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

PRESENT : DONNA M. MILLS **PART** 21

Justice

GARCIA-MARTINEZ, HAYDEE

INDEX NO. 101469/05

Plaintiff,

-v-

MOTION DATE

MOTION SEQ. NO. 001

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

MOTION CAL NO.

The following papers, numbered 1 to 6 were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1+6
Answering Affidavits– Exhibits	2,3+4
Replying Affidavits	5

CROSS-MOTION: ✓ YES ___ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 6/13/08

J.S.C.

Check one: ___ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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Haydee Garcia-Martinez,

Plaintiff,

Index No. 101469/05

- against-

The City of New York, New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, 1873 Amsterdam Realty and 1871 Moy Realty Corp.,

Defendants.

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Donna Mills, J.:

In this negligence action, motion sequence numbers 001 and 002 are consolidated and disposed of in accordance with the following decision and order. Under motion sequence #001, co-defendant 1873 Amsterdam Realty Corp. (Amsterdam Realty) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all claims and cross claims. Co-defendant City of New York (the City) cross-moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross claims. Under motion sequence #002, co-defendants New York City Transit Authority (NYCTA), and Manhattan and Bronx Surface Transit Operating Authority(MABSTOA) move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint, all claims and cross claims. Co-defendant 1871 Moy Realty Corp. (Moy Realty) cross-moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all claims and cross claims. The plaintiff discontinued her action against the City but not against the remaining co-defendants. Based upon the following facts and law, MABSTOA's and NYCTA's motion should be granted under motion sequence # 002, but all other motions under motion

sequence # 001 and # 002 should be denied, as a triable question of fact exists whether NYCAC § 7-210 still imposes a duty on the City to maintain bus shelters and bus stops.

Plaintiff sustained an injury to her person, at 1:30 P.M. on February 9, 2004, just after she was discharged from a NYCTA bus. Plaintiff, then 50 years old, suffered a fracture, requiring surgery and pinning, plus multiple disc herniations. Her injury occurred after she alighted from the bus and then, either after taking her first step, or a few steps, off the bus, slipped on ice at the bus stop location either in the street, on the curb, or on the sidewalk by the bus stop. Her husband, who also exited from the same bus ahead of her, did not slip and was not injured.

It is undisputed that there is a designated bus stop located directly in front of and in between the abutting premises identified as 1871 and 1873 Amsterdam Avenue. It is also undisputed that it had snowed several days prior to the accident. The abutting owner of 1871 Amsterdam Avenue is Moy Realty, and the abutting owner of 1873 Amsterdam Avenue is Amsterdam Realty.

Pedro Ramos, who cleans the sidewalk for Moy Realty, appeared for a deposition on its behalf. At his deposition, Ramos testified that, prior to the date of the incident, he had shoveled snow from the building to the curb, but stated that he did not push snow into the street at the bus stop and that he used salt.

The accident occurred after the implementation of the new sidewalk law, Administrative Code of the City of New York (NYCAC) § 7-210, which now places the burden on the abutting landowner to maintain the sidewalk in a safe condition from the building to the street curb. NYCAC § 7-210 (b) provides in pertinent part:

> 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 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. This subdivision shall not apply to one-, two- or three-family residential real property that is (I) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

The City's position is simply that, subsequent to the implementation of the new sidewalk law, the abutting landowners became responsible for the removal of snow and ice, pursuant to NYCAC § 7-210, which it alleges, by way of the unique fact pattern in this case, includes the bus stop and the immediate area surrounding the bus stop.

Moy Realty and Amsterdam Realty, in essence, present identical arguments in opposition to the City's summary judgment motion, and in support of that portion of their summary judgment motions alleging it is not their duty to maintain bus stops. While they acknowledge that it is their responsibility as abutting landowners, pursuant to NYCAC § 7-210, to keep the sidewalks free of snow and ice, they maintain that their duty exists only for that portion of the sidewalk extending from the edge of the abutting property to the curb and does not include the area where the bus stop is located. They oppose the City's cross motion on two bases. The first basis for their opposition is their position that, if the plaintiff stepped on the curb and slipped there, then NYCAC § 7-210 is inapplicable, pursuant to NYCAC § 19-101 [d]. According to NYCAC § 19-101 (d), the sidewalk does not include the curb (*see Vucetovic v Epsom Downs, Inc.*, 45 AD3d 28, 31 [1st Dept 2007] *decision to appeal granted* 9 NY2d 1013 [2007] *affirmed* 2008 WL 2242308 [2008]). NYCAC 19-101 (d) defines sidewalk as:

> that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians.

The second basis for their opposition is that, while NYCAC § 7-210 does impose on abutting building owners the responsibility to clear sidewalks in front of the abutting premise of snow and ice, the statute does not also impose on the abutting landowner the City 's prior NYCAC § 7-210 duty to maintain a bus shelter or a bus stop area, should there be one located in

front of that particular abutting landowner's abutting premise. Their position is that this was a New York City Department of Sanitation (Department of Sanitation) responsibility prior to the enactment of NYCAC § 7-210 and it still remains a Department of Sanitation responsibility after the enactment of NYCAC § 7-210.

The court's responsibility to determine whether there is a duty "involves a very delicate balancing of such considerations as logic, common sense, science and public policy (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d 106, 108 [cite omitted] [1st Dept 1987, *affd* 72 NY2d 888 [1988])" (*Kulp v The City of New York*, 18 Misc 3d 1140A [Sup Ct, NY County, 2008, Feinman, J.]; 2008 WL 538671 at 4). Prior to the enactment of the new sidewalk law, NYCAC § 7-210, it was the City's duty to keep its sidewalks "reasonably free from snow and ice and [the City] could be held liable for the negligent failure to do so (*Schlausky v City of NY*, 41 AD2d 156, 157-158 [(1st Dept) 1973]" (*id.* at 4). After the enactment of NYCAC § 7-210, the duty to keep sidewalks clear of snow and ice was transferred to that of the abutting landowner (NYCAC § 7-210 [b], *supra*).

"The threshold question in a tort action is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002])" (*Kulp v City of New York,* 18 Misc 3d at 4). Addressing the proposition that maintaining the bus shelters and bus stops is still a City responsibility, the court notes that, prior to the enactment of NYCAC § 7-210, it was the City that usually had the responsibility for maintaining the bus shelters (*see Papts Food Corp. v City of New York*, 107 AD2d 643, 645 [1st Dept 1985]). In *Papts*, the court pointed out that, pursuant to NYC Charter 2903 (d) (2) and *Bus Top Shelters, Inc. v City of New York* (99 Misc 2d 198, 202 [Sup Ct, Special Term, NY County 1978]), the City had the authority to establish, determine and maintain the location of bus stops and bus shelters (*id.* at 645; *see also* New York City Charter § 378 [b]). Moreover, regarding the removal of ice and snow from sidewalks, it is the City that establishes the priorities for clearing snow

from areas of heavy pedestrian traffic, such as shopping centers, main thoroughfares, cross walks and bus stops (*see Valentine v The City of New York,* 86 AD2d 381, 387 [1st Dept 1982]). This court notes that, in *Papts*, the Appellate Division did state that NYCAC § 755 (2)-7.0, a section unrelated but similar in composition to NYCAC § 7-210, provides that "[e]very owner, lessee, tenant, occupant or person in charge of any building or premises shall keep ... said sidewalks ... free from ... litter ... Such persons shall also remove ... litter ... between the curbstone abutting the building or premises and the roadway area extending one and one-half feet from the curbstones into the street on which the building or premises front" (*see Papts Food Corp. v City of New York*, 107 AD2d at 644).

The Appellate Division recently held in *Cabrera v City of New York* (45 AD3d 455 [1st Dept 2007]) that the "**duty to maintain public sidewalks**, and roadways -including those **adjacent to bus stops-** in a reasonably safe condition and good repair, free from any defect, **falls upon the City**" (*id.* at 456) [emphasis added]. It is axiomatic that not all abutting landowners have bus shelters or bus stops on the sidewalk in front of their abutting premise. But for those who do, such as Moy Realty and Amsterdam Realty, other than making the conclusory statement that, subsequent to the enactment of NYCAC § 7-210, maintenance of the bus shelter and bus stop areas is now the responsibility of the abutting landowners, the City has not provided proof to substantiate this assertion. By analogy, a similar post NYCAC § 7-210 issue of whether or not it is an abutting landowner's responsibility to maintain tree wells and the surrounding sidewalk areas was raised and recently decided by the New York Court of Appeals (*see Vucetovic v Epsom Downs, Inc.*, 2008 WL 22423808). The Court of Appeals decision provides in pertinent part:

Acknowledging that this case presents a close question, we are constrained to agree with the courts below that section 7-210 does not impose civil liability on property owners for injuries

that occur in City-owned tree wells. In reaching this result, we are guided by the principle that "legislative enactments in derogation of common law, and especially those creating liability where none previously existed," must be strictly construed [cites omitted].

Here, sections 19-152 and 16-123, the provisions whose language section 7-210 tracks, contemplate the installation, maintenance, repair and clearing of sidewalks or sidewalk flags. Significantly, tree wells are not mentioned in sections 19-152, 16-123, or 7-210. And while section 7-210 employs the phrase "shall include but not limited to," this clause applies to the types of maintenance work to be performed, not the specific features of what constitutes a sidewalk. Given the statutory silence and the absence of any discussion of tree wells in the legislative history, it seems evident that the City Council did not consider the issue of tree well liability when it drafted section 7-210. If the City Council desired to shift liability for accidents involving tree wells exclusively to abutting landowners in derogation of the common law, it needed to use specific and clear language to accomplish this goal

(*id.*).

At this juncture, Moy Realty and Amsterdam Realty have raised the question of whether or not the enactment of NYCAC § 7-210 has also imposed the duty on them to keep bus shelters or bus stops and the immediate area around them clear of ice and snow, or does this duty still remain with the City. In reaching that result, it was:

> guided by the principle that "legislative enactments in derogation of common law, and especially those creating liability where none previously existed," must be strictly construed

(*see Vucetovic v Epsom Downs, Inc.*, 2008 WL 22423808). The Court of Appeals held, in Vucetovic, that NYCAC § 7-210 does not impose civil liability on property owners for injuries that occur in "City owned" tree wells [emphasis added] because tree wells are not specifically mentioned in NYCAC § 7-210.

By comparison, NYCAC § 7-210 does not specifically state that abutting landowners are responsible for the maintenance of bus stops and bus shelters on sidewalks. As a matter of law, based on the determination of the Court of Appeals in Vucetovic, this court finds that NYCAC § 7-210 does not impose the duty upon abutting landowners the responsibility for maintenance of snow and ice at a bus stop or bus shelter. However, the record does indicate that some sort of

maintenance of snow and ice occurred at and near the bus stop where plaintiff was injured. A triable question of fact has been raised as to what entity cleared the three foot path at the bus stop, that being the City or one of the abutting landowners (*see Schlausky v City of N.Y.*, 41 AD2d at 157-158). Though an abutting landowner may not have the duty to remove snow and ice, where the attempted removal makes the condition more hazardous, liability could be imposed (*see Gerber v City of NY*, 280 AD2d 289, 289 [1st Dept 2001]). Where a triable issue of fact exists, summary judgment must be denied (*Andre v Pomeroy*, 35 NY2d 361 [1974]).

MABSTOA is a subsidiary of co-defendant NYCTA and is not a City agency or an entity synonymous with the City (*see Papts Food Corp. v City of New York*, 107 AD2d at 645). Counsel for MABSTOA and NYCTA cites to numerous cases for the proposition that, while it is their duty to deliver a bus passenger safely to his/her destination, it is not their duty to maintain the bus stop or the area surrounding the bus stop. Their duty ceases once the passenger steps off the bus (*see Otonoga v City of New York*, 234 AD2d 592, 593 [2d Dept 1996]; *Blye v Manhattan and Bronx Surface Tr. Operating Auth.*, 124 AD2d 106, 109 [1st Dept 1987]; and *Douglas v New York City Tr. Auth.*, 19 AD2d 707 [1st Dept 1963]). They further point to New York City Charter § 2904, New York Administrative Code § 693-6.0, *D'Ambrosio v City of New York* (55 NY2d 454, 457-458 [1982]), and *Papts Food Corporation v City of New York*, (107 AD2d at 645) for the proposition that the City's duty to maintain and repair public sidewalks is a duty that may only be shared with an abutting landowner. None of the other co-defendants oppose MABSTOA's and NYCTA's motion.

Plaintiff opposes MABSTOA's and NYCTA's motion and cites to *Tolbert v New York City Transit Authority* (256 AD2d 171, 171 [1st Dept 1998]); *Gross v New York City Transit Authority* (256 AD2d 128, 129 [1st Dept 1998]); *Hickey v Manhattan & Bronx Surface Operating*

Authority (163 AD2d 262, 262 [1st Dept 1990]); *Miller v Fernan* (73 NY2d 844, 846 [1988]); and *Jenkins v New York City Transit Authority* (262 AD2d 455 [2d Dept 1999]) in support of her opposition. Her reliance on *Tolbert, Gross, Hickey* and *Miller* is misplaced and is distinguishable from the case at hand, in that, here, the bus driver dropped the passenger off at the allocated bus stop, which had a three-foot-wide cleared path, whereas in those cited cases the common carrier either did not discharge the passenger at the allocated bus stop or dropped the passenger off directly in front of a pothole. Her reliance on *Jenkins* is similarly misplaced in that the Appellate Division, in *Jenkins*, citing to *Miller v Fernan*, held that a "common carrier owes a duty to an exiting passenger to stop at a place where the passenger may safely disembark and leave the area" (*Jenkins v New York City Transit Authority*, *262 AD2d* at 455). Here, the plaintiff's husband safely exited ahead of her at the exact same spot where plaintiff disembarked, whereas the plaintiff slipped and fell. Based on the facts and the law, MABSTOA and NYCTA have established that they are entitled to summary judgment.

The complaint states that plaintiff's injury was caused by the negligent maintenance of a "sidewalk/curb." To establish a prima facie case of negligence, the plaintiff must establish that a defendant owed a duty of reasonable care, that there was a breach of that duty and that she suffered an injury which proximately resulted from the breach of a duty (*Kulp v City of New York,* 18 Misc 3d at 3). At this point there is a duty to maintain the bus stop sidewalk area but the question exists whether that duty was the City's, Moy Realty's, or Amsterdam Realty's.

Regardless of whose duty it was to maintain the sidewalk at the bus stop location, the City, Moy Realty and Amsterdam Realty all argue that plaintiff's complaint should be dismissed on the premise that plaintiff cannot establish exactly where she fell, and thus, has not made out a prima facie case of negligence (*see Bernstein v City of New York*, 69 NY2d 1020, 1021-1022

[1987]; *compare McNally v Sabban*, 32 AD3d 340, 341 [1st Dept 2006]; *but see Douglas v New York City Tr. Auth.*, 19 AD2d at 707-708). A 50-h hearing was held at the NYCTA offices on July 6, 2004. A deposition of the plaintiff was also held on October 19, 2006. The 50-h hearing and the deposition addressed, amongst other things, the issue of the location of the site of plaintiff's injury. The record reveals that an interpreter was present at both, as the plaintiff did not speak English, and that a number of times the plaintiff indicated that she did not understand a question asked about the location or the nature of her accident.

Copies of the 50-h hearing and the deposition transcripts were provided to the court, which it read and reviewed. This court's review of the 50-h hearing found plaintiff's relevant testimony about her fall on pages 16, 17 and 19 of that document. At plaintiff's 50-h hearing, plaintiff stated that she fell in the street after she stepped off the bus. In pertinent part she stated that she exited from the front of the bus and either she stepped from the bottom step of the bus to the sidewalk and then slipped, or, she had taken two steps from the bus before her accident took place. Her 50-h testimony also indicated that both feet were off the bus and her right foot made contact with the street. She also stated that she put her other foot towards the sidewalk and then she slipped on the ice that was on the sidewalk.

A review of her deposition testimony found relevant testimony related to her slip and fall on pages 27-31, 32, 52, 63, 68, 78, 87-89, 93 and 102-103. In pertinent part, she stated that she fell on the sidewalk. She stated that there was no snow on the curb but there was ice on the sidewalk. She stated that the steps of the bus from which she exited were directly in the middle of a three-foot-wide path that was parallel to the roadway. As she exited there was a pole with a bus stop sign to her right and mounds of snow, about three feet long and two to three inches deep, to her right and her left [the right side and the left side of the cleared three foot path at the

bus stop]. The cleared path had ice on it which she did not see until after she fell. On pages 102 to 103 of the deposition transcript, she stated that when she got off the bus she took two steps in the street and after the first step onto the sidewalk she slipped.

In a March 10, 2008 affidavit attached to her March 12, 2008 Affirmation in Opposition to Amsterdam Realty's December 20, 2007 Motion and her March 19, 2008 Affirmation in Opposition to Moy Realty's March 14, 2008 Cross Motion, plaintiff unequivocally states that she slipped on ice on the sidewalk of a path between two mounds of snow after being discharged at the M101 bus stop in front of 1871 and 1873 Amsterdam Avenue.

Based on the plaintiff's testimonies at the 50-h hearing and her deposition this court finds that plaintiff has established a prima facie case of negligence. The court reiterates that a question of fact exists as to who cleared the three foot path on the sidewalk area immediately surrounding the bus stop where plaintiff was injured. This court notes plaintiff's argument that Moy Realty's cross motion is untimely pursuant to the Court of Appeal's standards as delineated in *Brill v City of New York* (2 NY3d 648 [2004]), but finds that matter is moot in light of this court's decision to deny summary judgment to Moy Realty.

Accordingly, based on the aforesaid, it is

ORDERED that Manhattan and Bronx Surface Transit Operating Authority's and New York City Transit Authority's joint motion for summary judgment (sequence #002) is granted and the complaint is hereby severed and dismissed as against Manhattan and Bronx Surface Transit Operating Authority and New York City Transit Authority, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that Amsterdam Realty's motion (sequence # 001) is denied, and it is further

ORDERED that the City's cross motion (sequence # 001) is denied, and it is further

ORDERED that Moy Realty's cross motion (sequence # 002) is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 6/13/08

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.