

**Ai Qiong He v City of New York**

2007 NY Slip Op 31323(U)

May 18, 2007

Supreme Court, New York County

Docket Number: 0102237/2002

Judge: Eileen A. Rakower

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

PRESENT: Rakower

PART 5

Index Number : 102237/2002

HE, AI QIONG

vs

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

DECIDED BY JUDGE WITH ACCOMPANYING DECISION / ORDER

FILED

MAY 24 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/18/07

EILEEN A. RAKOWER c.

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
AI QIONG HE,

Plaintiff,

Index No.  
102237/02

- against -

Decision and  
Order  
Motion Seq. 2&3

THE CITY OF NEW YORK, JKD REALTY CORP.,  
CKD DIVISION REALTY CORP.,

**FILED**

Defendants.

MAY 24 2007

-----X  
HON. EILEEN A. RAKOWER

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs brings this action for personal injuries allegedly sustained when her foot became caught in a crack in the sidewalk and she fell on the sidewalk adjacent to 45-47 Division Street in the County and State of New York on April 24, 2001. The defect which caused plaintiff's fall is alleged to be a crack with a height differential of one to two inches. Plaintiff sues the two adjoining land owners and the City of New York ("City"). Defendant CKD Division Realty Corp. ("CKD"), an out of possession owner/landlord of the premises known as 47-49 Division Street ("47-49"), moves for summary judgment pursuant to CPLR 3212, dismissing all claims and cross claims as against it. Defendant JKD Realty Corp. ("JKD"), the owner of the building known as 45 Division Street ("45"), also moves for summary judgment pursuant to CPLR 3212, dismissing all claims and cross claims as against it. Plaintiff opposes both motions. Defendant City does not submit papers.

The existing law applicable at the time of this accident imposed liability for defects in the sidewalk upon an adjoining land owner only where that landowner created the defective condition or caused the defect to occur because of some special use. CKD and JKD each contend it did not cause or create the defect nor derived a special use of the area in question.

CKD, in support of its motion, provides the deposition testimony of Wayne Chan, the Principal and President of CKD and the deposition testimony of Dorothy Rozier, a record searcher for the Department of Transportation with the City of New York. CKD argues that it did not undertake to repair the sidewalk, nor did it have permits to affect the sidewalk. Rather, the only permit regarding the sidewalk adjacent to 47-49 was issued to Con Edison. CKD concludes that in the absence of proof that it caused or created the defect at issue for some special use, all claims and cross claims as against it must be dismissed.

JDK, by separate motion, provides the deposition testimony of plaintiff as well as the deposition testimony of Jeffrey Leong, President of JDK. JDK argues that Mr. Leong swept the sidewalk daily, but did no repairs to the sidewalk and was not aware of any defective conditions in the sidewalk. Further, JDK made no special use of the sidewalk. JDK urges that all claims and cross claims against it must be dismissed.

Plaintiff, in opposition to both motions, provides photographs of the crack in the sidewalk which constitutes the alleged defect, the deposition testimony of plaintiff, the affidavit of plaintiff, photographs of a forklift, portions of the deposition of Jeffrey Leong, the deposition of Ki Ching Lui, an employee of CKD who operates an elevator for CKD, and a portion of the deposition of Wayne Chan, a representative of CKD. Plaintiff asserts that CKD owns a forklift, and moves merchandise using that forklift on the sidewalk. Additionally, Mr. Lui testified that CKD replaced the entire sidewalk in front of 47-49. Regarding JDK, plaintiff argues only that its motion is untimely.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

Pursuant to CPLR 3212(a), a party may move for summary judgment after issue has been joined “provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.” Here, the note of issue was filed December 27, 2006. JDK’s motion was served on March 8, 2007. Therefore, JDK’s motion is timely.

JDK has established that as the adjoining landowner of the area of the sidewalk in front of 45 Division Street, it had no duty to repair the sidewalk, and made no special use of the sidewalk. Plaintiff, CKD nor City raise an issue of fact that would require a trial of the matter as it concerns JDK.

Plaintiff alleges through the affidavit of plaintiff and the deposition of Mr. Leong that CKD used a forklift on its sidewalk to move merchandise. Plaintiff also provides photographs of that forklift parked in the street. Plaintiff alleges further, through the deposition of Mr. Lui, the elevator operator for CKD, that the entire sidewalk was replaced at some point in time.

CKD points out that Mr. Lui can not recall if the sidewalk repair was before or after plaintiff’s accident. CKD submits the deposition of Mr. Wayne Chan, President of CKD, who could not remember undertaking repairs to the sidewalk. Regarding the forklift, Mr. Lui stated that it was too big to be used on the sidewalk and that he did not see it used on the sidewalk.

Plaintiff argues that there is an issue of fact as to whether CKD made special use of the sidewalk area such that it had a duty to maintain and repair that area of the sidewalk in a safe condition. Further, plaintiff argues that either the use of a forklift on the sidewalk or the repair of the sidewalk may have created the very defect upon which plaintiff fell.

Despite CKD’s contention that there is no record of it receiving a City permit to replace the sidewalk and no direct evidence that it caused or created the defect at issue, an issue of fact exists as to whether the use of a forklift on that sidewalk constitutes a special use or created the cracked sidewalk. *See, Stockdale v. City of New York*, 294 A.D.2d 195 (1<sup>st</sup> Dept. 2002).

Wherefore it is hereby


ORDERED that defendant JKD Realty Corp.'s motion for summary judgment is granted, and all claims and cross claims as against it are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant CKD Division Realty Corp.'s motion for summary judgment is denied.

The case in all other respects continues.

DATED: May 18, 2007



EILEEN A. RAKOWER, J.S.C.

**FILED**  
MAY 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE