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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Justice

Index Number : 113924/2009
MALDONADO, GUILLERMINA
vs.
MASARYK TOWERS
SEQUENCE NUMBER : 001
VACATE NOTE OF ISSUE/READINESS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

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: 3/22/12
MAR 22 2012

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

----------x

GUILLERMINA MALDONADO,

Plaintiff,

-against-

MASARYK TOWERS CORPORATION and THE CITY OF NEW YORK,

Defendants.

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Index No. 113924/09

Motion Subm.: 12/20/11
Motion Seq. No.: 001

DECISION & ORDER

BARBARA JAFFE, JSC:

For Masaryk:
Jonathan Groubert, Esq.
Lester Schwab *et al.*
120 Broadway
New York, NY 10271
212-964-6611

For City:
John Orcutt, Esq.
Michael A. Cardozo
Corporation Counsel
100 Church St.
New York, NY 10007
212-442-6851

By notice of motion dated November 3, 2011, defendant Masaryk Towers Corporation (Masaryk) moves for an order vacating the note of issue and striking the matter from the trial calendar as discovery has not been completed or, in the alternative, compelling plaintiff and defendant City to provide discovery and extending its time to file motions for summary judgment. Plaintiff and City oppose. At oral argument on December 20, 2011, plaintiff and Masaryk resolved by stipulation the outstanding discovery between them. The only issue remaining is discovery pertaining to City.

In this action, plaintiff alleges that on February 24, 2009, while she was crossing the intersection of Delancey and Willett Streets in Manhattan, she fell due to a dangerous condition on the curb/sidewalk at or near 246 Delancey Street, premises allegedly owned and/or maintained by defendants. (Affirmation of Jonathan Groubert, Esq., dated Nov. 3, 2011 [Groubert Aff.],

Exh. A).

On June 7, 2011, Masaryk served a discovery demand seeking from City repair records related to the sidewalk, sewer, fire hydrant, and water main in the area of the accident for the time period of two years before the accident to the present. (*Id.*, Exh. B).

Masaryk asserts that post-accident repair records are relevant here as it is undisputed that the sidewalk where plaintiff fell has since been repaired but there is no evidence as to which entity made the repairs, and there is thus an issue as to which entity exercised control over the area. (*Id.*).

City asserts that post-accident repair records are irrelevant as the fact that an entity made repairs after plaintiff's accident does not reflect that it had a duty to maintain the area before plaintiff's accident, observing that section 7-210 of the Administrative Code of the City of New York shifted liability for sidewalk repairs from City to abutting property owners. It thus argues that it may be held liable only if it affirmatively caused or created the defect at issue, and that post-accident records would not demonstrate whether it made any repairs or performed work at the location before the accident. (Affirmation of John Orcutt, Esq., dated Nov. 30, 2011).

In reply, Masaryk maintains that if City made post-accident repairs to the area, it exercised control over the area and therefore may be held liable for any defective conditions therein. (Reply Affirmation, dated Dec. 1, 2011).

In a negligence action, evidence of post-accident repairs is neither admissible nor discoverable (*Hinton v City of New York*, 73 AD3d 407 [1st Dept 2010], *lv denied* 15 NY3d 715), and may not constitute an admission of negligence (*Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549 [1st Dept 2011]), absent an issue of control (*Fernandez v Higdon El. Co.*, 220 AD2d 293 [1st

Dept 1995]).

Here, as the duty to maintain the sidewalk belongs to the abutting property owner and not City (Admin. Code § 7-210), Masaryk's mere assertion that there is an issue of ownership or control of the area does not create an issue of control or ownership. (*See Cortes v Cent. El., Inc.*, 45 AD3d 323 [1st Dept 2007] [motion to compel post-accident maintenance records properly denied absent issue of control]; *McConnell v Santana*, 30 AD3d 481 [2d Dept 2006] [court erred in requiring production of records of repairs and service to bus after accident]; *Orlando v City of New York*, 306 AD2d 453 [2d Dept 2003] [court providently exercised discretion in denying plaintiff's motion to compel post-accident maintenance records]; *Sosa v City of New York*, 281 AD2d 469 [2d Dept 2001] [evidence of post-accident repairs was properly disregarded by court]; *David v City of New York*, 267 AD2d 419, 420 [2d Dept 1999] ["[a]s there was no disputed issue concerning the maintenance and control of the sidewalk where the accident occurred, the plaintiff's testimony regarding subsequent repairs should have been stricken"]; *Angerome v City of New York*, 237 AD2d 551 [2d Dept 1997] [as defendants admitted to maintaining and controlling traffic light at issue, plaintiff not entitled to post-accident repair records]; *compare Gordon v City of New York*, 245 AD2d 184 [1st Dept 1997] [post-accident repair estimates were discoverable as relevant to issue of who controlled or maintained sidewalk where plaintiff fell; action arose prior to enactment of Admin. Code § 7-210]).

Moreover, proof of post-accident repairs may not be used to establish that City negligently created the condition before the accident. (*See* Prince, Richardson on Evidence § 4-612 [Farrell 11th ed] ["Evidence of repairs made after an accident is inadmissible if offered as an admission of negligence or culpability in causing the injury, because the inference is unjust

and public policy forbids it."]).

Accordingly, it is hereby

ORDERED, that defendant Masaryk Towers Corporation's motion to vacate the note of issue or compel is denied in its entirety.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: March 23, 2012
New York, New York

MAR 23 2012

FILED

MAR 26 2012

COUNTY CLERK'S OFFICE