[* 1]

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

BARBARA JAFFE Jaffe

PART 5

Index Number : 102122/2007

HOLDER, ADRIENE

VS.

F.M. RING ASSOCIATES, INC.

SEQUENCE NUMBER : 003

DISMISS

CAL # 56

INDEX NO. 102122/07

MOTION DATE 4/12/11

MOTION SEQ. NO. 003

MOTION CAL. NO. 56

this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 2
Replying Affidavits	3

FILED

JUN 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 6/20/11

JUN 20 2011

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

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

----------x

ADRIENE HOLDER,

Plaintiff,

-against-

F.M. RING ASSOCIATES INC., FRANK RING, MICHAEL RING, F.M.R. HOLDING CO., SPRING SCAFFOLDING INC., and THE CITY OF NEW YORK,

Defendants.

----------x

Index No.: 102122/07

Motion Date: 4/12/11
Motion Seq. Nos.: 003,
Motion Cal. Nos.: 56, .

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:	**For Spring:**	**For Ring:**	**For City:**
Eric H. Green, Esq.	Yolanda Zawisny, Esq.	John E. McLoughlin, Esq.	Andrew Lucas, ACC
295 Madison Avenue	Zawisny & Zawisny, P.C.	Fischetti & Pesce, LLP	Michael A. Cardozo
16th Floor	578 Driggs Avenue	310 Old Country Road, Suite 201	Corporation Counsel
New York, NY 10017	Brooklyn, NY 11211	Garden City, NY 11530	100 Church Street
212-532-2450	718-388-3330	516-8731511	New York, NY 10007
			212-788-0560

By notice of motion dated October 29, 2010, defendant City of New York (City) moves pursuant to CPLR 3211(a)(7) and/or 3212 for an order dismissing plaintiff's claims and all cross-claims against them. Plaintiff and defendants F.M. Ring Associates, Inc., Frank Ring, Michael Ring, and F.M.R. Holding Company (collectively Ring) oppose. By notice of motion dated November 16, 2010, Ring moves pursuant to CPLR 3212 for same, and plaintiff opposes. By notice of motion dated December 14, 2010, Spring Scaffolding, Inc. (Spring) moves pursuant to CPLR 3212 for same. Plaintiff and Ring oppose.

I. FACTUAL BACKGROUND

Ring owns and manages a 153-157 West 23rd Street, a building in Manhattan. On March 2, 2004, Ring and Spring entered into a contract whereby Spring agreed to construct a sidewalk

bridge in front of the building for the purpose of repainting the building's windows. (Affirmation of Yolanda Zawisny, Esq., dated Dec. 14, 2010 [Zawisny Aff.], Exhs. G, J). The contract provides that Ring is responsible for the "safe use" of the sidewalk bridge and does not contain an indemnification provision. (*Id.*). Ring constructed the sidewalk bridge on March 5, 2004. (*Id.*).

On January 22, 2006, plaintiff allegedly tripped on a circular metal plate embedded in and protruding from the sidewalk in front of the building. (*Id.*, Exh. D). As a result, she allegedly fell into a pole supporting the sidewalk bridge and sustained physical injuries. (*Id.*).

On May 14, 2008, a New York City Department of Transportation (DOT) search was conducted for the block where plaintiff fell, which yielded 2 notices of violation, 3 corrective action reports, 22 permits, and the 2 Big Apple maps most recently received by the DOT, each dated October 23, 2003. (Affirmation of Andrew Lucas, Esq., dated Nov. 16, 2010 [Lucas Aff.], Exhs. D, F). None of these materials refers specifically to the metal plate on which plaintiff allegedly tripped. (*Id.*).

Both notices of violation relate to 165 West 23rd Street, not 153-157 West 23rd Street, and both refer to violations that do not involve a metal plate embedded in and protruding from the sidewalk. (*Id.*, Exh. F). Similarly, the corrective action reports do not relate to the exact accident site, as they refer to repairs performed on the street in front of 165 West 23rd Street. (*Id.*). And, of the 22 permits discovered, only 3 were issued for work to be performed on the sidewalk. (*Id*). The first, permit M01-2004078-042, was issued on March 18, 2004 for the purpose of making sidewalk repairs for a bus shelter in front of 172-174 West 23rd Street, across the street from the accident site. (*Id.*). The second, permit M04-2004314-014, was issued on November 9, 2004 for

the purpose of opening the sidewalk in front of 157 West 23rd Street to repair it. (*Id.*). The third, permit M01-2005286-165, was issued on October 13, 2005 for the purpose of "tree pits [and] tree planting" at an unspecified location along the block. (*Id.*).

Nor does the plate appear on the Big Apple Maps. (*Id.*). The maps' legend contains symbols corresponding to different types of defects, including a symbol for an "obstruction protruding from the sidewalk," but does not include a symbol for an embedded metal plate; the symbol for "an obstruction protruding from the sidewalk" does not appear on the map at the accident location. (*Id.*). Instead, three other symbols appear, one for a section of broken curb, another for a raised or uneven sidewalk, and a third for a "deficiency pertaining to metal doors and frames." (*Id.*).

On July 2, 2009, plaintiff was deposed, testifying that the photographs her attorney provided, which depict a length of sidewalk with sidewalk bridge poles, an embedded, protruding metal plate, and no other encumbrances, show the location of her trip and fall and the metal plate on which she tripped. (Affirmation of John E. McLoughlin, Esq., dated Nov. 16, 2010 [McLoughlin Aff.], Exh. B).

Isidre Anglada, superintendent for 153-157 West 23rd Street, was deposed the same day. (Zawisny Aff., Exh. G). He testified that he had been superintendent of the building for two years when the accident occurred, that he had visited the building everyday to ensure that the sidewalk in front of it was clean, and that he had never seen a bicycle rack or a metal plate on the sidewalk before the accident. (*Id.*). When presented with photographs of the accident site, he was not familiar with the plate. (*Id.*).

On September 16, 2009, Mary Jackson, DOT Traffic Controller Inspector, was deposed,

testifying that she visited the accident site on January 11, 2006 in order to determine where a "No Standing" sign should be placed along the block and saw no bicycle rack or remnants thereof. (Lucas Aff., Exh. E).

On September 16, 2009, DOT record searcher Nalik Zeigler was deposed, testifying that he searched "[p]ermits, repair orders, [c]orrective [a]ction [r]eports . . ., [n]otices of [v]iolations . . ., applications, contracts, sidewalk violations, notice and complaints, and Big Apple Maps" for the block where plaintiff allegedly tripped and fell and that this search yielded 22 permits, 2 notices of violation, 3 corrective action reports, 4 applications, and 2 Big Apple Maps. (Lucas Aff., Exh. D). According to Zeigler, City permit M04-2004314-014, the only permit discovered that relates to the accident site, shows only that work could be performed on the sidewalk in front of 157 West 23rd Street between November 9, 2004 and November 18, 2004, not that work was actually performed. (*Id.*). He also testified that his search uncovered no records of installation, maintenance, or removal of a bicycle rack at the accident site. (*Id.*). By affidavit dated December 23, 2009, Virgil Lupu, supervisor of Spring's estimation department, stated that Spring "never alters [] or removes any structures or furniture attached to the sidewalk, including [C]ity bike racks," that Spring's policy is to build around and away from such racks, and that Spring did not remove the bicycle rack in question, does not have any records of removing the rack, and did not receive any complaints about the sidewalk shed. (Zawisny Aff., Exh. A).

On January 21, 2010 and May 12, 2010, Jason Accime, manager of the DOT's City Racks Program, was deposed. (Lucas Aff., Exhs. H, I). When presented with photographs of the accident site, he testified that the metal plate depicted was a base plate for a City bicycle rack that was installed by a City contractor on April 5, 2000. (*Id.*). He also testified that the rack is City

property, and although City "does not have the contract to maintain the bike racks," and "there is no procedure in place to maintain any single bike rack," it must remove and relocate a rack "if something becomes loose." (*Id.*, Exh. H). He also testified that only City is authorized to remove its own bicycle racks, that it maintains removal and repair records, and that these records, which include photographs of an intact bicycle rack at the accident site, do not show that the City ever removed or repaired the rack. (*Id.*, Exh. I).

By affidavit dated July 22, 2010, Accime stated that he searched a repair spreadsheet, the "only place that the [DOT] maintains records relating to the removal and repair of bike racks," and found no bicycle rack repairs, reported problems, or removals for the accident site. (*Id.*, Exh. K).

By affidavit dated November 16, 2010, Reba N. Dickstein, office manager for Ring, stated that Ring requested neither that a bicycle rack be installed in front of the building nor that a rack be removed, and that she has "no recollection of a bicycle rack being installed, damaged, or removed at this location." (McLoughlin Aff., Exh. H).

II. PERTINENT PROCEDURAL BACKGROUND

On February 13, 2007, plaintiff filed a summons and verified complaint dated January 2, 2007, asserting claims for negligence against Ring and City. On January 12, 2009, plaintiff served on defendants an amended summons and verified complaint dated November 20, 2008, adding Spring as a defendant. (Lucas Aff., Exh. B). On January 28, 2009, February 17, 2009, and March 3, 2009, City, Ring, and Spring, respectively, joined issue with service of their answers, all asserting cross-claims for indemnity and contribution against one another. (McLoughlin Aff., Exh. A).

On January 29, 2010, I issued my part rules, requiring that motions for summary judgment be filed no later than 60 days after the filing of the note of issue. On October 29, 2010, plaintiff filed her note of issue. (Affirmation of Michael M. Szechter, Esq. in Opposition, dated Jan. 25, 2011 [Szechter Aff. in Opp.], Exh. E). On November 1, 2010 and November 17, 2010, City and Ring, respectively, served their motions for summary judgment. (Lucas Aff.; McLoughlin Aff.). Spring served and filed its motion for summary judgment on January 13, 2011 and January 25, 2011, 76 and 89 days after the note of issue was filed, respectively. (Zawisny Aff.).

III. ANALYSIS

"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 eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must "lay bare" its evidence (*Silberstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); "unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, 49 NY2d 557, 562).

Moreover, "as a general rule, a party does not carry its burden in moving for summary

judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). And a defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

A. City's motion

1. Contentions

City denies that it is liable for plaintiff's injuries, as it neither received prior written notice of the embedded, protruding metal plate in the sidewalk nor caused or created it. (Lucas Aff.). More specifically, it contends that plaintiff has not satisfied her burden of proving prior notice or causation, as the records discovered through the DOT search are unrelated to the metal plate and do not show that City knew of or caused the plate to protrude from the sidewalk. (*Id.*). In any event, even if the Big Apple Maps' identification of "deficiencies pertaining to metal doors and frames" is interpreted to refer to the metal plate, City argues that the map did not provide it with written notice because permit M04-2004314-014 shows that work was performed on the sidewalk in front of 157 West 23rd Street after the map was created and served on it. (*Id.*).

In opposition, plaintiff claims that there are material issues of fact as to the origin and nature of the metal plate, as City's records show only that a bicycle rack was supposed to be installed, not that one actually was, and Jackson testified that she did not see the plate or bicycle rack when she visited the accident site days before it occurred. (Szechter Aff. in Opp.). Plaintiff thus contends that the Big Apple Maps provided City with written notice of the plate defect, as they show "deficiencies pertaining to metal doors and frames," and the metal plate may be part of

it. (*Id.*). Plaintiff also claims that permit M04-2004314-014 does not render the maps inaccurate, as Zeigler testified that it shows only that work on the subject sidewalk was authorized, not that it was actually performed. (*Id.*).

In opposition, Ring claims that it is undisputed that the metal plate was installed in the sidewalk as part of a City bicycle rack, relying on Accime's identification of the plate and testimony regarding the DOT's records of rack installation. (Affirmation of John E. McLoughlin, Esq. in Opposition, dated Jan. 31, 2011 [McLoughlin Aff. in Opp.]). And, like plaintiff, Ring maintains that the Big Apple Maps create issues of material fact as to whether City received notice of the plate defect, as the maps' legends do not contain a symbol for broken or defective bicycle racks, and the plate could be coded as a metal door and frame deficiency because it is made of metal. (*Id.*).

In reply, City asserts that the plate is part of a City bicycle rack, as Accime testified that a rack was installed at the accident site, and DOT records and photographs show that a rack was installed there. (Affirmation of Andrew Lucas in Reply, dated Feb. 22, 2011). Although City concedes that the permit does not prove that work was actually performed, it nonetheless maintains that the Big Apple Maps did not provide it with written notice of the plate, as the maps' legends contain a symbol for obstructions protruding from the sidewalk, and this symbol would have appeared at the accident location had the plate defect been included on the maps. (*Id.*). Additionally, it contends that Jackson's January 11, 2006 visit to and inspection of the accident site did not provide it with notice, either, as she did not see the plate, and even if she had, that it would still not be liable, as fewer than 15 days elapsed between her visit and the accident. (*Id.*).

2. Prior written notice

Pursuant to New York City Administrative Code § 7-201(c)(2), no civil action may be maintained against City arising from a dangerous or defective condition on a sidewalk unless plaintiff demonstrates that City received written notice of the condition or that City acknowledged the existence of the condition in writing and failed to repair or remove it within 15 days. Whereas plaintiff bears the burden of establishing at trial that City had written notice (*Katz v City of New York*, 87 NY2d 241, 243 [1995]), she bears no such burden at the pleading stage. Rather, City, as movant, must establish an absence of written notice. (*McNeill v City of New York*, 40 AD3d 823, 824 [2d Dept 2007]). If City does so, the burden shifts to plaintiff to establish that it caused or created the dangerous condition. (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

a. The Big Apple Maps

The Big Apple Map, provided by the New York State Trial Lawyer's Association for the purpose of providing City with the written notice required by the Administrative Code, is acceptable for establishing prior written notice so long as the precise defect appears on the map. (*D'Onofrio v City of New York*, 11 NY3d 581 [2008]). If the exact location of the defect or the nature of the symbol on the map is in dispute, whether the map provided City with prior written notice is an issue for jury determination. (*Reyes v City of New York*, 63 AD3d 615, 615 [1st Dept 2009]; *Almadotter v City of New York*, 15 AD3d 426, 427 [2d Dept 2005]).

Here, three symbols appear at the accident location: one for a section of broken curb, another for a raised or uneven sidewalk, and a third for a "deficiency pertaining to metal doors and frames." Although the record shows that the plate was part of a City bicycle rack (*see infra*

III.B.2), and although the maps do not reflect an "obstruction protruding from a sidewalk," City fails to prove that the plate, which was metal, could not have been a deficiency " pertaining to metal doors and frames," as it provides neither the definition of such deficiencies nor any proof that metal plates embedded in the sidewalk are only depicted as an "obstruction protruding from the sidewalk." City has thus failed to sustain its burden of proving the absence of material issues of fact as to whether the maps provided it with prior written notice. (*See Almadotter*, 15 AD3d at 427 ["whether the 'cracked, uneven, irregular, unlevel, raised, dangerous and/or hazardous condition' of the sidewalk . . . is the same condition as the 'extended section of obstructions protruding from [the] sidewalk' noticed on the Big Apple Map is a question of fact which should be resolved by a jury"]; *see also Quinn v City of New York*, 305 AD2d 570, 571 [2d Dept 2003] [whether Big Apple Map provided City with prior written notice properly left to jury given "conflicting testimony as to whether the defect noted on the Big Apple Map for the sidewalk . . . corresponded with the defect described by the injured plaintiff"]; *cf Camacho v City of New York*, 218 AD2d 725, 726 [2d Dept 1995] [Big Apple Map did not provide City prior written notice where plaintiff claimed she tripped on a large hole and symbol for "raised portion of sidewalk sufficient to cause hazard" appeared on map at accident site]).

b. The notices of violation, work permits, and the corrective action reports

In order to show that work permits and other records do not provide prior written notice of a dangerous or defective condition, City must offer sworn statements from those with personal knowledge of the records search. (*McNeill,* 40 AD3d at 824).

Here, two DOT employees explain the scope and results of their searches, and City provides an affidavit from one of them stating that he fruitlessly searched the only records of

bicycle rack repair, maintenance, and removal maintained by DOT. City has thus satisfied its burden of demonstrating that its records contain no evidence of prior written notice of the plate defect. (*See Campisi v Bronx Water & Sewer Serv., Inc.*, 1 AD3d 166, 167 [1st Dept 2003] [affidavit of records clerk who caused a search to be performed sufficient to establish lack of prior written notice]; *Cruz v City of New York*, 218 AD2d 546, 547 [1st Dept 1995] [same]).

c. Jackson's site visit and inspection

Evidence that Jackson was present at the accident site 11 days before the accident occurred and did not notice the metal plate or bicycle rack, and that even if she had and City acknowledged it in writing, City would not be held liable for failing to repair or remove the plate within 15 days of the accident. (*See* Administrative Code § 7-201[c][2] [City liable only if it fails to repair or replace defect within 15 days of providing written acknowledgment of defect).

3. Caused or created

In light of the determination that City has failed to demonstrate that it did not receive prior written notice, there is no need to consider whether City caused or created the plate defect.

B. Ring's motion

1. Contentions

Ring claims that it cannot be held liable for any injuries caused by the metal plate, as section 7-210 of the New York City Administrative Code does not shift liability for injuries caused by City signposts to abutting landowners, and the metal plate is analogous to a City signpost in that it was embedded in and protruded from the sidewalk, and City was responsible for its installation, maintenance, and removal. (McLoughlin Aff.).

In opposition, plaintiff contends that Ring had to have noticed the presence or absence of

a bicycle rack, as Anglada cleaned and inspected the sidewalk daily. (Szechter Aff. in Opp.). She also asserts that Ring was engaging in a special use of the sidewalk by contracting with Spring for the construction of a sidewalk bridge, and thus, that Ring is liable for her injuries. (*Id.*) Additionally, she argues that the cases Ring cites for the proposition that it cannot be held liable for her injuries are distinguishable, as a bicycle rack is not analogous to a street sign post, and in any event, that the record does not conclusively show that the plate was a part of a City rack. (*Id.*).

In reply, Ring maintains that the plate is part of a City bicycle rack, relying on Accime's identification, the records search he performed, the photographs of the accident site that depict such a rack, and the absence of evidence to the contrary. (Affirmation of John E. McLoughlin, Esq. in Reply, dated Jan. 31, 2011). Therefore, Ring argues, it cannot be held liable for plaintiff's injuries, as the rack was intended to protrude from the sidewalk, City was responsible for its installation, repair, and removal, and there is no evidence that Ring removed the rack or otherwise caused the plate defect. (*Id.*).

2. Administrative Code § 7-210

Pursuant to section 7-210 of the Administrative Code, the owner of real property abutting a sidewalk, and not the City, has the duty to "maintain such sidewalk in a reasonably safe condition" and is liable for injuries arising from his failure to do so. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]). This section is strictly construed against City. (*Id.* at 521).

In maintaining the sidewalk, abutting landowners are obligated to repair or replace "hardware defects," which include "hardware or other appurtenances not flush within ½" of the sidewalk." (New York City Administrative Code § 19-152[a][6]). Whereas manhole covers and

castings are considered hardware for the purpose of section 19-152 (Administrative Code § 19-147[d]), City property, such as street signs and posts (*Smith v 125th St. Gateway Ventures, LLC*, 75 AD3d 425 [1st Dept 2010]; *Calise v Millennium Partners*, 26 Misc 3d 1222[A], 2010 NY Slip Op 50208[U] [Sup Ct, New York County 2010]; *Sehnert v New York City Tr. Auth.*, 2009 NY Slip Op 32807[U] [Sup Ct, New York County 2009]; *King v Alltom Props., Inc.*, 16 Misc 3d 1125[A], 2007 NY Slip Op 51570[U] [Sup Ct, Kings County 2007]), emergency subway escape hatches (*Arden v N.Y. City Tr. Auth.*, 2008 NY Slip Op 30018[U] [Sup Ct, New York County 2008]), and fire hydrants (*Manning v City of New York*, 16 Misc 3d 1132[A] [Sup Ct, Richmond County 2007]) are not, as they are intended to protrude from the sidewalk, and City has sole responsibility for their installation, maintenance, and removal (*Calise*, 2010 NY Slip Op 50208[U], 26 Misc 3d 1222[A]; *King*, 16 Misc 3d 1125[A]; *Manning*, 16 Misc 3d 1132[A]). "The fact that any one of these things can be broken off from their base and cause a tripping hazard does not thereby cause a metamorphosis to occur, converting the [encumbrance] . . . into street hardware." (*King*, 2007 NY Slip Op at *4, 16 Misc 3d at ** 1125[A]).

Therefore, "liability may be imposed on [an] abutting property owner only where he or she has affirmatively created the dangerous condition, negligently made repairs to the area, caused the dangerous condition to occur through a special use of that area or violated a statute which expressly imposes liability on the property owner for failure to maintain the abutting sidewalk." (*Grier v 35-63 Realty, Inc.*, 70 AD3d 772, 773 [2d Dept 2010]).

Here, the record reflects that the metal plate was part of a City bicycle rack, as DOT records and photographs show that a rack had been installed at the accident site, Accime testified that the metal plate in photographs of the accident site was a City bicycle rack base, and plaintiff

affirmed that the plate was the one on which she tripped. Absent admissible evidence demonstrating that the plate was not part of a City rack, plaintiff fails to show the existence of an issue of material fact as to the identification of the plate. (*Alvarez*, 68 NY2d at 324).

As the plate was part of City property intended to protrude from the sidewalk, and as City had sole responsibility for its installation, repair, and removal, it was not street hardware that Ring was obligated to maintain pursuant to section 19-152 and for which it is liable pursuant to section 7-210. Like a City sign, signpost, lamppost, or fire hydrant, the bicycle rack to which the plate was attached was embedded in and intended to protrude from the sidewalk, and as section 7-210 must be strictly construed against City, Ring is not liable for any injuries caused by the plate solely because it remained in the sidewalk after the rack was removed. (*See Manning,* 16 Misc 3d at *3 [abutting landowner not liable under sections 7-210 and 19-152 for plaintiff's injuries allegedly sustained as result of tripping on metal hole in ground left after fire hydrant removed]; *see also Smith,* 75 AD3d 425 [abutting landowner not liable for plaintiff's injuries allegedly sustained as result of tripping on a broken portion of City signpost embedded in sidewalk]; *Calise*, 2010 NY Slip Op 50208[U], 26 Misc 3d 1222[A] [same]; *King*, 16 Misc 3d 1125[A] [same]).

a. Caused or created

Given the evidence that Anglada had never seen a bicycle rack or the metal plate during the two years he worked as superintendent for the building before the accident, and that Ring h ad neither requested that a bicycle rack be installed or removed nor removed the rack, Ring has sustained its burden of demonstrating, *prima facie*, that it neither caused nor created the plate defect in the sidewalk. (*See Farrell v City of New York*, 67 AD3d 859, 861 [2d Dept 2009]

[abutting landowner made *prima facie* showing of entitlement to summary judgment by submitting evidentiary proof that it did not affirmatively cause defect or negligently perform repairs on accident site]; *Marino v Parish of Trinity Church,* 67 AD3d 500, 501 [1st Dept 2009] [same]; *Bruno v City of New York*, 36 AD3d 640, 641 [2d Dept 2007] [same]).

As plaintiff only speculates that Ring removed the rack or otherwise caused the plate defect, she has failed to raise an issue of fact precluding summary judgment in Ring's favor. (*See Marino*, 67 AD3d at 502 [plaintiff's speculation that other evidence of abutting landowner's repairs of accident site might exist insufficient to raise triable issue of fact]; *Torres v City of New York*, 32 AD3d 347, 349 [1st Dept 2006] [plaintiff, who submitted no evidence in opposition to motion, relying solely on affirmation of counsel, failed to raise triable issue of fact]).

b. Special use

"The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to special use for his own benefit and the part is used subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others." (*Balsam v Delma Eng'g*, 139 AD2d 292, 298 [1st Dept 1998]). An abutting landowner puts a sidewalk to special use when he installs an object that benefits him differently than it does the general populace. (*Id.*).

Here, Ring contracted with Spring for the construction of a sidewalk bridge over the accident site so that the building's windows could be repainted. Although Ring controlled the sidewalk bridge and used it for its own benefit, plaintiff did not trip on the sidewalk bridge, and there is no evidence in the record that construction of the bridge resulted in the removal of the bicycle rack or otherwise caused the plate defect or forced plaintiff to walk over and trip on the

plate, and plaintiff provides only speculation to the contrary. Thus, Ring was not putting the sidewalk to special use such that it is liable for plaintiff's injuries. (*See Korie v 27 W. 71st Street, LLC*, 2009 NY Slip Op 32649[U], * 24 [Sup Ct, New York County 2009] [erection of scaffolding over sidewalk not special use where plaintiff did not trip on scaffolding and no evidence in record showing that scaffolding "encroached on the sidewalk where plaintiff tripped in such a manner that directed plaintiff to walk upon the alleged defective portion of the sidewalk"]; *see also Montalbano v 136 W. 80 St. CP*, 2011 NY Slip Op 4161, * 2 [1st Dept 2011] [no special use of sidewalk by abutting landowner where plaintiff tripped over sidewalk defect, and Con Edison had replaced portion of sidewalk before accident to install gas line for landowner, as no evidence in record showed that installation of line caused or contributed to defect]).

C. Spring's motion

1. Contentions

Spring argues that it cannot be held liable for plaintiff's injuries, as it was not responsible for the sidewalk, any encumbrances thereon, or the sidewalk bridge, and there is no evidence in the record that it removed the bicycle rack or otherwise caused the plate defect. (Zawisny Aff.). Additionally, it claims it is entitled to summary judgment on Ring's cross-claims for indemnification and contribution, as there is no indemnification provision in the contract.

In opposition, plaintiff claims that Spring's motion is untimely, as the part rules provide that all summary judgment motions must be filed within 60 days of the note of issue, and Spring has failed to show good cause for its late filing. (Szechter Aff. in Opp.). Morever, even if Spring's motion were timely, she claims that it must still be denied, as it has provided no

evidence that it did not remove the rack. (*Id.*).

In opposition Ring contends that there are material issues of fact as to whether Spring removed the bicycle rack that preclude summary judgment in its favor on Ring's cross-claims for indemnification, as Spring has provided no testimony based on personal knowledge that it did not remove the bicycle rack, and a jury could reasonably conclude that Spring did so based on the close proximity of the poles supporting the sidewalk bridge to the metal plate. (Affirmation of John E. McLoughlin, Esq. in Opposition, dated Jan. 28, 2011).

In reply, Spring explains its delay in filing by its reliance on the 120-day rule time period for the filing of summary judgment motions provided in CPLR 3212, as it claims no justice was assigned to the case at the time it filed its motion. (*Id.*). Assuming its motion is timely, Spring maintains that it is entitled to summary judgment because there is no evidence of affirmative negligence on its part, and speculation as to whether it removed the bicycle rack in order construct the sidewalk bridge does not demonstrate the existence of material issues of fact. (Affirmation of Yolanda Zawisny, Esq. in Reply, dated Feb. 21, 2011).

2. Late filing

Pursuant to CPLR 3212, the deadline for filing a motion for summary judgment is 120 days after the filing of the note of issue (*Brill v City of New York*, 2 NY3d 648, 651 [2004]), although the court may require a shorter deadline (CPLR 3212[a]). My part rules require that motions for summary judgment be filed within 60 days of the filing of the note of issue.

Before the court may consider an untimely motion, the moving party must demonstrate good cause for the delay, or "a satisfactory explanation for the untimeliness." (*Brill*, 2 NY3d at 652. "No excuse at all, or a perfunctory excuse, cannot be good cause," and the motion's merits

or absence of prejudice resulting from the delay is immaterial. (*Id.*).

Here, Spring served and filed its motion for summary judgment 76 days and 89 days after plaintiff filed her note of issue, respectively, thus exceeding the time for filing summary judgment motions permitted by my part rules. As I issued these rules eight months before plaintiff filed the note of issue, and as this case was assigned to my part at that time and at the time this motion was filed, Spring has failed to demonstrate good cause for its late filing. (*Cf Gomez v Penmark Realty Corp.*, 50 AD3d 607, 608 [1st Dept 2008] [good cause shown for filing of summary judgment motion beyond deadline established by newly assigned judge's part rules where case was previously assigned to another judge whose part rules made no provision for the timing of summary judgment motions, and movant could not have known about reassignment until after his deadline passed]; *Hair v City Univ. of N.Y.*, 2010 NY Slip Op 32842[U], * 3 [Sup Ct, New York County 2010] [good cause shown where parties completed discovery without judicial intervention, so case was not assigned to an IAS part or justice and motion filed within CPLR 3212[a] 120-day deadline]). In light of this determination, the merits of Spring's motion need not be considered.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is denied; and it is further

ORDERED, that defendants F.M. Ring Associates, Inc., Frank Ring, Michael Ring, and F.M.R. Holding Company's motion for summary judgment is granted and the complaint is hereby dismissed as against defendants F.M. Ring Associates, Inc., Frank Ring, Michael Ring,

and F.M.R. Holding Company, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED, that defendant Spring Scaffolding, Inc.'s motion for summary judgment is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: June 20, 2011
New York, New York

JUN 20 2011

FILED

JUN 22 2011

NEW YORK
COUNTY CLERK'S OFFICE