At an IAS Term, Part 25 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of September, 2007.

P R E S E N T:

HON. SYLVIA O. HINDS-RADIX,
Justice.

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TERRY FRAZIER,
Plaintiff,

- against - Index No. 23329/01

THE CITY OF NEW YORK, 358-74 VERNON AVENUE HOUSING DEVELOPMENT FUND CORP. AND R & J BRICK MASONRY, INC.,

Defendants,

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358-74 VERNON AVENUE HOUSING DEVELOPMENT FUND CORPORATION,
Third-Party Plaintiff,

- against - Third-Party Index No. 75355/03

R & J BRICK MASONRY, INC.,

Third-Party Defendant,

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R & J BRICK MASONRY, INC.,
Second Third-Party Plaintiff,

- against - Second Third-Party Index No. 7506/04

ELITE CONSTRUCTION, INC., ADIRONDACK MECHANICAL CONTRACTORS, INC., CHASE ELECTRIC CORP. AND YOU ENTERPRISES, INC.

Second Third-Party Defendants,

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 3
Opposing Affidavits (Affirmations)	2, 4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants R & J Brick Masonry, Inc. (R& J) and 358 -74 Vernon Avenue Housing Development (Vernon) cross-move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing both plaintiff Terry Frazier's complaint and all cross claims against them on the grounds that they did not have a duty to maintain the sidewalk where plaintiff's slip and fall accident allegedly occurred, did not create the subject sidewalk defect and did not make special use of such sidewalk.[1] Plaintiff and defendant the City of New York separately oppose the instant motions on the grounds that the summary judgment motion of R & J is untimely and, in any event, questions of fact exist with regard to the alleged special use by R & J and Vernon of the subject sidewalk and their alleged creation of the subject hazardous condition by reason of construction work performed on the property located adjacent to the sidewalk.

[1] By short form order dated July 25, 2007, the motions for summary judgment by the second third-party defendants Elite Construction, Inc., Adirondack Mechanical Contractors, Inc., Chase Electric Corp. and You Enterprises, Inc. were granted without opposition. All cross claims and counterclaims were also dismissed as to the second third party defendants.

In the instant action, plaintiff alleges that he sustained injuries on November 13, 2000 when he tripped over a broken sidewalk located in front of property owned by Vernon. At the time of plaintiff's accident, R & J was the general contractor for the construction of a nursing home on the property.

At his deposition, plaintiff averred that he tripped and fell as he was walking on Vernon Avenue on the sidewalk located on the left side of the street. To his left was a construction site which contained the foundation of a building. He fell in the "concrete" area of the sidewalk, not the area of the sidewalk which contained some debris. He described the area of the sidewalk where he fell as being a mix of "new and old" concrete which had been "broken up." He had never walked on Vernon Avenue prior to the date of his accident. He testified that he fell on the portion of sidewalk adjacent to "the middle" of the construction site.

Ralph Perri, the president of R& J, testified on behalf of that company. He recalled that the construction started before November 2000, but could not recall the exact date. He also could not recall exactly when the project was completed. He testified that a new sidewalk was installed in front of the property upon completion of the project and said sidewalk would have been installed "much after" November 2000. He further testified that, to his understanding, no work was done with respect to the sidewalk prior to November 2000. Pursuant to a permit issued to R & J on August 31, 2000, R & J was permitted to temporarily close the sidewalk in front of the construction site as needed. Mr. Perri believed that the

permit was obtained in order for R & J to close the sidewalk during times when it used a crane to "set plank" on the property. He stated that the crane would have sat in the street and lifted materials over the sidewalk onto the construction site and the sidewalk would have been closed during those times for pedestrian safety. He also stated that a backhoe and concrete truck were involved in the construction prior to November 2000 and would have accessed the site via a gate located, if one were standing facing the construction site, to the far left of the site. He also testified that no concrete pieces emanating from the site were stored on the sidewalk and, aside from machinery or vehicles going into the "gate area," no other equipment drove on any other part of the sidewalk. He did not know of any construction debris being stored on the subject sidewalk. Materials for the site had to go through the subject gate or "be loaded off from the street" or "if they enclosed the sidewalk, it would be put on the sidewalk or whatever."

Lilly Cox, the president of L.W.C. Management (LWC), the housing consultants for Vernon during the construction, testified at a deposition on behalf of Vernon. Ms. Cox testified that LWC had acted as a "housing consultant" to Vernon for a couple of years prior to November 2000. She further testified that construction work continued at the site after November 2000 and the property received a temporary certificate of occupancy in April 2002. She testified that there is a new sidewalk at the site which must have been installed during construction but she had "no idea when."

Summary judgment should only be granted where there are no triable issues of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). In order to prevail on a motion for summary judgment, the movant must present a prima facie case demonstrating entitlement to judgment as a matter of law *(Prince v Di Benedetto*, 189 AD2d 757, 759 [1993]; *Zarr v Piccio*, 180 AD2d 734, 735 [1992]). Once the movant has established its prima facie case, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Romano v St. Vincent's Medical Center of Richmond*, 178 AD2d 467, 470 [1991]; *Tessier v New York City Health & Hospitals Corp.*, 177 AD2d 626 [1991]). The evidence presented on summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*Goldstein v Monroe County*, 77 AD2d 232, 236 [1980]). Additionally, "[i]t is well established that negligence cases do not generally lend themselves to resolution by summary judgment, since that remedy is appropriate only where the negligence or lack of negligence of defendant is established as a matter of law" (*Chahales v Garber*, 195 AD2d 585, 586 [1993]). However, summary judgment is appropriate even in a negligence case where the movant satisfies his or her initial burden of proof and the nonmovant's opposition to the motion for summary judgment is "entirely

conjectural and there is no genuine issue [of fact] to be resolved" (*Cassidy v Valenti*, 211 AD2d 876, 877 [1995]).

It is well settled that "[l]iability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, a party cannot be held liable for injuries caused by the dangerous and defective condition of the property" (*Minott v City of New York*, 230 AD2d 719, 720 [1996][internal quotation marks and citations omitted]). With respect to contractors, "a contractor may be liable under the common law 'for affirmative acts of negligence which result in the creation of a dangerous condition upon a public street or sidewalk'" (*Pickering v Lehrer, McGovern, Bovis, Inc.*, 25 AD3d 677, 679 [2006], quoting *Ingles v City of New York*, 309 AD2d 835, 835 [2003]). Similarly, a landowner is not liable to a pedestrian injured by a defect in a public sidewalk abutting the landowner's property "unless the landowner caused the defective condition through negligent construction or repair, or as a result of some special use, or if a statute imposes the obligation to maintain the sidewalk on the abutting property" (*Grossman v Amalgamated Housing Corp.*, 298 AD2d 224, 335 [2002]).[2] The "special use" doctrine imposes liability on an abutting landowner where he or she derives a special benefit from the property unrelated to its public use (*see Melamed v Rosefsky*, 291 AD2d 602, 603 [2002]). Generally, special use cases involve either the

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[2] Although New York Administrative Code § 7-210, effective September 15, 2003, established, in certain circumstances, a landowner's duty to maintain an abutting sidewalk, such statute does not apply in the instant case as the subject accident occurred in November 2003.

installation of some object in the sidewalk or street or a variance in the construction of same (*Spangel v City of New York*, 285 AD2d 425, 425 [2001]; *accord Tyree v Seneca Center-Home Attendant Program, Inc.*, 260 AD2d 297, 297 [1999]).

As an initial matter, the court finds that the cross motion for summary judgment by R & J is timely, even though it was served more than 60 days subsequent to the filing of the note of issue (*see* Local Rule 13, Uniform Civil Trial Rules of the Supreme Court, Kings County), given that a timely cross motion for summary judgment was made by Vernon on nearly identical grounds (*see Grande v Peteroy*, 39 AD3d 590, 591-592 [2007]). Accordingly, the court shall consider both cross motions.

In the instant case, the court finds that R & J and Vernon are entitled to summary judgment dismissing the complaint and all cross claims as against them. These defendants have demonstrated, prima facie, that they did not cause the sidewalk defect or make special use of the portion of the sidewalk where plaintiff tripped and fell. Mr. Perri testified that the subject sidewalk was not replaced until "much after" November 2000 and that, to his understanding, no work was performed on the sidewalk prior to that date. He also testified that vehicles and machinery would enter the site through a gate located at the far left side of the construction site and that such vehicles and machinery did not operate on any other portion of the sidewalk. Plaintiff testified that he tripped and fell on the portion of the sidewalk adjacent to the "middle" of the construction site. Accordingly, defendants have

demonstrated, prima facie, that they did not create the subject defective sidewalk condition and also did not make special use of the area of the sidewalk where plaintiff tripped and fell.

Plaintiff argues that the movement of heavy machinery over a portion of the sidewalk by R & J creates a question of fact as to its liability and the liability of Vernon. However, although the use of a portion of a public sidewalk as a driveway or entranceway to property may create a triable issue with respect to special use (*see Adorno v Carty*, 23 AD3d 590, 591 [2005]; *Katz v City of New York,* 18 AD3d 818, 819 [2005]; *Morales v Sinmar Development Corp.*, 298 AD2d 236, 237 [2002]; *Breger v City of New York,* 297 AD2d 770, 771 [2002]; *Melamed*, 291 AD2d at 603; *Rosario v City of New York*, 289 AD2d 133, 134 [2001]; *Schwartzberg v Eisenson*, 260 AD2d 854, 855 [1999], *lv denied* 93 NY2d 815 [1999]) or the movement of heavy machinery or equipment over a specific area of sidewalk may raise a question of fact concerning whether the party responsible for same created the subject defect (*see Stockdale v City of New York*, 294 AD2d 195, 196 [2002]; *Peretich v City of New York*, 263 AD2d 410, 411 [1999]; *Caturano v City of New York*, 224 AD2d 202, 202 [1996]), here, there is no testimony that any heavy machinery was utilized in the vicinity of plaintiff's accident. Rather, Mr. Perri stated that vehicles, machinery, equipment and materials were all transported onto the property through a gated area located at the far left of the property. Plaintiff did not testify that he tripped in an area of the sidewalk used as a driveway or entranceway onto the property. Instead, he stated that he tripped on an area of "broken up" concrete located adjacent to the "middle" of the construction site (*see Adorno,* 23 AD3d at

591 [noting that "(w)here a sidewalk is adjacent to but not part of the area used as a driveway, the plaintiff bears the burden of proof on a motion for summary judgment of showing that the special use of the sidewalk contributed to the defect"]; *accord Ivanyushka v City of New York,* 300 AD2d 544, 544-545 [2002][finding that defendants were entitled to summary judgement where there was no evidence that the alleged sidewalk defect that caused plaintiff to trip and fall on a public sidewalk directly adjacent to the driveway of the premises owned by the abutting landlords was caused by the special use of the sidewalk as a driveway or that the driveway in any way contributed to the allegedly defective condition]; *see also Billera v Paolangeli*, 20 AD3d 743, 745 [2005] [contractor's summary judgment motion seeking dismissal of complaint as against him should have been granted where trip and fall accident occurred upon concrete slabs near the subject premises and the only defects caused by contractor's heavy machinery were located close to the street and not in the specific area of plaintiff's fall]); *but see cf. Mincey v Mensch*, 253 AD2d 656, 656 [1998][finding that issue of fact existed as to whether defect in curb was caused by cars driving over the curb in the course of entering and exiting a parking lot that lay between the curb and defendants' buildings, even though plaintiff did not trip over the part of the curb that was cut to provide entrance to the lot, but rather over the part located at the corner some distance away, given that discovery was incomplete and the possibility existed, "at this early stage of the action, that the individual defendants' alleged special use of the sidewalk produced a proximate cause of the fall"]). Moreover, unlike in the *Mincey* case, discovery

in this action is complete and both plaintiff and defendants have had the opportunity to testify with respect to the happening of the accident, the location and conditions present at the accident, the activities undertaken at the construction site and the impact, or lack thereof, of such activities on the subject sidewalk.

Although there are some discrepancies between the testimony of Mr. Perri, who stated that the construction site was closed off by a fence, presumably for the duration of the project with a gated area in use at the far left of the site for access to the site, and plaintiff's testimony that there was no fence present at the time he fell, it would be pure speculation for the court to find that machinery or equipment traversed the sidewalk in any area other than that identified by Mr. Perri based, in essence, upon the mere fact that the sidewalk was located adjacent to a construction site. Likewise, it would be speculation to find that Mr. Perri's statement that unspecified materials may have been kept on an unspecified portion of the sidewalk for an unidentified duration prior to being moved onto the property if the sidewalk was ever blocked off to pedestrians, such as when an on-street crane would unload items from the street, raises a question of fact as to whether R & J created the subject defect or that R & J or Vernon made special use of the sidewalk. Although R & J obtained a permit to block off the sidewalk for pedestrian safety, if needed, there is no definitive evidence that the sidewalk ever was blocked off prior to plaintiff's accident, that such "blocking off" caused the defect complained of by plaintiff or that such temporary and specific use of the sidewalk obligated R & J or Vernon to maintain such sidewalk, let alone

repair already existing defects, to the extent the subject defect represented same (*see generally Schwartzberg,* 260 AD2d at 855 ["The basis upon which liability is imposed . . . under the special use doctrine is that the (complained of) condition was created solely for (the landowner's) benefit, and hence he (or she) has the duty to repair or maintain it"]). In addition, plaintiff testified that he never had traversed Vernon Avenue prior to his fall and, accordingly, did not know the condition of the sidewalk at any time prior to the day of his accident. Further, although Ms. Cox testified that a new sidewalk now exists at the property, but she did not know when it was constructed, Mr. Perri testified that the new sidewalk was put in at the completion of the project. Plaintiff testified that only a foundation existed at the time of his accident and the photographs submitted to the court do not evidence any work in progress in the area where he fell with respect to construction of an entirely new sidewalk in that vicinity. As a result, plaintiff and the City of New York have failed to raise triable issues of fact, as opposed to mere speculation and conjecture, and R & J and Vernon are, therefore, entitled to summary judgment dismissing the complaint and all cross claims as against them.

As a result, the cross motions of R & J and Vernon for summary judgment dismissing the complaint and all cross claims against them are granted in their entireties. The action is hereby severed and continued as against the remaining defendant, the City of New York.

The foregoing constitutes the decision and order of the court.

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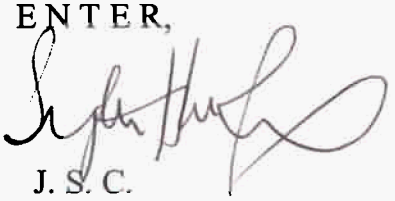

J. S. C.

HON. SYLVIA O. HINDS-RADIX JSC