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| Frid v City of New York |
| 2011 NY Slip Op 30273(U) |
| February 7, 2011 |
| Sup Ct, NY County |
| Docket Number: 101088/2009 |
| Judge: Michael D. Stallman |
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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 : 101088/2009

FRID, ELVIRA

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. 101088/09

MOTION DATE 12/2/10

MOTION SEQ. NO. 001

MOTION CAL. NO. 38

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

The following papers, numbered 1 to 8 were read on this motion and cross motion for summary judgment

| | Papers Numbered |
|--|-----------------|
| Notice of Motion— Affirmation — Exhibits A-N | <u>1-2</u> |
| Notice of Cross Motion— Affirmation — Exhibits A-B (Affidavit), Exhibits C-L | <u>3-5</u> |
| Affirmation in Opposition — Exhibits A-F | <u>6</u> |
| Reply Affirmation— Exhibits A-C | <u>7</u> |
| Reply Affirmation— Exhibits A-D | <u>8</u> |

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

FILED

FEB 10 2011

NEW YORK HON. MICHAEL D. STALLMAN
COUNTY CLERK'S OFFICE

Dated: 2/7/11
New York, New York

[Signature] J.S.C.

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

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

-----X
ELVIRA FRID,

Plaintiff,

- against -

Index No. 101088/2009

THE CITY OF NEW YORK, THE NEW YORK CITY
TRANSIT AUTHORITY and ROOSEVELT ISLAND
OPERATING AUTHORITY,

Defendants.

~~Decision and Order~~
FILED

-----X
FEB 10 2011

HON. MICHAEL D. STALLMAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, plaintiff alleges that, on April 16, 2008, at approximately 4:00 p.m.-5:00 p.m., she tripped and fell on a raised and uneven portion of the sidewalk at the entrance of the F line subway station on Roosevelt Island.

Plaintiffs commenced this action on January 27, 2009 against the City of New York, Roosevelt Island Operating Corporation (RIOCI), and the New York City Transit Authority (NYCTA). During discovery, counsel for NYCTA informed plaintiff's and defendant's counsel that, "As per the enclosed Memorandum dated March 9, 2010 from New York City Transit Authority Engineer Carmelite Cadet, please be advised that the New York City Transit Authority was and is responsible for maintaining the alleged accident location." Lehrer Affirm., Ex K.

The City and RIOCI move for summary judgment dismissing the action as against them. Plaintiff cross-moves for summary judgment in her favor as to liability against NYCTA and for an order assessing costs and sanctions against NYCTA pursuant to CPLR 8303-a and 22 NYCRR Part 130.

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). "The moving party need not specifically disprove every remotely possible state of facts on which its opponent might win the case." *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 (2009).

City and RIOC's Motion for Summary Judgment

The City and RIOC assert that they did not own, control, or maintain the sidewalk, and they did not install the sidewalk. They submit a NYCTA memorandum dated March 9, 2010 from Carmelite Cadet, P.E., Engineering Services, which states, in pertinent part:

“Pursuant to your request for information, Department of Subways Engineers performed a filed inspection of the sidewalk located near the entrance of the “F” line subway station “Roosevelt Island”, New York, New York. After reviewing all relevant documents, we concluded that the area of the sidewalk at the location mentioned above is owned, operated, maintained and controlled by New York City Transit Authority.”

Lehrer Affirm., Ex K. The City and RIOC also submit a memorandum dated June 16, 2010, “Re Roosevelt Island Station” from Terence Purdon, who testified at his deposition on September 15, 2010 that he is a superintendent whose current duties involve overseeing approximately 65 workers who do station maintenance. Herzog Affirm., Ex H [Purdon EBT], at 7. The handwritten memorandum, which bears Purdon's signature, states:

* 4]

“ON OUR [sic] ABOUT THE SUMMER OF 2001 I WAS ASSIGNED THE TASK OF REPLACING THE DEFECTIVE EXTERIOR CONCRETE OF THE ROOSEVELT ISLAND STATION. OUR METHOD OF REPLACEMENT WAS COLORED, POUR IN PLACED, STAMPED CONCRETE. THIS WAS INSTALLED AROUND THE ENTIRE EXTERIOR OF THE ENTRANCE TO THE STATION.

UNFORTUNATELY [sic] THIS PRE-DATES OUR RECORD RETENTION REQUIREMENT, THEREFORE I AM UNABLE TO PROVIDE ANY WRITTEN DOCUMENTATION FOR THE AFOREMENTIONED WORK NOTED.”

Lehrer Affirm., Ex L. The City and RIOC submit the affidavit of Thomas N. Turcic, the Director of Engineering with RIOC. According to Turcic, “Roosevelt Island Operating Corporation does not own or control the area of the Sidewalk [the sidewalk, including the brick sidewalk, located near the entrance of the “F” line subway station on Roosevelt Island], nor did they own or control the Sidewalk in April of 2008;” “[RIOC] did not install the Sidewalk”; “[RIOC] did not perform any maintenance or repair work on the Sidewalk, nor are they responsible for the maintenance and repair of the sidewalk.” *Id.*, Ex N.

In opposition, plaintiff argues that the City and RIOC’s motion should be denied because the record does not exclude the possibility that ownership and maintenance duties or responsibilities were shared jointly with NYCTA. Alternatively, plaintiff argues that, even if RIOC had no maintenance duties with respect to the accident location, it allegedly failed to notify anyone to rectify the allegedly defective raised condition. Plaintiff cites the deposition testimony of Frensheria Michael, a special patrolman officer employed by RIOC. When asked, “whose job would it be to bring it [the raised condition of the walkway] to their [MTA’s] attention?”, Michael answered,

“It would be our job, based on patrol, but it would be their job to maintain that. If we did not recognize or have any officer to patrol the area on foot, it would be their job to notice their own defective material. But if we notice it, we would normally call 311 and we would talk to the book clerk. We’d summon a supervisor, we’d summon

our supervisors, and we'd file a complaint and we'd get a reference number from 311 for a public hazardous condition.

Q. Is that what you consider to be a hazardous condition?

A. Yes."

Lehrer Affirm., Ex H [Michael EBT], at 52.

The City and RIOC have met their prima facie burden of showing entitlement to summary judgment dismissing the complaint as against them. Plaintiff has not raised a triable issue of fact as to whether RIOC was a joint owner or tenant with NYCTA of the premises where plaintiff allegedly tripped and fell, so as to give rise to a duty of care owed to plaintiff. Whether the City leased the premises either to RIOC or NYCTA, the City is an apparently an out-of-possession lessor.

A landlord is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless the landlord: (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision

Vasquez v The Rector, 40 AD3d 265, 266 (1st Dept 2007); see also *Lane v Fisher Park Lane Co.*, 276 AD2d 136, 141-142 (1st Dept 2000). Plaintiff has not demonstrated that the exceptions above apply here.

Michael's testimony as to the duties of special patrolman officers of Roosevelt Island does not establish that RIOC either owed or assumed a duty of care to plaintiff, the breach of which may be actionable in tort. Plaintiff cites no authority for such a proposition.

Therefore, the City and RIOC's motion for summary judgment is granted. The complaint is dismissed as against the City and RIOC, and NYCTA's cross claim seeking indemnification or contribution against these defendants is also dismissed.

Plaintiff's Motion for Summary Judgment and for Sanctions against NYCTA

Plaintiff points out that several NYCTA witnesses testified at their deposition that they understood that their responsibility for maintenance and cleaning of an area outside of a subway station extended only to three feet beyond a station's boundaries. However, as discussed above, the letter from NYCTA's counsel dated March 15, 2010 definitively stated that NYCTA "was and is responsible for maintaining the alleged accident location." Lehrer Affirm., Ex K. Therefore, plaintiff is granted partial summary judgment against NYCTA solely on the issue of ownership and control of the area where plaintiff allegedly fell.

To prove a prima facie case of negligence in a trip and fall case, "there must be evidence tending to show the existence of a dangerous condition and that the defendant either created the defect or had actual or constructive notice of it." *Puma v New York City Tr. Auth.*, 55 AD3d 585, 585 (2d Dept 2008); *Picerno v New York City Tr. Auth.*, 4 AD3d 349, 350 (2d Dept 2004). "To constitute constructive notice, 'a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the defendant] to discover and remedy it.'" *McMahon v Gold*, 910 N.Y.S.2d 561, 563 (2d Dept 2010), citing *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

On the issue of dangerousness, plaintiff submits the affidavit of Herbert W. Braunstein, P.E., P.A., a licensed professional engineer and public adjuster. Braunstein observed that "a portion of the sidewalk/walkway is paved with stampcrete and part with concrete slab," and "the stampcrete are raised causing a vertical displacement of ½ inch, which runs for a distance of 16 feet from the adjoining concrete slab." Herzog Affirm., Ex J ¶¶ 3-4. Braunstein opined that "this condition represents a trip hazard for pedestrians walking over this area." Braunstein also observed that

[* 7]

“[t]here is an expansion joint between the concrete slab and stampcrete that measure[s] 1 inch wide. The pour elastic joint filler has deteriorated. *Id.* ¶ 5. Braunstein opined, “This condition also represents a trip hazard for pedestrians walking over this area.” *Id.* Braunstein then concluded, “with reasonable engineering certainty, that hazardous conditions do exist for Ms. Frid to sustain personal injuries considering the above mentioned existing conditions. More specifically the combination of an open expansion joint and raised brick pavers caused a dangerous walking surface.” *Id.*

“[W]hen the suit is founded on a claim of negligence, the plaintiff will generally be entitled to summary judgment 'only in cases in which there is no conflict at all in the evidence, the defendant's fell far below any permissible standard of due care, and the plaintiff's conduct either was not really involved . . . or was clearly of exemplary prudence in the circumstances.’” *Ugarriza v Schmieder* 46 NY2d 471, 475-476 (1979)(citation omitted). Here, the affidavit of plaintiff's expert was not sufficient to establish plaintiff's prima facie burden of summary judgment as a matter of law. The expert's conclusory statement that the conditions represent “a dangerous walking surface” does not establish, in itself, that the premises were not reasonably safe. Plaintiff's engineer cited provisions of the New York City Building Code, rules and regulations of the New York City Department of Transportation, and standards from the American Society for Testing and Materials (ASTM), but he did not opine that the ½ inch raised edge constituted violations of the provisions cited. Neither can the Court rule on this motion that the cited provisions are applicable to the condition in question.

Therefore, except as to the issue of NYCTA's ownership and control of the area where plaintiff allegedly fell, plaintiff's motion for summary judgment against NYCTA is denied. In light

[* 8]

of the Court's determination that plaintiff has not established as a matter of law that the premises were not reasonably safe, the Court does not reach the other issues of whether NYCTA had actual or constructive notice of the raised stamped concrete, or whether NYCTA had caused or created the alleged hazardous condition.

Finally, the branch of plaintiff's motion seeking costs and sanctions against NYCTA and for additional discovery is denied. Plaintiff preemptively sought costs and sanctions in the belief that any opposition to plaintiff's cross motion for summary judgment would be baseless. However, as discussed above, whether the premises is not reasonably safe due to the raised section of walkway is an ultimate issue for the trier of fact. Additional post-note of issue discovery is unwarranted.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants City of New York and Roosevelt Island Operating Corporation is granted, the complaint and the cross claim by defendant New York City Transit Authority are severed and dismissed as against these defendants, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in these defendants' favor accordingly; and it is further

ORDERED that plaintiff's cross motion for summary judgment is granted in part, only to the extent that it has been determined that defendant New York City Transit Authority was and is responsible for the maintenance of the area where plaintiff claims to have tripped and fallen, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: February 7, 2011
New York, New York

ENTER:



J.S.C.

RON. MICHAEL D. STALLMAN

FILED

FEB 10 2011

NEW YORK
COUNTY CLERK'S OFFICE