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SCANNED ON 2/15/2012

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

PRESENT: Saliann Scarpulla Justice PART 19

Index Number : 110340/2008
**BURNS, SHARON**
VS.
**100 CHURCH OWNER**
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

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

...tion to/for _____

_____ | No(s). _____
_____ | No(s). _____
_____ | No(s). _____

**Upon the foregoing papers, it is ordered that this motion is**

determined in accordance with the accompanying decision/order.

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

Dated: 2/7/12

**FILED**

FEB 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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SHARON BURNS,

Plaintiff,

- against-

Index No.: 110340/2008
Submission Date: 11/16/11

100 CHURCH OWNER LLC, CONSOLIDATED, EDISON COMPANY OF NEW YORK, INC., CUSHMAN & WAKEFIELD, INC. AND SAPIR REALTY MANAGEMENT CORP.,

**DECISION AND ORDER**

Defendant.

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For Plaintiff:
Di Tomasso & Di Tomasso
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New York, NY 10007

For Defendants 100 Church Owner LLC and Sapir Realty Management:
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For Defendant Cushman & Wakefield, Inc.:
The Law Offices of Edward Garfinkel
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Papers considered in review of this motion for summary judgment:

Notice of Motion . . . . . 1
Affs in Opposition. . . . . 2, 3
Replies . . . . . 4, 5

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, plaintiff Sharon Burns ("Burns") moves for summary judgment as to liability against defendants 100 Church Owner LLC ("100 Church") and Cushman & Wakefield, Inc. ("Cushman").

Burns commenced this action seeking to recover damages for the injuries she sustained on November 22, 2006 when she tripped and fell on a crack in the sidewalk in

front of 50 Park Place, property owned by 100 Church. Cushman and defendant Sapir Realty Management Corp. ("Sapir") managed the property and defendant Consolidated Edison Company of New York ("Con Ed") owned the sidewalk grating adjacent to the sidewalk crack upon which Burns tripped and fell. Burns described the crack as a "couple of inches" high.

Burns now moves for summary judgment as to liability against defendants 100 Church and Cushman. Burns argues that 100 Church is liable pursuant to N.Y.C. Code 7-210. Alternatively, Burns argues that 100 Church is liable pursuant to the special use doctrine because 100 Church had garage accesses which traversed the subject sidewalk and the defect was located on part of the sidewalk used as a driveway.

Burns further argues that Cushman must be held liable pursuant to its management agreement with 100 Church by which it was obligated to maintain the subject property.

Finally, Burns maintains that both 100 Church and Cushman, in response to a Notice to Admit dated April 20, 2011, admitted that a wide view photograph of the subject crack was an accurate depiction of the subject property on the date of the occurrence, and therefore, both conceded notice of the subject dangerous condition. She also contends that 100 Church had notice as evidenced by its employee Fredrick Walker's ("Walker") examination before trial testimony that he swept around the subject building every day. When asked if he observed any cracks, he testified that "here and there you always see a crack somewhere."

In opposition, 100 Church first argues that Burns has not established that she fell in an area of special use because the evidence presented does not conclusively establish whether she fell in front of one of the driveways or between the two driveways. Also, because the crack upon which she fell is connected to a subway grating, issues of fact exist as to whether the crack was created by the installation of the grating.

100 Church next contends that issues of fact exist as to whether the defect was trivial in nature. While Burns testified that the crack was raised "a couple of inches, approximately," the photographs depict a smaller defect. Further, a question of fact exists as to whether the crack was open and obvious and the extent of Burns' comparative negligence.

Finally, 100 Church argues that no evidence was presented to establish that it had actual or constructive notice of the defect. It did not concede notice in the Notice to Admit, rather it merely admitted that the photograph depicted a portion of the property known as 50 Park Place. No evidence was presented as to the length of time the subject defect existed and no evidence was presented that 100 Church was aware of the subject crack before Burns' fall.

In opposition, Cushman first argues that the motion must be denied because Burns has failed to establish actual or constructive notice. Walker's testimony that "here and there you will always see a crack somewhere" does not rise to the level of notice required of a specific defect to impute liability for negligence. In fact, Walker never testified as to

seeing any specific cracks in the sidewalk. He testified that there were hairline cracks in the sidewalk but nothing "significant." Further, Director at Cushman Jim Whelan ("Whelan") testified that Cushman only began managing the building approximately six months prior to Burns' accident and therefore, any notice prior to that time could not be imputed to Cushman. In addition, Whelan testified that he never observed the subject crack and Cushman never performed any sidewalk repair. Cushman further maintains that Burns provided no evidence establishing the length of time the crack existed before her accident, whether she made any prior complaints about the crack, or whether anyone had fallen in that area prior to her accident.

In reply, Burns argues that Whalen testified that pursuant to Cushman's contract with 100 Church, it was responsible for maintenance of the property and was expected to do a property inspection once a month. He also testified that the sidewalk was swept a "couple of times a day." Burns also submits a Litigation Support Intake form indicating "Broken SDW with holes at this location" reported September 17, 2004 in front of 50 Park Place.

**Discussion**

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must

then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

N.Y.C. Adm. Code § 7-210 provides that "it shall be the duty of the owner of real property abutting any sidewalk to maintain such sidewalk in a reasonably safe condition,..." and that "the owner of real property abutting any sidewalk shall be liable for any personal injury proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition..." However, an abutting landowner must still have either created or had sufficient notice of any defect before liability can attach. *See Early v Hilton Hotels Corp.*, 73 A.D.3d 559 (1st Dept. 2010); *Araujo v Mercer Sq. Owners Corp.*, 33 Misc. 3d 835 (Sup. Ct. N.Y. Co., 2011).

Here, Burns fails to meet her burden of establishing entitlement to judgment as a matter of law. In support of her motion, Burns refers, among other things, to Walker's testimony and a Litigation Support Intake form. However, none of that evidence establishes, *prima facie*, that 100 Church or Cushman created or had notice of the specific dangerous condition upon which Burns tripped and fell, or that 100 Church or Cushman failed to properly maintain the sidewalk in a reasonably safe condition, thereby proximately causing her injuries. The mere existence of the crack, and Walker's general knowledge that there were minor cracks on the sidewalk over a period of time, is insufficient to establish actual or constructive notice. Burns has not submitted any

additional evidence, such as expert testimony, to prove that 100 Church or Cushman created or had actual or constructive notice of the specific defect upon which she fell.

Further, contrary to Burns' contention, 100 Church and Cushman's response to the April 20, 2011 Notice to Admit does not constitute an admission of notice of the subject crack prior to the date of the accident. Rather, they merely admit that a photograph taken of the area of the subject crack accurately depicted a portion of the subject property. Notably, the purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial. *See DeSilva by DeSilva v. Rosenberg*, 236 A.D.2d 508 (2nd Dept. 1997); *Kalabovic v. Ft. Place Coop., Inc.*, 159 A.D.2d 609 (2nd Dept. 1990). It may not be employed to request admission of material issues or ultimate or conclusory fact, such as notice. *Lewis v. Hertz Corp.*, 193 A.D.2d 470 (1st Dept. 1993).

Finally, Burns fails to submit sufficient evidence to establish liability pursuant to the doctrine of special use. Evidence was presented that 100 Church used portions of the sidewalk as a driveway. However, it is unclear, from the photographs and from Burns' testimony, whether she tripped on a crack in the sidewalk in the portion of the sidewalk purportedly used for a driveway. In any event, Burns presents no evidence indicating that the subject defect was caused by the special use or that the special use contributed to the

condition. *See generally Torres v. City of New York*, 32 A.D.3d 347 (1st Dept. 2006); *Adorno v. Carty*, 23 A.D.3d 590 (2nd Dept. 2005).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Sharon Burns' motion for summary judgment as to liability against defendants 100 Church Owner LLC and Cushman & Wakefield, Inc. is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
February 7, 2012

FILED

FEB 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Saliann Scarpulla, J.S.C.