Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Malka Tenenhaus,

Plaintiff,

- against -

The City of New York, Consolidated Edison Company of New York, Angelo Ferrari, Huei C. Yang, Shia-Lien Yang and Tze-Hsiung Yang,

Defendants.

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Index Number: 15450/10

Motion Date: 9/13/11

Motion Cal. Number: 18

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this motion by defendants, Angelo Ferrari, Huei C. Yang, Shia-Lien Yang and Tze-Hsiung Yang, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the Ferrari and the Yang defendants (hereinafter referred to as movants) for summary judgment dismissing the complaint against them is granted.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon a raised sidewalk flag in front of movants' residence located at 15-03 215th Street in Queens County on February 7, 2010. It is uncontested that said abutting premises is an owner-occupied two-family home. Huei Yang testified in her deposition that movants have owned the premises since 1998, have been living in said premises and that none of them ever performed any repairs to the sidewalk prior to the date of the accident. She also testified that the driveway area and driveway apron was in the same condition as when they purchased the property in 1998 and that the raised sidewalk flag was there when she purchased the property.

An abutting homeowner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the homeowner created the defective condition or caused it through some special use, or unless a statute charges the homeowner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the homeowner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

The only statutory provision imposing liability upon property owners in the City of New York for failing to repair and maintain the public sidewalks abutting their property is section 7-210 of the New York City Administrative Code, and that section specifically excludes owner-occupied residential premises of less than four families (see Admin. Code §7-210 [b]). It is uncontested that the subject premises is a two-family house owned and occupied by movants as their residence.

In the absence of any statute imposing liability upon movants for failing to repair and maintain the sidewalk abutting their property, the only grounds for liability against them would be if they actually created the defective condition or caused it through a special use. Plaintiff has failed to rebut movant's testimony that they did not cause any repairs to be done to the sidewalk and, thus, did not create the defect, and that they did not cause the condition through a special use of the sidewalk (see Nilsen v. City of New York, 28 AD 3d 625 [2nd Dept 2006]; Bachman v. Town of North Hempstead, 245 AD 2d 327 [2nd Dept 1997]).

In opposition, plaintiff contends that movants created the condition through the special use of the sidewalk as a driveway. The Court notes that the condition at issue was not on movants' driveway or on the portion of the sidewalk in front of their driveway over which their vehicle drove. Rather, the condition was a raised sidewalk flag adjacent to one of the sidewalk flags that were in front of the driveway.

The use of a sidewalk as a driveway constitutes a special use (see Campos v. Midway Cabinets, Inc., 51 AD 3d 843 [2nd Dept 2008]). Where the condition is located on a part of the sidewalk used as a driveway, the abutting property owner, as the proponent of summary judgment, bears the burden of establishing that he neither created the condition nor caused it through a special use of the driveway (see id.). Movants have met their burden of proffering evidence that any special use of the driveway by them did not create the condition of the adjacent sidewalk flag through Yang's deposition testimony that the driveway and driveway apron were in the same condition when they purchased the premises in 1998 as they were on

the date of the accident and that the raised sidewalk flag adjacent to the driveway was there when they purchased the premises.

In support of the contention of plaintiff's counsel that movants created the condition complained of through their special use of the sidewalk as a driveway, counsel annexes to plaintiff's opposition papers an affidavit of their designated expert, Scott Silberman, a professional engineer, who opined, based solely upon examination of the photographs annexed to the opposition papers, "The photographs indicate that the vertical height differential of between four to five inches between the driveway and the adjacent sidewalk flag was either caused or exacerbated by movants' use of the public sidewalk as a driveway since they purchased the property in 1998, some twelve years prior to the accident. Vehicles are heavy loads. Repetitive loads on a driveway can cause same to become in a depressed condition as the subsurface is compacted and, accordingly, lowers the driveway surface height in relation to the surrounding sidewalk."

"It is well settled that an expert's affidavit which contains bare conclusory assertions is insufficient to defeat summary judgment. While an expert may, in his area of expertise, reach conclusions beyond the ken of the ordinary layman, he may only do so on the basis of the established facts" (Wright v New York City Housing Auth., 208 AD 2d 327, 331 [1st Dept 1995][internal citations omitted]).

Silberman merely states that cars are heavy and can cause a driveway to become depressed. He does not aver that movants' driveway in fact became depressed and that such was in fact caused by vehicles traversing the sidewalk in front of the driveway. Even had he so averred, he provides no data that would support such a conclusion. He did not indicate that he performed any personal inspection of the site, or that he performed any soil compaction, load or stress analysis or any other tests or measurements, and did not describe what observations he made concerning the morphological state of the area. He does not even aver that the height differential was 5 inches, through any measurements or otherwise, but merely relates what plaintiff testified was her estimate of the height differential.

It is obvious even to a layperson that a height differential between two adjacent sidewalk flags can only be the result of either the level of one flag being lower that the surrounding sidewalk or being higher than the surrounding sidewalk, or a combination of a sidewalk flag being depressed and an adjacent one being raised from the surrounding sidewalk. In examining the photographs annexed to plaintiff's opposition as Exhibit "C", the

Court notes that the subject sidewalk flag upon which plaintiff allegedly tripped is higher than the adjoining flag in front of the driveway – consistent with plaintiff's estimate of the height differential as 4-5 inches – at the point where it meets the curbside lawn strip which contains a tree the roots of which, clearly visible, extend to the sidewalk. The height differential gradually tapers down to a much smaller elevation on the left where it meets the front lawn of movants' premises. This flag is flush with the sidewalk flag that abuts it on the other side. Both of these flags abut the curbside tree. Said flags are both pitched to the left, being higher where they meet the curbside tree and lawn strip and lower where they meet the front lawn of movants' home. The left-hand photograph on the second page of Exhibit "C", the photograph on the 11th page and the photograph on the 14th page of said Exhibit (the pages of photographs contained in Exhibit "C" are not numbered or marked in any way) show a view of the sidewalk from the opposite direction. The flag abutting the subject flag upon which plaintiff allegedly tripped is also raised from the flag next to it, which is clearly not on a driveway. This flag and the one next to it have red spray paint markings on them. The vertical edge created by the height differential appears to have been filled in with a cement patch in an obvious attempt to create a ramp or more gradual slope for the benefit of pedestrians. The height differential is less than that between the subject flag and the one on the driveway, but it is raised nevertheless, and it is flush with and at the same slope as the subject flag upon which plaintiff allegedly tripped. Silberman failed to note any of this, and failed to rule out that the height differential between the flag in front of the driveway and the adjacent one was the result of the latter being elevated from the surrounding sidewalk as opposed to the flag in front of the sidewalk being depressed.

Thus, Silberman sets forth no objective basis to support his conclusory and vague assertion that the photographs "indicate" that the height differential between the driveway and the adjacent sidewalk flag "was either caused or exacerbated" by the use of the sidewalk as a driveway.

Silberman's also noted that the photographs also depict concrete debris (shown strewn in the curbside lawn strip in the photographs) and that such indicates that an improper attempt had been made to create a ramp between the raised edge of the flag and the abutting flag in front of the driveway to provide a smoother, less abrupt transition between the two sidewalk elevations, that the manner in which the work was done made the concrete patch prone to being dislodged and caused it to deteriorate over time and that what was left of it was removed. He opined that the correct way to have remedied the condition was to replace the full flag of the

sidewalk. Silberman's observation and opinion in regard to what incompetent efforts appear to have been attemped in the past to fill in the base of the sidewalk rise with a cement patch to ameliorate the tripping hazard created by the height difference, however, is irrelevant to the present matter, since plaintiff alleges that her accident was caused by tripping upon the raised edge of the sidewalk flag, not upon any cement patchwork or upon the concrete debris.

Since plaintiff does not dispute that movants fall under the exception to liability under §7-210 of the Administrative Code and that they did not create the raised sidewalk condition, and since she has failed to raise any issue of fact through any competent evidence that movants caused the condition by a special use, movants are entitled to summary judgment as a matter of law.

Accordingly, the motion is granted and the complaint is dismissed against movants.

Dated: September 15, 2011

KEVIN J. KERRIGAN, J.S.C.