

**Jing Ying Chen v United China Star Corp.**

2023 NY Slip Op 30269(U)

January 26, 2023

Supreme Court, New York County

Docket Number: Index No. 157924/2019

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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INDEX NO. 157924/2019

JING YING CHEN, MAN FONG LIU AS ADMINISTRATOR
FOR ESTATE OF SONG-AI LI, MAN FONG LIU
INDIVIDUALLY,

MOTION DATE 07/12/2022

MOTION SEQ. NO. 004

Plaintiff,

- v -

DECISION + ORDER ON MOTION

UNITED CHINA STAR CORP., XING CHEN,

Defendant.

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UNITED CHINA STAR CORP.

Third-Party
Index No. 595760/2020

Plaintiff,

-against-

YU FEN LI

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for JUDGMENT - SUMMARY .

This action arises out of injuries sustained, including the unfortunate death of plaintiff Song-Ai Li, as a result of an apartment fire. Plaintiff moves for summary judgment as against defendant<sup>1</sup> United China Star Corp., the owner of 113 Mott Street, New York, NY 10013 (the premises), alleging that it failed to keep and maintain the premises in a reasonably safe condition. Defendant opposes the instant motion on the grounds that plaintiff has failed to

<sup>1</sup> Defendant Xing Chen's motion to dismiss was granted by this Court by Order dated March 23, 2021, accordingly the only direct defendant is United China Star Corp.

establish a prima facie case and there are questions of fact that preclude summary judgment. For the reasons set forth below, plaintiff's motion for summary judgment is denied.

### **Applicable Law**

“[T]he proponent of a summary judgment motion must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ for this purpose” (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988][citation omitted]). “[A]verments merely stating conclusions, of fact or of law, are insufficient’ to ‘defeat summary judgment’” (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383 [2004][citations omitted]).

It is well settled that absent proof that a defendant actually created the dangerous condition or, had actual or constructive notice of the same, there can be no liability on a claim for premises liability (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v F.W. Woolworth Company*, 24 NY2d 936, 937, [1969]; *Armstrong v Ogden Allied Facility Management Corporation*, 281 AD2d 317 [1st Dept 2001]; *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 [1st Dept 1999]; *Allen v Pearson Publishing*, 256 AD2d 528, 529 [2d Dept 1998]; *Kraemer v K-Mart Corporation*, 226 AD2d 590 [2d Dept 1996]).

A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an

accident to permit the defendant to discover and remedy the same (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). The notice required must be more than general notice of any defective condition (*id.* at 838; *Piacquadio* at 969). Instead, notice of the specific condition alleged at the specific location alleged is required and, thus, a general awareness that a dangerous condition may have existed, is insufficient to constitute notice of the particular condition alleged to have caused an accident (*Piacquadio* at 969). The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2d Dept. 2002]. *lv denied* 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group*, 269 AD2d 575 [2000]). Alternatively, a defendant may be charged with constructive notice of a hazardous condition if it is proven that the condition is one that recurs and about which the defendant has actual notice (*Chianese v Meier*, 98 NY2d 270, 278 [2002]; *Uhlich v Canada Dry Bottling Co. Of NY*, 305 AD2d 107 [2003]). If such facts are proven, the defendant can then be charged with constructive notice of the condition's recurrence (*id.*; *Anderson* at 422).

### **Discussion**

On December 19, 2018, a fire started in unit #3F of the premises. It is undisputed that the fire originated as a result of a “clamp light” that was in use in the unit.

Plaintiffs, Jing Ying Chen and Song-Ai Li were inside unit #5F, when plaintiff Jing Ying Chen exited the apartment to retrieve belongings left in the hallway and encountered a smoky condition. Ms. Chen then reentered unit #5F, closed the door, called 911 and subsequently lost consciousness. It is alleged, that plaintiff Song-Ai Li passed away as a result of the fire incident, however the Court does not see any document in the record to support that contention, nor has plaintiff cited to any.

In support of its motion for summary judgment, plaintiffs contend that the alleged defective condition of a self-closing mechanism in the door to unit #3F caused plaintiffs' injuries and death. Further, plaintiffs aver that additional defective conditions existed, namely the use of unit #3F as a storage unit and the alleged non-existence of operational smoke and carbon monoxide detectors. In support of these contentions, plaintiff submits an expert affidavit from, Mr. Eugene J. West, that purports to have inspected the subject door and determined that it did in fact contain a self-closing mechanism which likely malfunctioned causing the door to remain open thereby by allowing the fire to spread and subsequently cause injuries to plaintiffs.


In opposition, defendant cited to the testimony of Xing Chen, principal of defendant, that he was not aware of unit #3F use as a storage unit, as well as the existence of the self-closing mechanism on the door. While plaintiffs' urge this Court to determine that this testimony is not credible, it is not the function of this Court to opine on the credibility of testimony. Moreover, it is undisputed that at the time of the incident self-closing were not required by the building code.

Defendant also submits the affidavit of its expert Bernard P. Lorenz, P.E., that rejects the findings of Mr. West. Defendant contends that the plaintiffs have not demonstrated that the inoperability of the self-closing door or even that a self-closing door existed in unit #3F.

The Court finds that plaintiffs have failed to establish its entitlement to judgment as a matter of law. Specifically, the Court finds that at the outset there is a question regarding the existence of a self-closing mechanism in the door. Further, with respect to the alleged defective condition of unit #3F being used as a storage facility, plaintiff has failed to establish that defendant had notice of such a condition and whether that would constitute a defective condition that was the proximate cause of plaintiffs' injuries. In sum, the record before this Court is replete

with questions of fact that are within the purview of a jury as opposed to a determination that can be made on a motion for summary judgment. Accordingly, it is hereby

ADJUDGED that plaintiffs' motion for summary judgment is denied.

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LYLE E. FRANK, J.S.C.

1/26/2023  
DATE

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	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
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CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE