Murphy v City of New York
2013 NY Slip Op 33449(U)
November 25, 2013
Supreme Court, New York County
Docket Number: 102571/2011
Judge: Kathryn E. Freed
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[* 1]
INDEX NO. 102571/2011
RECEIVED NYSCEF: 12/6/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT Justice

PART 5

Index Number : 102571/2011
MURPHY, ESTHER
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT CAL #39

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
DEC 02 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11-25-13
NOV 25 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

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

---------- X

ESTHER MURPHY,

Plaintiff,

DECISION/ORDER

- against-

Index No. 102571/2011
Seq. No. 005

THE CITY OF NEW YORK, ELDORADO HOLDING CORP., JUDEX ENTERPRISES INC. d/b/a PANGEA, POLISH NATIONAL ALLIANCE and JOZEF PILSUDSKI INSTITUTE OF AMERICA and CHURCH & LOUIS, INC. d/b/a NINTH WARD,

Defendants.

---------- X

FILED
DEC 0 2 2013
NEW YORK
COUNTY CLERK'S OFFICE

KATHRYN FREED, J.:

RECITATION, AS REQUIRED BY CPLR§2219, OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED	1-3
ORDER TO SHOW CAUSE AND AFFIDAVITS ATTACHED	
ANSWERING AFFIDAVITS	4-6
REPLYING AFFIDAVITS	7-9
EXHIBITS	
OTHER	

This is a personal injury action in which plaintiff Esther Murphy (Murphy) alleges that, on September 10, 2010, at approximately 11:00 p.m., she was caused to trip, fall and sustain serious injuries due to the defective condition of the sidewalk pavement and tree well in front of the premises located at 178 Second Avenue and 180 Second Avenue in Manhattan's East Village. Under motion sequence number 005, defendants Judex Enterprises Inc. (Judex) d/b/a Pangea (Pangea) and Eldorado Holding Corp. (Eldorado) move for an order, pursuant to CPLR§3212, granting summary judgment and dismissing all claims and cross claims against them on the ground

that the alleged sidewalk defect is trivial as a matter of law, and therefore, not actionable. Under motion sequence number 006, defendant Jozef Pilsudski Institute of America (Pilsudski Institute) moves, pursuant to CPLR§3212, for an order granting summary judgment and dismissing the complaint and all cross claims against it on the ground that it is not responsible for plaintiff' s injuries, or for the condition of the sidewalk which allegedly caused her to trip and fall.

Under motion sequence number 007, defendants Polish National Alliance (PNA) and Church & Louis, Inc. (Church & Louis) d/b/a Ninth Ward (Ninth Ward) also move for an order, pursuant to CPLR§ 3212, dismissing the complaint and all cross claims against them on the ground that they are not responsible for plaintiff's injuries, or for the condition of the sidewalk which allegedly caused her to trip and fall. The motions, under motion sequence numbers 005, 006 and 007, are consolidated for the purpose of disposition.

It is well settled that, to obtain summary judgment in its favor, each movant must "demonstrate that there are no material issues of in dispute, and that it is entitled to judgment as a matter of Law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d303. 306 [1st Dept. 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City* of New York, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary

judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]). Thus, based on the Court's examination of the motions, only Pilsudski Institute has succeeded in making the requisite showing.

Among the proofs submitted in support of the motions is a copy of Murphy's deposition transcript together with the transcripts of the witnesses produced for deposition by the various named defendants. Also submitted, are copies of the pleadings, multiple photographs of the subject sidewalk and tree well, a commercial lease and a report generated by a 3-1-1 call.

According to Murphy, prior to her accident, she, her son and daughter-in-law had dinner at Cacio Pepe, a restaurant located at 182 Second Avenue. Murphy testified that, on their way to Cacio Pepe, the three of them walked by the area where she later fell, but that she did not notice anything particular about the sidewalk pavement at that time. They left Cacio Pepe around 11:00 p.m., and started walking along the busy sidewalk while looking to hail a taxi cab. Her son was walking a couple of feet ahead of her and her daughter-in-law was walking alongside her, on her left. According to Murphy's testimony, they had only walked about 30 to 50 feet when she suddenly tripped. She stated that her "right foot caught the sidewalk that was raised" and that "it threw me over into the tree well," which was to her right (Murphy dep. at 26). Murphy explained that, as she started to fall, her foot hit a chunk of hardened concrete inside the tree well and she then struck the tree with her lower back and left elbow and fell to the ground. While her son was helping her up, he pointed out a raised portion of sidewalk pavement near the tree well as the cause of her accident.

Two days later, and after she had received medical treatment for, among other things, fractures to her left elbow and to the fourth and fifth metatarsals of her left foot, Murphy returned to the site with her son, her daughter-in-law, and an investigator from her attorney's office to

photograph the area.

Seeking to recover damages for her accident and injuries, Murphy filed a written notice of claim within 90 days of her accident. On February 28, 2011, a hearing pursuant to General Municipal Law 50-h, was held, after which, Murphy commenced the instant action by filing her summons and complaint on or about March 2, 2011. In her initial complaint, Murphy named The City of New York, Eldorado, Pangea, PNA and Pilsudski Institute as defendants based on their alleged ownership and control of the premises abutting the sidewalk and tree well, and/or their responsibility to maintain and repair the sidewalk and tree well. Plaintiff claims that the raised pavement flag, which she describes as higher on the end nearest the tree well and narrows down in the direction of the buildings, is about two inches higher that the flag adjoining it, at its highest point. She also claims that there is a two-inch height differential between the ground in the tree well and the sidewalk pavement adjacent to it. She acknowledges that, at the time of her accident, the lighting was good, her view was unobstructed and that she was looking in front of her as she walked alongside her daughter-in-law.

In her complaint, plaintiff charges defendants with actual and constructive notice of the defective conditions of the sidewalk and the tree well, both of which she identifies as causes of her accident. She asserts that the sidewalk pavement and tree well looked as if they had been in a defective condition for a significant period of time prior to her accident.

During discovery, it was revealed that when plaintiff and her son and daughter-in-law walked out of Cacio Pepe, they turned left and walked past the Ninth Ward's outdoor sidewalk café. At that point, PNA impleaded Ninth Ward as a third-party defendant and plaintiff moved to amend her complaint to add Ninth Ward as a direct defendant. Via order dated November 21, 2011, the

Honorable Barbara Jaffe, before whom this matter was then pending, granted the motion based on Ninth Ward's tenancy in premises adjacent to the location of plaintiff's accident, and ordered the amendment of the caption to reflect this change. The parties pursued additional discovery and plaintiff filed a note of issue on or about March 5, 2013.

The parties acknowledge that the alleged misleveled pavement flags run along the property line between 178 Second Avenue and 180 Second Avenue, with the higher flag on 178 Second Avenue's side of the property line, and with the tree well on 180 Second Avenue's side of the property line. The subject pavement is part of a public sidewalk and, according to William Steyer (Steyer), Manhattan's Director of Forestry for the Forestry Division of the New York City Parks Department (Parks Dept.), the tree and tree well in front of 180 Second Avenue are the property of The City of New York.

At the deposition of Eldorado's president Martin Levine (Levine), he described the building at 178 Second Avenue as 25 feet wide and five stories high, with a retail space on the ground floor used by Pangea restaurant, and four decontrolled residential units on the floors above. Levine testified that he is responsible for the maintenance of the exterior of the premises and that he visits the property about once a month to do a general inspection of the property, or to have a meeting with Pangea's owners. He stated that his monthly inspections include a glance at the sidewalk, and that if he notes any work needing to be done, he hires someone to do it.

Levine testified that Eldorado has owned 178 Second Avenue at least as far back as 1991 or 1992, and he denied ordering any work to be done, at any time, to the sidewalk out front. He also denied: having any responsibility with respect to the tree well, which, he insisted, is entirely in front of the neighboring property at 180 Second Avenue; ever noticing a height differential between any

flags of pavement, including those along the property line with 180 Second Avenue; receiving a notice of violation from the City; or speaking with the owners of Pangea about trees uprooting the sidewalk in front of the building. Although Levine was questioned about the lease between Eldorado and Judex, the corporate entity that owns and operates Pangea, that was in effect in September 2010, there is no copy of the lease attached to the motion papers for the Court's review.

Pangea's president, Stephen Shanaghan (Shanaghan), was also deposed in this matter. Shanaghan testified that he, along with his business partner and Judex's secretary, Arnoldo Caballero (Caballero), manage Pangea. He stated that Pangea operates an outdoor sidewalk café on a seasonal basis directly in front of the building, which, in purported compliance with a New York City permit, measures up to 21 feet wide by 11 feet deep. Shanaghan also stated that, as part of his daily responsibilities, he inspects the sidewalk in front of his restaurant for cleanliness. When asked whether the specific location of Pangea's café would cause pedestrian traffic to bottleneck as people walked by, Shanaghan acknowledged that while this is a possibility, he never observed this actually occur, adding that the sidewalk on that part of Second Avenue is wider than the sidewalks in most other parts of the City.

Shanaghan acknowledged that, back in the spring of 2010, he had observed cracking in the sidewalk "which appeared to be as a result of the trees or the tree trunks" (Shanaghan dep. at 23). He explained that the cracking seemed to come from two trees, one in front of 180 Second Avenue and the other in front of 176 Second Avenue, and that he made a "3-1-1" call to report the problem. According to the "3-1-1 Call Center" record, the call was made on May 9, 2010, and redirected to the attention of the Parks Dept. (plaintiff's exhibit G). The 3-1-1 report states, in relevant part: "caller states that there are 2 trees that are uprooting on the sidewalk and would like the sidewalk

repaired" and "2 trees one between 176 and one between 178 on 2nd avenue" (*id.*).

When asked whether he made the call out of a concern about pedestrian traffic and the possibility that the cracking might be hazardous, Shanaghan replied:

"I was trying to preempt any situation from happening. It wasn't really a major cracking that was occurring. But out of my concern in being on top of the details of the front of my space, I wanted to report it and have it fixed before it became more pronounced"

(Shanaghan dep. at 34-35). Shanaghan stated that the inspector who came out to examine the sidewalk informed him that the repairs were the landlord' s responsibility, not the Citys. The inspector then reportedly handed him a brochure with information on the subject.

Aside from Murphy's accident, which he recalled learning about when he was notified about it by his landlord's insurance company in April 2011, Shanaghan, like Levine, denied ever seeing or hearing about any other falls, and he denied having ever received any complaints about the condition of the sidewalk out front. Despite his observation of cracking pavement, Shanaghan specifically denied noticing any misleveling between flags, or noticing a drop off between the sidewalk pavement and the tree well, at any time prior to September 10, 2010.

Shanaghan testified that he discussed the sidewalk with the landlord some time in 2011, and that he recalled the landlord coming to the site with a contractor to inspect the sidewalk. However, he did not recall any actual repair work being done to the sidewalk in front of either 178 or180 Second Avenue. Shanaghan also testified that he remembered seeing someone laying cement in the tree well in front of 180 Second Avenue in the spring of 2012. Finally, Shanaghan denied knowing whether any of the named defendants were ever issued a notice of violation for the condition of the sidewalk in front of either building.

Central to Eldorado and Pangea's joint motion are their contentions that the sidewalk defect is trivial and not actionable, and that they cannot be held liable for any problems involving or arising from the tree well because it is located on the other side of the property line with 180 Second Avenue.

Relying on the Court of Appeals decision in *Trincere v County of Suffolk* (90 N.Y.2d 976, 977 [1997]) and its progeny for the proposition that there is no set rule as to when a defect can be considered trivial, and that "[n]ot every injury allegedly caused by an elevated brick or slab need be submitted to a jury," Eldorado and Pangea insist the particular facts and circumstances here weigh in their favor and do not create a basis for liability. To this end, they proffer the photographs and measurements of the subject pavement taken on both March 21, 2013 and May 1, 2013, by Nicholas Hurzeler (Hurzeler), an attorney with the firm representing them, showing the height of the alleged defect to be only one-half (½) inch. They reference testimony given during Murphy's deposition in which she stated that there was nothing blocking her view, and that she was looking in front of her as she walked (Murphy dep at 25, 27), as further proof that the misleveling was trivial or she would have noticed it. Additionally, they rely on their own denials, at both Levine and Shanaghan' s depositions, of having received any written complaints about the sidewalk, or of having knowledge of any other accidents resulting from the condition of the sidewalk, prior to or subsequent to plaintiff's incident.

