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

PRESENT: Hon. MICHAEL D. STALLMAN, Justice PART 21

Index Number : 117950/2006
SEHNERT, BARBARA
VS.
NYCTA
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. 117950/2006
MOTION DATE 11/18/10
MOTION SEQ. NO. 003
MOTION CAL. NO. 12

The following papers, numbered 1 to 11 were read on this motion for summary judgment

	Papers Numbered
Notice of Motion— Affirmation — Exhibits 1-17	1-2
Notice of Cross Motion— Affirmation — Exhibits A-G	3-4
Reply Affirmation and Affirmation in Opposition to City's Cross Motion	5
Notice of Cross Motion— Affirmation — Exhibits A-C [Affidavit]	6-8
Affirmation in Opposition to City's Cross Motion; Affirmation in Opposition to City's Cross Motion	9;10
Reply	11

FILED
JAN 24 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ■ Yes □ No

Upon the foregoing papers, it is ordered that this motion and cross motions for summary judgment are decided in accordance with the annexed memorandum decision and order.

Dated: 1/19/11
New York, New York

_____, J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER/JUDG.

HON. MICHAEL D. STALLMAN

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE

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

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BARBARA SEHNERT and MARVIN SEHNERT,

Plaintiffs,

Index No. 117950/2006

- against -

THE NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSIT AUTHORITY, THE CITY OF NEW YORK, BROADWAY TENTH PROPERTY LLC, ERNEST REALTY ASSOCIATES LLC, AND 34th STREET PARKING CORP.

Decision and Order

Defendants.

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BROADWAY TENTH PROPERTY LLC and ERNEST REALTY ASSOCIATES LLC,

Third-Party Plaintiffs,

- against -

34th STREET PARKING CORP.,

Third-Party Defendant.

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HON. MICHAEL D. STALLMAN, J.:

Plaintiff alleges that, on November 2, 2005, she sustained injuries after exiting the M34 bus at a bus stop located at the northwest corner of the intersection of West 34th Street and Tenth Avenue in Manhattan. According to the notice of claim, plaintiff tripped and/or stumbled and fell immediately after exiting the bus, due to a protruding piece of metal that was embedded in the sidewalk at the bus stop. According to the bill of particulars, plaintiff's alleged accident occurred adjacent to premises located at 435-445 Tenth Avenue.

Plaintiffs move for partial summary judgment in their favor against defendant City of New York (Motion Seq. No. 003). The City cross-moves to dismiss the complaint, or in the alternative,

for summary judgment dismissing the complaint. Pursuant to CPLR 3211 and 3212, defendant 34th Street Parking Corp. moves to dismiss all claims and cross claims, including the third-party claims as against it. Defendants Broadway Tenth Property LLC and Earnest Realty Associates LLC move for summary judgment dismissing the complaint as against them (Motion Seq. No. 004). This decision addresses the two motions and the two cross motions.

DISCUSSION

The standards for summary judgment are well settled.

> "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action."

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

Plaintiffs' motion for partial summary judgment; the City's cross motion for summary judgment

As a threshold matter, plaintiffs' objection to the City's cross motion for summary judgment as untimely served is academic. Plaintiffs' motion, initially returnable on August 26, 2010, was purportedly served on July 29, 2010, but the City's cross motion was purportedly served the day before the return date, on August 25, 2010. However, it appears that plaintiffs' motion and the City's cross motion were adjourned to September 15, 2010, and adjourned on consent again to September 29, 2010. In light of these adjournments, plaintiffs' objection to the timeliness of the service of the City's cross motion is academic. Plaintiff and the City both had adequate time and opportunity to address each motion on its merits.

Plaintiffs contend that Sehnert tripped and fell over a broken signpost that the City installed and removed. The City contends that it did not have prior written notice of the alleged condition, which is required under Administrative Code § 7-201 (c) (2). 34th Street Parking Corp. argues that information may exist that would reveal that the metal protrusion is the remains of a City sign post, thereby constituting a special use by the City that obviates prior written notice required under Administrative Code § 7-201 (c) (2). Plaintiffs argue that Administrative Code § 7-210, not Administrative Code § 7-201 (c) (2), applies in this case, and that Administrative Code § 7-210 does not require prior written notice to the City. In addition, plaintiffs assert that "block front orders" and testimonial evidence indicate that the City had prior written notice of the defect.

> "Administrative Code of the City of New York § 7-201(c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location. As recognized by plaintiff, prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City."

Katz v City of New York, 87 NY2d 241, 243 (1995) (citation omitted). Case law recognizes two exceptions to the prior written notice requirement: "namely, where the locality created the defect or hazard through an affirmative act of negligence and where a "special use" confers a special benefit upon the locality." *Amabile v City of Buffalo*, 93 NY2d 471, 474 (1999).

As the City indicates, the enactment of Administrative Code § 7-210, which shifted the liability for the breach of the duty to maintain and repair public sidewalks to owners whose property abuts the sidewalk (except in certain instances), did not modify the notice requirement Administrative Code § 7-201. Administrative Code § 7-210 (d) states, "Nothing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in

which an action or proceeding against the city is commenced, including any provisions requiring prior notice to the city of defective conditions."

Contrary to the argument of 34th Street Parking Corp., the installation of a City signpost would not constitute a special use by the City, an argument that the Court of Appeals rejected in *Poirier v City of Schenectady* (85 NY2d 310 [1995]). There, the plaintiff claimed that she tripped over a metal traffic sign post anchor protruding four inches above the sidewalk. The Court of Appeals rejected the argument that the City of Schenectady, in installing the anchor, made a special use of the sidewalk. The Court reasoned,

> " Traffic signs are intended to promote the orderly flow of vehicular and pedestrian traffic, and the posts and anchors are generally maintained by the municipality in the discharge of its duty to create safe streets. However, this does not translate into a special use; the signs do not confer a special benefit upon the municipality, or the motorists and pedestrians who use the public streets and sidewalks."

Poirier, 85 NY2d at 315.

To establish that the City created the alleged sidewalk defect, plaintiffs rely upon the notice to admit that Broadway Tenth Property LLC and Ernest Realty Associates LLC purportedly served upon the City. Jannetty Affirm., Ex 16. The notice to admit dated May 2, 2008 demands the City to admit, in relevant part:

> "14. The City of New York erected the sign post complained of prior to plaintiff's alleged accident.
> 15. The City of New York removed the sign post the sign post complained of prior to plaintiff's alleged accident.
> 16. The City of New York failed to remove the entire sign post, therein, failing to restore the area of the public sidewalk—where plaintiff fell—to a flat surface.
> 17. In its attempt to remove the sign post, the City of New York left a thin metal strip protruding from the public sidewalk, and that thin metal strip is the defect that allegedly caused plaintiff to fall."

Plaintiffs' counsel contends that the City should be deemed to have admitted these allegations, because the City did not respond to the notice to admit. Plaintiffs also cite the deposition testimony of Charles Louie, an employee from the City's Department of Transportation. According to plaintiffs, Louie testified that the City would be the sole entity to install and remove bus signs, and that documents that he reviewed indicated that there was a bus sign that was installed at the location where Sehnert was injured, and this sign went missing and needed to be replaced.

Plaintiffs' reliance on the City's purported failure to respond to the notice to admit is misplaced.

> "[T]he purpose of a notice to admit is to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices. Otherwise stated, the procedure is designed to elicit a stipulation regarding specific matters concerning which there is general agreement. Accordingly, it may not be employed to request admission of material issues or ultimate or conclusory facts."

Lewis v Hertz Corp., 193 AD2d 470 (1993) (citations omitted). Here, the notice to admit improperly demanded admissions as to disputed facts. Paragraphs 80 and 81 of the complaint alleged that the City knew or should have known of the "aforescribed hazardous, defective, and dangerous condition of the subject sidewalk/bus stop, due to a protruding piece of metal embedded in sidewalk," and that the City "cause and/or created" the dangerous condition. Jannetty Affirm., Ex 1. The City denied these allegations in the first paragraph of the answer, informing all parties that the City's alleged creation of the defect would be a disputed issue of fact and not a matter for which there was general agreement. Jannetty Affirm., Ex 4. Essentially, the notice to here "amount[s] to a deposition on written questions which, in this case, would permit plaintiffs the benefit of an examination before trial conducted solely by leading questions, which, it has been observed '[j]ustice and fair play

dictate . . . should not be allowed.'" *Berg v Flower Fifth Ave. Hosp.*, 102 AD2d 760, 760 (1st Dept 1984).

Neither have plaintiffs established a prima facie case for summary judgment based on Louie's deposition testimony. Louie was shown "block front orders," which Louie described as a print-out in response to a database inquiry "as to what signs are at a certain location at [a] certain date." Jannetty Affirm., Ex 12 [Louie EBT] at 31. Louie reviewed block front orders marked as Defendant's Exhibits 1A, 1B, 2A, and 2B. *Id.* at 30; *see also* Bertulfo Affirm., Ex E [block front orders]. Plaintiffs' contention is based on one entry on the block front orders, which refers to a bus stop sign installed 118 feet from Tenth Avenue on February 28, 2004, and the documents indicate that the sign is missing in April 2004. Louie EBT, at 34-36.

However, plaintiffs have not established that the metal protruding from the sidewalk upon which Sehnert tripped and fell is the remnant of the bus stop sign that was installed in February 2004. First, plaintiffs alleged in both the notice of claim and the verified bill of particulars that the alleged defect was approximately 42 feet west of Tenth Avenue (Bertulfo Affirm., Exs A, B), which is not the location of the bus stop sign, which according to the block front orders, is located 118 feet from Tenth Avenue.

Second, photographs of the alleged defect from the top view show a metal piece that appears to a have an outline resembling an L or a backwards Z. Jannetty Affirm., Ex 17. Louie testified at his deposition that the bus stop sign installed in February 2004 was "[m]aybe about 2 and half inches, 3 inches in diameter round pole." Louie EBT, at 43. A priori, the cross section of a round pole (which would resemble a circle) would not resemble the defect that the photographs depict. Moreover, Louie was shown a photograph of "a top view of the stump," which Louie described

"[l]ooks like a metal pole that's in an L shape." *Id.* at 24. Louie was asked, "Is there any type of sign you know of in your experience with DOT that would be or could be attached to that type of pole?" *Id.* He answered, "No." *Id.* Counsel for 34th Street Parking Corp. then asked Louie, "Do you know of any signs that would use a post or pole with the Z or N shape from a top view?" Louie again answered, "No."

Therefore, plaintiffs have not demonstrated that the City caused or created the alleged sidewalk defect at issue, and plaintiffs' motion for summary judgment is denied.

City's cross motion for summary judgment

As the City indicates, Administrative Code § 7-201 requires plaintiffs to prove that the City had prior written notice of alleged sidewalk defect. The City has established a prima facie case that it had no prior written notice of the defect by submitting records from its Department of Transportation for the period of two years prior to and including the date of the accident, which apparently comprise block front orders that were reviewed at Louie's deposition. *See* Bertulfo Affirm., Ex E.

Plaintiffs fail to raise a triable issue of fact that the City lacked prior written notice of the alleged sidewalk defect. As discussed above, plaintiffs incorrectly believed that the alleged sidewalk defect at issue involved the installation of a bus stop sign in February 2004 which was later repaired in April 2004, because the location of that bus stop sign and its description do not match the area and description of the sidewalk defect.

Finally, none of the cases that plaintiffs cite stand for the proposition that the City is liable for the alleged defect simply because it might be a remnant of a sign that the City installed. First,

there is no evidence that indicates the metal allegedly protruding from the sidewalk is the remnant of a City sign pole, and the records produced do not indicate that the City installed a sign at the location where Sehnert allegedly tripped and fell. Second, assuming, for the sake of argument, that the alleged defect were a remnant of a sign that the City installed, no evidence indicates that the City removed the sign.

The authorities that plaintiffs cite do not stand for the proposition that the City may be held liable for sidewalk defects that resulted from any non-party acts of damage to, or removal of, a City sign absent prior written notice. That the abutting landowner would not be liable for sidewalk defects caused by City signs does not lead to the conclusion that the City may be held liable for those defects, absent proof of prior written notice or proof that the City itself caused or created the defect.

Broadway Tenth Property LLC and Ernest Realty Associates LLC's motion for summary judgment

Broadway Tenth Property LLC and Earnest Realty Associates correctly point out that "a City sign or signpost is not part of the 'sidewalk' for purposes of section 7-210 of the Administrative Code of the City of New York." *Smith v 125th Street Gateway Ventures, LLC*, 75 AD3d 425, 425 (1st Dept 2010).

Here, plaintiffs contend that the sidewalk defect is the remnant of a City sign post. However, as discussed above, the record does not establish that the sidewalk defect was such a remnant of a sign that the City had installed. For the reasons discussed above, defendants' reliance on the notice to admit that the City purportedly failed to answer is misplaced.

Therefore, Broadway Tenth Property LLC and Ernest Realty Associates LLC's motion for summary judgment is denied.

34th Street Parking Corp.'s cross motion for summary judgment

Defendant 34th Street Parking Corp. entered in a five-year lease agreement, as amended, with Broadway Tenth Property LLC and Ernest Realty Associates LLC and operates a parking lot on the corner of West 34th Street and Tenth Avenue. According to Wilson Lata, the manager of the parking lot, "[a]t no time did 34th Street Parking Corp. ever install anything into the sidewalk on W. 34th Street, or remov[e] anything that was installed into the sidewalk or make any repairs to the sidewalk prior to November 2, 2005." Lata Aff. ¶ 3. Lata further maintains that "34th Street Parking Corp. never installed a sign post or removed a sign post on the sidewalk of W. 34th Street at any time prior to November 2, 2005." *Id.* ¶ 4. Plaintiffs do not oppose 34th Street Parking Corp.'s cross motion for summary judgment.

Defendant 34th Street Parking Corp. has established a prima facie case for summary judgment dismissing the complaint as against them. Its motion is granted without opposition. Dismissal of plaintiffs' action against this defendant necessarily results in dismissal of this defendant's cross claims against co-defendants, and co-defendants' cross claims against 34th Street Parking Corp., for common-law indemnification and contribution. The third cause of action of the third-party complaint, which seeks common-law indemnification and contribution against 34th Street Parking Corp., is also dismissed.

The first and second cause of action of the third-party complaint allege breach of the lease agreement and seek indemnification from defendant 34th Street Parking Corp. 34th Street Parking Corp. contends that, under its lease agreement, its obligation to maintain the sidewalk is limited to non-structural repairs. According to the third-party complaint, the lease agreement provides, in relevant part:

> "Tenant shall, throughout the term of the lease, take good care of demised premises and the fixtures and [appurtenances] therein and the sidewalk adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when amended to preserve them in good working order and condition.. . ."

Jannetty Affirm., Ex 8; *see also* Chin Affirm., Ex B.

The above-quoted clause is a standard lease provision. Any repair of the alleged sidewalk defect would have entailed structural repairs to the sidewalk. *Cf. Berkowitz vDayton Const., Inc.*, 2 AD3d 764, 765 (2d Dept 2003)(raised sidewalk slab is structural defect that tenant was not required to repair under its lease). Therefore, the first and second causes of action of the third-party complaint are dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that the cross motion for summary judgment by defendant City of New York is granted; and it is further

ORDERED that the cross motion for summary judgment by defendant/third-party 34th Street Parking Corp. is granted; and it is further

ORDERED that the motion for summary judgment by defendants Broadway Tenth Property LLC and Ernest Realty Associates LLC (Motion Seq. No. 004) is denied; and it is further

ORDERED the complaint is severed and dismissed against defendants City of New York, and 34th Street Parking Corp, with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs, and the cross claims of these defendants against one another and against defendants New York City Transit Authority and Metropolitan Transportation

Authority, sued herein as Metropolitan Transit Authority, Broadway Tenth Property LLC and Ernest Realty Associates LLC, are dismissed; and it is further

ORDERED that third-party complaint is dismissed, with costs and disbursements to third-party defendant 34th Street Parking Corp., as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment in the action in favor of the defendants City of New York and 34th Street Parking Corp. against plaintiffs accordingly, and to enter judgment in third-party action in favor of third-party defendant 34th Street Parking Corp. against third-party plaintiff Broadway Tenth Property LLC and Ernest Realty Associates LLC accordingly; and it is further

ORDERED that the remainder of the action shall continue.

Dated: January 19, 2011
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN