

**Hervas v LLSJ Realty Corp.**

2013 NY Slip Op 31970(U)

August 15, 2013

Supreme Court, New York County

Docket Number: 114399/2008

Judge: Kathryn E. Freed

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

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PRESENT: \_\_\_\_\_  
Justice

PART ✓

Index Number : 114399/2008  
HERVAS, REBECCA  
vs.  
LLSJ REALTY  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT *CAL. # 47*

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

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

Dated: 8-15-13

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

- 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

**FILED**

**AUG 22 2013**

**COUNTY CLERK'S OFFICE  
NEW YORK**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 5

-----X  
REBECCA HERVAS,

Plaintiff,

-against-

DECISION/ORDER  
Index No. 114399/2008  
Seq. Nos. 005

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

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

Defendants.

-----X  
HON. KATHRYN E. FREED:

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

PAPERS	NUMBERED
<u>Sequence 005</u>	
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.1,2 (Ex. A-J)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	..3,4 (Ex. A-I)
REPLYING AFFIDAVITS.....	.....5.....
 <u>Sequence 006</u>	
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	..1,2 (Ex. A-C)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	..3,4 (Ex. A-I)
REPLYING AFFIDAVITS.....	.....5.....

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

Defendant LLSJ Realty Corporation, (herein after "LLSJ"), moves pursuant to CPLR §3212,  
for summary judgment dismissing plaintiff's claims, all cross-claims and counterclaims. Defendant

J&E Jewelry, (“J&E”) joins in the motion with LLSJ. Plaintiff opposes.

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

The instant action arises from an incident occurring 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.

This motion is made along with a motion by defendants Yan Kan Wong Realty Corp., i/s/h/a Yan Kan Wong and Wong Realty, (collectively “Wong”), who moved 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. Wong primarily moved for summary judgment, alleging that the defective condition which caused plaintiff’s fall was part of the pedestrian ramp, also known as a curb cut, and not the sidewalk. Therefore, it was the City’s responsibility’s to oversee and maintain said ramp.

LLSJ adopts Wong’s summary judgment motion, and also raises additional facts in support of its summary judgment motion. Specifically, LLSJ moves for summary judgment because there is no evidence which indicates with any semblance of certainty that it ever did any sidewalk repairs. Nor is there any evidence that LLSJ had any responsibility to maintain or repair said sidewalk.

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 March 15, 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. ( See Rach Aff. in Support, Ex. G). 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.

Thereafter, the Note of Issue was filed on September 12, 2012, and the summary judgment motion by Wong, was served and filed on October 25, 2012. The within motion by LLSJ, was served on all parties by mail on November 13, 2012 and filed on November 19, 2012. The within

motion by J&E was served on all parties by mail on January 3, 2013 and filed on January 4, 2013.

Positions of the parties:

In addition to adopting the Wong's arguments as set forth in this Court's decision in Sequence 004, LLSJ argues that even if Wong is not successful in its summary judgment motion, the action against LLSJ warrants dismissal because it is merely a tenant of Wong. As such, it has no responsibility for repair or maintenance of the sidewalk. LLSJ refers to the deposition of Judy Lee, conducted on April 13, 2010. ( See Rach Aff. in Support, Ex. H). Ms. Lee testified at a deposition on behalf of defendants LLSJ and J&E, in her capacity as partner of LLSJ and owner of J&E. She testified that she had operated a business out of 201 Canal Street for over twenty years. She also testified that she rented space as LLSJ from Yan Kan Wong Realty and subleased said space to J&E. (Ex. H ¶¶ 14-17, 23). Ms. Lee specifically testified that neither LLSJ or J&E ever had any "duty or responsibility to maintain or perform repairs relative to the property. ( *Id.* ¶28).

Mr. Eduard Velez testified on behalf of Wong Realty on April 13, 2010. He testified that he was the manager of the subject property for Wong Realty and that he was present on the property at least once every day. ( Ex. I, ¶¶ 9-14). He also testified that he was responsible for making any necessary repairs and made repairs to the sidewalk near where the subject accident occurred. However, these repairs were done sometime after that date. (*Id.* ¶¶ 34-35). Mr. Velez further testified that he had never received any complaints about any part of the sidewalk at any time prior to the incident. (*Id.* ¶32).

Based on the aforementioned, LLSJ and J&E argue that plaintiff has failed to present any evidence in admissible form, which demonstrates that either of them had a duty to maintain the sidewalk. Additionally, plaintiff has failed to submit any evidence to show that LLSJ or J&E ever

performed any repair work to the sidewalk. Additionally, she has failed to present any evidence that these defendants in any way created the sidewalk condition which caused plaintiff's injury. Therefore, defendants insist that plaintiff has failed to establish a prima facie showing that they were responsible for her injuries, necessitating the dismissal of the Complaint and any cross-claims against them.

It should be noted that in her Affirmation in Opposition, plaintiff referenced all defendants generally. However, other than this general reference, plaintiff fails to address the issues raised by LLSJ and J&E, individually.

#### 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 [1<sup>st</sup> 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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept. 2002] ).

In the instant matter, plaintiff fails to establish a prima facie case of negligence against LLSJ or J&E. Since there are no material issues of fact in dispute as to their lack of responsibility for plaintiff's accident, summary judgment is warranted.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that LLSJ Realty Corporation and J&E Jewelrys' motions for summary judgment are granted; and it is further

ORDERED that any cross-claims between the various defendants pursuant to the lease or any other obligations that may arise between them, ( assuming there are any), are preserved, and it is further

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

DATED: August 15, 2013

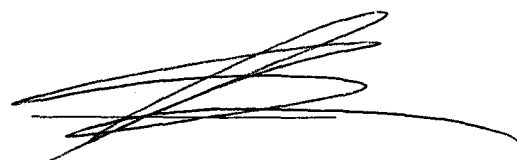
ENTER:

AUG 15 2013

**FILED**

AUG 22 2013

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NEW YORK



Hon. Kathryn E. Freed  
J.S.C.  
**HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT**