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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

GLORIA DINALLO,

Plaintiff,

- v -

NEW YORK UNION SQUARE RETAIL, L.P., UNION SQUARE-14TH ST. ASSOCIATES, L.P., CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, BOARD OF MANAGERS OF ONE UNION SQUARE EAST CONDOMINIUM, ONE UNION SQUARE EAST CONDOMINIUM, and MAXWELL KATES BROKERAGE, INC.,

Defendants.

INDEX NO. 102666/09

MOTION DATE 5/31/12

MOTION SEQ. NO. 003

The following papers, numbered 1 to 13 were read on this motion for summary judgment and cross motion for summary judgment

Notice of Motion–Affirmation of Service; Affirmation — Exhibits A- F, G [Affidavit]	No(s). 1-2; 3-4
Notice of Cross Motion—Affidavit of Service; Affirmation — Exhibits A-M	No(s). 5-6; 7
Affirmation In Opposition— Exhibit A—Affidavit of Service; Affirmation in Opposition; Affirmation In Opposition –Exhibits A-C	No(s). 8-9; 10; 11
Reply Affirmation — Exhibit A—Affidavit of Service	No(s). 12-13

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant City of New York is granted, and the cross motion for summary judgment by defendant One Union Square Retail LLP s/h/a New York Union Square Retail, L.P. is granted; and it is further

ORDERED that the complaint is severed and dismissed as against defendants City of New York and New York Union Square Retail, L.P., with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the cross claims by and against the City of New York and New York Union Square Retail, L.P. are dismissed; and it is further

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

ORDERED that the action is severed and continued against the remaining defendants.

In this action, plaintiffs allege that, on July 11, 2008, plaintiff Gloria Dinallo tripped and fell on the public sidewalk located outside of the entrance to the Food Emporium at 10 Union Square East in Manhattan. Her husband asserts a derivative cause of action for loss of consortium.

The City of New York moved for summary judgment dismissing the complaint and all cross claims as against it. By decision and order dated February 15, 2012, this Court severed and stayed the action as against defendant The Great Atlantic & Pacific Tea Company, Inc. (which was in bankruptcy proceedings) and consolidated this action with *Dinallo v Board of Managers of One Union Sq. East Condominium*, Index No. 109800/201010, under this index number. Thereafter, One Union Square Retail LLP s/h/a New York Union Square Retail, L.P. also cross-moved for summary judgment dismissing the complaint and all cross claims as against it. Plaintiffs opposed both the motion and cross motion.

The notice of claim states that the accident "occurred upon the lip of the sidewalk directly outside of the entrance of Food Emporium located thereat." (Gibek Affirm., Ex A.) At her 50-hearing, Gloria Dinallo testified that she tripped over "a cement raised sidewalk level above, you know, the normal sidewalk." (Gibek Affirm., Ex C, at 6.) According to Dinallo, it was raised "about an inch and a half to two inches, but I can't really – I really can't say. I don't know." (*Id.*) At her deposition, Dinallo was asked, "You mentioned a lip, can you tell what you mean by that?" (Gibek Affirm., Ex D, at 30.) Dinallo answered, "A raised cement." (*Id.*) When asked to describe it in more detail, she testified, "The cement. I don't know how to explain it. It's not the sidewalk, it's the next – the cement platform or outside the store where the sidewalk ends and that begins, it's raised." (*Id.*) Black and white photographs are attached to the copy of the notice of claim addressed to the City and the New York City Transit Authority. (See Gibek Affirm., Ex A.)

The City has demonstrated prima facie entitlement to summary judgment as a matter of law. Effective September 14, 2003, Section 7-210 of the Administrative Code of the City of New York shifted responsibility for sidewalk

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maintenance and liability for injuries arising from a defective sidewalk, from the City of New York to the owner of the real property which abuts the defective sidewalk, with several exceptions not relevant here. A title search reveals that the City is not the abutting property owner, and the abutting property is neither a one, two, or three-family residential property. (*See* Gibek Affirm., Ex G [Schloss Aff.].) According to the City, record title for New York Block 870, Lot 2 on July 11, 2008 was "Union Square –14th Street Associates, by Declaration of Condominium recorded August 10, 1987." (*Id.* ¶ 3.)

Administrative Code § 7-210 (a) states, "It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition." Thus, to the extent that plaintiffs assert that the height differential was due to a defect in the public sidewalk, the City was not liable for Gloria Dinallo's injuries. (*Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010].)

Plaintiffs' arguments in opposition are unavailing. "Plaintiff[s'] mere hope that discovery will uncover evidence needed to defeat summary judgment is insufficient to deny the motion." (*Smartix Intl. Corp. v MasterCard Intl. LLC*, 90 AD3d 469 [1st Dept 2011].) Plaintiffs' argument that summary judgment should be denied because the City did not address the question of whether it made a special use of its own public sidewalk is without merit.

New York Union Square Retail, L.P. has also demonstrated prima facie entitlement to summary judgment as a matter of law. It is not disputed that New York Union Square Retail, LP is the owner of the retail condominium unit. Adam Lichtenstein, an employee of Malkin Properties, LLC, testified at his deposition that the owner of the retail property unit back in July 2008 was "New York Union Square Retail, LP care of Malkin Properties." (Peknic Affirm., Ex I, at 8, 29.)

To the extent that plaintiffs could argue that this defendant had a duty to repair the alleged height differential in the abutting sidewalk pursuant to Administrative Code § 7-210, "an owner of an individual [condominium] unit in the building, is not an 'owner' for purposes of Administrative Code of the City of New York § 7–210; thus, it is not liable for injuries sustained as a result of defects in the sidewalk." (*Araujo v Mercer Sq. Owners Corp.*, 95 AD3d 624, 624 [1st Dept 2012].)

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To the extent that plaintiffs could argue that the alleged height differential was attributable to a defect in the common elements of the condominium (as opposed to a defect in the abutting public sidewalk), "owners of individual units are not liable for injuries sustained as a result of defects in the common elements." (*Rothstein v 400 East 54th Street Co.*, 51 AD3d 431, 432 [1st Dept 2008].)

Plaintiffs' reliance on Section 6.9-3 of the Declaration of Condominium is misplaced. The sentence in Section 6.9-3 upon which plaintiffs rely states, in its entirety,

> "Each Unit and all portions of the Common Elements shall be kept in first class condition *by the Unit Owner or Board, whichever is responsible for the maintenance thereof* as set forth herein, and *such Unit Owner or Board, as the case may be*, shall promptly make or perform, or cause to be made or performed, all maintenance work, repairs and replacements necessary in connection herewith."

(O'Connor Opp. Affirm., Ex B, at 40 [emphasis supplied].) This sentence does not raise a triable issue of fact as to whether New York Union Square Retail, L.P. was responsible for maintenance of the abutting sidewalk and common elements outside the Food Emporium. The holding that "condominium common elements are solely under the control of the board of managers" is based on statutory interpretation of the Condominium Act (Real Property Law § 339-e [2]). (*Pekelnaya v Allyn*, 25 AD3d 111, 120-121 [1st Dept 2005].) Moreover, plaintiffs do not point to any other part of the condominium declaration that places responsibility upon the retail unit owner for maintenance and repair of the area where Gloria Dinallo allegedly tripped and fell.

Plaintiffs argue that summary judgment should be denied because the owner of a premises open to the public has a non-delegable duty to keep its premises safe, including areas of ingress and egress, citing, among other cases, *Backiel v Citibank, N.A.* (299 AD2d 504 [2d Dept 2002].) However, *Backiel* was cited in the lower court's decision in *Araujo v Mercer Square Owners Corp.* (33 Misc 3d 835 [Sup Ct, NY County 2011]), which was later

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reversed on appeal. (*Araujo*, 95 AD3d at 624.) Therefore, this argument is without merit.

Given the absence of a duty of care owed by movants to plaintiffs, it is irrelevant whether this defendant had actual or constructive notice of the alleged raised concrete portion that allegedly caused Gloria Dinallo to trip and fall on July 10, 2008.

Therefore, the motion and cross motion for summary judgment are granted.

HON. MICHAEL D. STALLMAN

Dated: 8/31/12
New York, New York

_____, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE