) (13 Misc 3d 1112, 1130).

Ordinarily, cases that, by their peculiar facts, are inapposite to the matter at hand or which, by virtue of counsel's misinterpretation of the law set forth therein, do not stand for the proposition for which they are cited merit no more than a passing mention. However, the instant matter does not involve a mere misinterpretation of the legal rationale set forth in those decisions, but rather a misrepresentation of the holdings set forth therein. Thus, a more extensive elaboration upon the misinformation presented was in order. Since it does not appear that plaintiff's counsel intended to mislead or disinform this Court, an admonishment to counsel to be more careful in the future is sufficient.

Therefore, Cooper has failed to meet its prima facie burden on this motion. Since the motion must, accordingly, be denied, this Court need not reach the question of whether plaintiff's opposition to the motion sufficiently raises a triable issue of fact (see Jones v. Jacob, 1 AD 3d 485 [2nd Dept 2003]).

Accordingly, the motion is denied.

Dated: February 28, 2007

_____
KEVIN J. KERRIGAN, J.S.C.