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

PRESENT: RAKOWER Justice PART 5

Index Number : 103963/2007
KANE, CHIQUITA
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3, 4, 5
Replying Affidavits	6, 7

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 12/23/09

HON. EILEEN A. RAKOWER

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

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CHIQUITA KANE,

Plaintiff,

Index No.103963/07
Seq No.: 002

Decision and Order

- against -

THE CITY OF NEW YORK, 300 JJ FRESH PRODUCE, INC., R.Y. MANAGEMENT CO., INC. and HUDSON VIEW WEST CONDOMINIUM,

Defendants.

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HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she fell on an elevation in the sidewalk area in front of 300 Albany Street in the County and State of New York on January 21, 2006. Hudson View West Condominium (Hudson)is the adjoining land owner, R.Y. Management Co., Inc. (RY) was the management company for the land owner, and 300 JJ Fresh Produce, Inc. (JJ) is the lessee of the ground level space at 300 Albany Street. JJ brings the instant motion for summary judgment pursuant to CPLR 3212 seeking to dismiss all claims and cross claims as against it. Hudson and RY partially oppose JJ's motion and cross move for similar relief, seeking to dismiss all claims and cross claims as against them. Plaintiff opposes both motions.

JJ, in support of its motion, provides the summons and complaint and amended verified complaint, the transcript of the examination before trial of Chiquita Kane dated June 23, 2008, photographs of the accident location and alleged defect, and the transcript of the examination before trial of Manuel Panza, manager of the delicatessen known as 300 JJ Fresh Produce, dated January 5, 2009. JJ argues that it had no responsibility to repair structural defects, if any, in the sidewalk, as it is the tenant of the adjoining landowner. Its only responsibility was to keep the sidewalk area swept. Therefore, it owes no duty to plaintiff, and the claims and cross claims as

against it must be dismissed. Additionally, the defect alleged is de minimus, and not actionable.

Hudson and RY, in partial opposition, provide an attorney affirmation asserting opposition only insofar as JJ is the tenant of the owner of the commercial unit in the adjoining building. Plaintiff brought a separate action arising out of this fall as against Hudson View Towers, the owner of the commercial unit, and obtained a default judgment against that entity. Hudson and RY assert that JJ fails to append its lease with Hudson View Towers, and has not made a prima facie showing that it had no responsibility for the subject sidewalk. However, Hudson and RY agree that the defect alleged by plaintiff is de minimus, and they do not oppose that portion of JJ's motion.

Hudson and RY bring a cross motion to dismiss all claims and cross claims as against them on the ground that the alleged defect which caused plaintiff's accident was too trivial to be actionable. In support of their cross motion, Hudson and RY provide: the summons and complaint in a related action as against Hudson View Towers Associates, A Joint Venture composed of WZ Hudson View Corp., WW View Associates and Hudson View Towers Corporation; the Decision and Order of this Court dated July 13, 2009 wherein a default judgment was granted as against Hudson View Towers Associates, A Joint Venture composed of WZ Hudson View Corp., WW View Associates and Hudson View Towers Corporation; the summons and complaint and amended verified complaint in the instant matter; Hudson and RY's answer and cross complaint; the notice of trial; the transcript of the examination before trial of Chiquita Kane dated June 23, 2008; color photographs of the alleged defect; plaintiff's verified bill of particulars; and the transcript of the examination before trial of Eric Clark, property manager for RY, dated January 5, 2009.

Plaintiff opposes both motions, providing: the summons and complaint and amended summons and complaint; City's answer; JJ's answer and cross complaint; Hudson and RY's answer to amended complaint and cross complaint; plaintiff's response to City's demand for a verified bill of particulars; the transcript of the examination before trial of Chiquita Kane dated June 23, 2008; the transcript of the examination before trial of Leslie Smalls, record searcher for the Department of Transportation, dated July 3, 2008; the transcript of the examination before trial of Cho Yoon, President of JJ, dated September 11, 2008; the transcript of the examination before trial of Manuel Panza dated January 5, 2009;the transcript of the examination before trial of Eric Clark dated January 5, 2009; and black and white

copies of photographs of the location of the accident and the alleged defect.

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 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

To establish negligence in a slip-and-fall or trip-and-fall case, a plaintiff must demonstrate that the defendant breached its duty to her by either creating a dangerous condition or, with actual or constructive notice of a dangerous condition, defendant failed to remedy the situation.(*Kesselman v. Lever House Restaurant*, 29 A.D.3d 302[1st Dept. 2006]).

Whether a dangerous condition exists on the property of another so as to create liability depends on the facts and circumstances of each case and is generally a question of fact for the jury. However, a court should examine the facts presented, including the width, depth, elevation, irregularity and appearance of the defect, along with the time, place and circumstance of the injury to determine whether the alleged defect is trivial.(*Trincere v. County of Suffolk*, 90 N.Y.2d 976[1997]).

Plaintiff's testimony makes clear that she was at the subject location on the date of the accident, wearing ankle high rubber soled "shoeboot[s]." It was cold, clear, not raining or snowing. The sidewalk itself was clear and dry. "I was crossing the street to go to the side where the deli is, that's when I fell." When asked if she knew what caused her to fall, plaintiff answered "[t]here was an elevation in the sidewalk." Her right toe "got caught into the concrete of the sidewalk and I tripped." When asked if she looked to see what she fell on, plaintiff answered, "[w]hen I was on the stretcher I saw the sidewalk was – which was elevated, yes." In the latter part of February, 2006, plaintiff returned to the accident location to take photographs. At her deposition, plaintiff placed an X at the place where she fell. This is memorialized in

photograph exhibits A and F.

Q: Also looking at exhibit Defendant's Exhibit F. Can you, if you can, I don't want you to guess, tell me the differential in height between the sidewalk areas where you allege the incident occurred?
A: The differential of height?
Q: Right. Didn't you state this incident occurred because there was an elevation?
A: An elevation.
Q: Do you know how big of an elevation there was?
A: About this much (indicating).
Q: About a quarter of an inch?
A: I'm not good with the inches and this and this and that. I'm not good with that. It was about a quarter of an inch. It was enough for my boot to go in and for me to fall.

. . .

A: Quarter of an inch to an inch, I would say.
Q: Do you know if anybody measured the area where the incident occurred, either yourself or any of your attorneys?
A: No.

The photographs provided and testimony regarding what is depicted in the photographs reveals an area where sidewalk flags meet, and the gap between them appears to contain rubber or caulk as a filler. The height differential, to the extent it is depicted in the photographs, is consistent with plaintiff's own characterization that it was between a quarter of an inch to an inch. The area was clear and dry and it was daylight, 9:45 a.m.. Finally, while there is caulk or rubber in the space between the slabs, there is nothing to indicate it creates a trap or snare, other than plaintiff's conclusory statement that it was enough for her boot to go in and for her to fall. Viewing the facts in the light most favorable to plaintiff, the defect to which plaintiff attributes her trip and fall was trivial. Plaintiff presents no evidence "to show that such defect presented a significant hazard, notwithstanding its minimal dimension, by reason of location, adverse weather or lighting conditions, or other circumstances giving it the characteristics of a trap or snare." (*Gaud v. Markham*, 307 AD2d 845 [1st Dept., 2003] citing also to *Trincere v. County of Suffolk*, 90 NY2d 976).

Wherefore, it is hereby

ORDERED that the motion of JJ to dismiss all claims and cross claims as against it is granted, and the action is severed and dismissed as to defendant 300 JJ Produce Inc., and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the cross motion of Hudson and RY to dismiss all claims and cross claims as against it is granted, and the action is severed and dismissed as to defendants Hudson View West Condominium and R.Y. Management Co., Inc., and the clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December 23, 2009

Eileen A. Rakower, J.S.C.