[*1] SCANNED ON 8/22/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART J

Index Number : 114399/2008
HERVAS, REBECCA
vs.
LLSJ REALTY
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT CAL: # 46

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
AUG 22 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8-15-13

AUG 15 2013

HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

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: Part 5

----------X

REBECCA HERVAS,

Plaintiff,

-against-

LLSJ REALTY CORP., YAN KAN WONG, WONG REALTY CORP., J&E JEWELRY and THE CITY OF NEW YORK,

Defendants.

----------X

DECISION/ORDER
Index No. 114399/2008
Seq. No. 004

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.1,2 (Ex. A-U).
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	..3,4 (Ex. A-I).
REPLYING AFFIDAVITS.....	.....5(Ex. A)....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants Yan Kan Wong Realty Corp., i/s/h/a Yan Kan Wong and Wong Realty, (collectively "Wong"), move pursuant to CPLR§§ 3211 and 3212, for summary judgment dismissing plaintiff's claims, all cross-claims and counterclaims, with prejudice as a matter of law. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court **denies** the instant motion.

Factual and procedural statement:

The instant action arises from an incident that occurred on November 16, 2007, on the sidewalk and adjoining pedestrian ramp abutting the premises located at 201 Canal Street, New York County. Plaintiff alleges that she was walking on the sidewalk of Mulberry Street, when she was propelled to the ground as a result of the "defective condition of concrete," thereby sustaining personal injuries.

Wong moves for summary judgment, alleging that the condition which allegedly caused plaintiff to fall was part of the pedestrian ramp, also known as a curb cut, and not the sidewalk. Therefore, it argues that it is actually the City who owes a duty to plaintiff, based on the fact that the City is responsible for maintaining pedestrian ramps as a matter of law.

Factual and Procedural Background:

Plaintiff commenced the action by filing a Summons and Complaint in Queens County, Supreme Court, on February 20, 2008. Issue was joined by Wong's filing of its Answer with cross-claims on April 1, 2008. Co-defendant LLSJ Realty Corp., ("LLSJ"), served its Answer with cross-claims on or about March 11, 2008. Co-defendant J&E Jewelry, ("J&E"), served its Answer with cross-claims on or about March15, 2008.

On August 14, 2008, LLSJ commenced a third party action against the City of New York ("City"). On September 17, 2008, Wong commenced a second third party action against the City, who then served its Answer and cross-claims on the first third party action on September 12, 2008, and to the second third party action on October 2008. Plaintiff commenced an action against the City by filing a Summons and Complaint in New York County Supreme Court on October 17, 2008. The City filed its Answer to plaintiff's action on or about November 18, 2008.

Consequently, pursuant to the Order of Justice Howard Lane, dated April 1, 2009, the Queen's and New York County actions were consolidated. Venue was then transferred to New York County. On September 3, 2008, plaintiff testified at a hearing pursuant to General Municipal Law §50-h. At said hearing, plaintiff testified in pertinent part, that she was walking along Mulberry Street, towards Canal Street with her friend Linda Thorp Halford, when she tripped over a raised area. She also testified that this particular area was approximately a half a foot away from the curb to Mulberry Street. Plaintiff identified that location of the accident on a photograph which she was shown during the hearing. (Aff. in Support, Ex. M). Similarly, during her deposition held on March 11, 2011, she testified that she tripped near the curb while approaching the intersection of Canal and Mulberry. Additional depositions were taken of non-party witness Linda Thorp-Halford, and of Eduard Velez, building manager for Wong.

On January 10, 2011, Wong served a Notice to Admit on the City. Wong argues that because the City failed to respond to same, the statements contained therein are deemed admitted pursuant to CPLR§ 3123(a). Additionally, Wong served the City with the affidavit of Scott E. Derector, a licensed engineer. In his affidavit, Mr. Derector stated that upon conducting an on-site inspection of the subject sidewalk and pedestrian ramp, he concluded that the plaintiff had tripped over a raised piece of concrete which was clearly a part of the pedestrian ramp. (*Id.* Ex. U). Thereafter, the Note of Issue was filed on September 12, 2012, and the within motion was served and filed on October 25, 2012.

Positions of the parties:

The gravamen of Wong's argument is that it cannot be held responsible for plaintiff's injury because it had no duty to maintain the pedestrian walkway, in that such duty falls squarely on the

City. Therefore, the case necessitates dismissal as a matter of law. Wong argues that plaintiff clearly fell over the raised pedestrian ramp at the location where the ramp meets the sidewalk. It refers the Court to the photographs referenced above. Additionally, Wong refers to the aforementioned affidavit of Mr. Derector, as well as to the statements contained in its Notice to Admit, in further support of its position that plaintiff tripped over the raised side of the pedestrian walkway and not a lowered sidewalk flagstone, as she now maintains.

In her Affirmation in Opposition, plaintiff argues that contrary to Wong's position, it was not a raised pedestrian ramp, but rather a lowered sidewalk that caused her to trip. In support of her position, she retained William Marletta, Ph.D., a certified safety specialist, who inspected the subject area on or about November 16, 2012. After his inspection, and after a review of the various photographs taken of the subject area, (which are appended to the report), Marletta issued his report. (Aff. in Opp. Ex. E).

In his report, Marletta opines that the sidewalk immediately adjacent to the ramp had settled, causing it to become uneven with the pedestrian ramp, which ultimately caused plaintiff's injury. He additionally opines that had the ramp actually been raised, the bottom of it would not have been even with the street. However, it should be noted that all the photographs reviewed by the Court indicate that the bottom of the ramp was, in fact, even with the street. Additionally, Marletta takes strong issue with Derector's findings. Plaintiff argues that at the very least, Marletta's testimony raises issues of fact sufficient to defeat summary judgment. Plaintiff also notes that Marletta determined that, following repairs made to the area by the City, Mr. Velez admitted that he also made subsequent repairs to the area on Wong's behalf.

Plaintiff argues that although repairs made after the accident are not admissible as to the question of negligence, they are relevant to the question of who exercised control and ownership over the ramp and its surrounding area. (*Id.*p.6). Thus, plaintiff argues that pursuant to Administrative Code §7-201, Wong is responsible for the sidewalk adjacent to the ramp.

In response, Wong argues that plaintiff now impermissibly asserts an entirely new theory of liability. Wong adamantly maintains that this potential theory of liability was never raised in plaintiff's Bill of Particulars. Thus, pursuant to CPLR§ 3043 (a)(3), she is precluded from raising it now. Wong proffers *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986] and *Crawford v. Smithtown Cent. School Dist.*, 91 A.D.3d 899 [2d Dept. 2012]), as support for its position that plaintiff cannot now raise, for the first time, in response to his motion, a new theory of liability. This is especially true given the protracted delay in presenting it. Wong insists that it must be deemed insufficient to raise a triable issue of fact. Wong further argues that the photographs relied upon by Marletta are also inadmissible because they were never exchanged during discovery. (Aff. in Reply, ¶30).

Moreover, Wong argues that Marletta's affidavit is inadmissible because plaintiff failed to "disclose the expert until the filing of his affirmation in opposition, after the note of issue and certificate of readiness had been filed," (*Id.* ¶19; see also *Scott v. Westmore Fuel Co. Inc.*, 96 A.D.3d 520[1st Dept. 2012]). Finally Wong argues that Marletta's opinion must be dismissed as it is merely speculative and conclusory. (*Id.* ¶¶ 21-29).

Conclusions of Law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson*

v. Waisman, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D. 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

Wong argues that pursuant to Administrative Code§ 7-201, it can not be held responsible for the defects of the pedestrian ramp which caused plaintiff's injuries.

Section 7-201 states in pertinent part:

> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk....

However, because this section created liability where none existed before, New York Courts have been reluctant to expand this liability. In *Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d 517, 521 [2008], the Court of Appeals stated "[i]n reaching this result we are guided by the principal that

'legislative enactments in derogation of common law, and especially those creating liability where none previously existed' must be strictly construed" (*Blue Cross & Blue Shield of N.J. Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 206[2004] [internal quotation marks and citation omitted]; see also McKinney's Cons Laws of NY, Book 1, Statutes § 301[c]). Therefore, since §7-201 does not include pedestrian ramps as being the responsibility of the abutting land owner, the City remains responsible for them (see also *Vidakovic v. City of New York*, 84 A.D.3d 1357, 1357-1358 [2d Dept. 2011]; *Gary v. 101 Owners Corp.*, 89 A.D.3d 627, 627-628 [1st Dept. 2011]; *Ortiz v. City of New York*, 67 A.D.3d 21, 23 [1st Dept. 2009], *revd. on other grounds* 14 N.Y.3d 779 [2010] and *Feeley v. 136 East 38th Street, LLC*, 2013 N.Y. Slip Op. 31459(U)).

As an initial matter, the Court finds Wong's argument that plaintiff is now asserting a new theory of liability which was never raised in her Bill of Particulars, to be factually inaccurate. A review of said Verified Bill of Particulars, indicates that plaintiff's allegations include injuries caused by a depressed sidewalk . (Aff. in Support. Ex. N ¶21). The unsafe conditions that plaintiff alleges caused the injuries include "in causing, permitting and/or allowing the sidewalk and/or curb to be and remain broken, rutted, raised, cracked, depressed, and/or uneven..." Thus, plaintiff is not raising any new theory of liability.

Therefore, the relevant underlying issue to be determined is whether the pedestrian ramp was raised or whether the sidewalk was depressed. In an effort to address this issue, both parties have submitted the opinions of expert witnesses. Wong urges this Court to find that plaintiff's affidavit is inadmissable based on the fact that she failed to disclose her expert witness pursuant to CPLR § 3101(d)(1)(i), until after the filing of the Note of Issue and Certificate of Readiness, filed on September 12, 2012.

While Marletta's report is not dated, the date that it was notarized was January 14, 2013. It was presumably first served on Wong, appended to plaintiff's Affirmation in Opposition, dated January 15, 2013. Wong additionally argues that this expert witness report must be deemed inadmissible because it was produced only as an attempt to oppose Wong's summary judgment motion. Wong further argues that the expert witness statement is speculative and conclusory and therefore does not raise sufficient facts to defeat its summary judgment motion.

As stated in *Colon v. Chelsea Piers Mgt., Inc.*, 50 A.D.3d 616, 617 [2d Dept. 2008], "[t]he affidavit of the expert ...which was submitted by the plaintiffs solely to oppose the defendant's motion for summary judgment, was not admissible because the plaintiffs failed to identify the expert during pretrial disclosure and served the affidavit after filing a note of issue and certificate of readiness attesting to the completion of discovery" (see also *Safrin v DST Russian & Turkish Bath, Inc.*, 16 A.D.3d 656 [2d Dept. 2005];*Gralnik v Brighton Beach Assoc.*, 3 A.D.3d 518 [2d Dept. 2004]).

The court notes that while New York Courts have often used their discretion in determining whether to disallow such a late filing of expert witness statements, it also notes that Wong only served and filed its own "Expert Disclosure Pursuant to C.P.L.R. §3101 (d), on October 2, 2012, also after the filing of the Note of Issue. Therefore, in accordance with the old adage that "what is good for the goose is also good for the gander," the Court deems both expert witnesses' opinions as admissible.

Furthermore, while both sides argue that the other's expert opinions are speculative and not based on fact, the Court finds that when faced with warring experts, the wisest path to take is to present both positions to the jury. As has been often stated, the Court's role in a summary judgment

motion is issue finding, not issue determination (see *Esteve v. Abad*, 271 A.D. 1st Dept. 1947]).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants Yan Kan Wong Realty Corp., i/s/h/a Yan Kan Wong and Wong Realty's motion for summary judgment dismissing all claims, cross-claims and counterclaims is denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: August 15, 2013

AUG 15 2013

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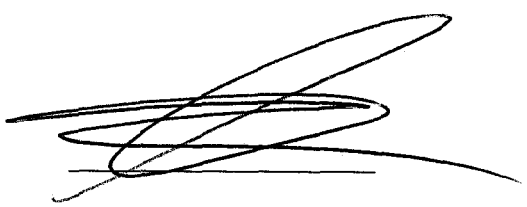

Hon. Kathryn E. Freed

J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

AUG 22 2013

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