In her opposition, plaintiff disputes Hurzeler's findings and submits an affidavit containing the findings and opinions of professional engineer Richard Berkenfeld (Berkenfeld), who visited the site on June 19, 2013, at or around the same time period as Hurzeler, and "observed that there is an abrupt vertical difference in elevation . . . that was measured to be between 3/4 inch and 7/8 inch"

(plaintiff opp, exhibit B at 19). Berkenfeld stated that, based on his visit to the site and his review of the complaint, the 50-h hearing, deposition transcripts, motion papers and specific rules, regulations, codes and guidelines pertaining to public sidewalks in New York City, it is his:

"opinion that the abrupt vertical difference in the elevation of approximately 3/4 inch to 7/8 inch between the public sidewalk of 180 Second Avenue and 178 Second Avenue which was indicated to be a cause of the accident . . . was a dangerous and hazardous condition that should have been corrected by the owner of 178 Second Avenue as per the Rules and Regulations of the New York City Department of Transportation that is included in 19-152 of the Administrative Code of the City of New York as well as 7-210 of the Administrative Code of the City of New York"

(plaintiff opp, exh. B at 32). Additionally, plaintiff contends that defendants' description of the defect as trivial is contradicted by Hurzeler who states, at paragraph 9 of his affidavit, that "[t]he condition of the sidewalk is plainly visible to any pedestrian traversing the sidewalk at that particular location." Plaintiff contends that, the description of the misleveling defect as "plainly visible" constitutes an admission that it was neither insignificant nor trivial (*see* Eldorado/Pangea aff, exh. 12).

Next, plaintiff asserts that the height differential between the flags of pavement is also not considered trivial under the Administrative Code of the City of New York. Section §19-152 Administrative Code provides, in relevant part:

"a. The owner of any real property, at his or her own cost and expense, shall (1) install, construct, repave, reconstruct and repair the sidewalk flags in front of or abutting such property . . . . The commissioner shall so order or direct the owner to reinstall . . . repave or repair a defective sidewalk flag in front of or abutting such property . . . The commissioner shall direct the owner to . . . reinstall . . . repave or repair only those sidewalk flags which contain a substantial defect. For the purposes of this subdivision, a substantial defect shall include any of the following:

* * *

2. one or more sidewalk flag(s) are cracked . . .

* * *

4. a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch . . ."

Therefore, plaintiff contends, even if the height differential is only ½ inch, as reported by Hurzeler, it cannot be deemed trivial under the Administrative Code, and cannot be a basis for a summary judgment dismissal of the claim.

Finally, plaintiff responds to Eldorado and Pangea's denials of notice of the defective pavement with references to Shanaghan 's testimony in which he testified about his daily inspections of the sidewalk and a copy of the report generated by his call to the 3-1-1 Call Center approximately four months prior to plaintiff's accident. Plaintiff also submits a copy of the violation issued to Eldorado the following July 7, 2011, which identified the sidewalk defects as "broken," "trip hazard," and "patchwork" and directed Eldorado to "replace 205 square feet of sidewalk" to correct the defects (plaintiff opp., exh. G). Plaintiff contends that the violation constitutes further evidence of Eldorado and Pangea's continuing negligence, in that they failed to correct the sidewalk and maintain it in a safe condition even after the 3-1-1 call and Murphy's accident.

It is well settled that "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d at 977 [internal quotation marks and citation omitted]). Here, the defect at issue involves a height difference between two flags of pavement which measures anywhere from ½ inch, according to Eldorado and Pangea, to 7/8 inch, according to plaintiff, with the highest edge by the corner of the tree well and adjacent to another height differential involving a drop off between the pavement and the tree well on 180 Second Avenue's side of the property line. The facts and circumstances surrounding plaintiff's accident, which include a lack of evidence of any change to the sidewalk immediately prior to September 10, 2010, do not lend themselves to summary judgment as between these parties.

Questions of fact remain as to whether the misleveling was significant enough to be a tripping hazard, and if so, whether it was visible and apparent and had existed for a sufficient length of time prior to plaintiff's accident to permit it to have been discovered and remedied (*see Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]).

The basis of Pilsudski Institute's summary judgment motion is that it is merely an upstairs tenant in the five-story building owned by PNA, and therefore, not responsible, under section §7-210 of the Administrative Code or under the terms and conditions of its lease with PNA for maintaining the abutting sidewalk. Section § 7-210 provides, in relevant part:

"a. It shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition.

"b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk . . . shall be liable for . . . personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags . . . ."

A tenant, on the other hand, "has no statutory obligation to maintain the public sidewalk adjacent to its store" (*O'Brien v. Prestige Bay Plaza Dev. Corp.*, 103 A.D.3d 428, 429 [1st Dept. 2013]).

Pilsudski Institute annexes a copy of its lease, dated May 1, 2000, as amended and extended on April 24, 2005, and further amended on April 5, 2010, effective May 1, 2010, for five years through April 30, 2013 (PNA/Pilsudski Lease) (*see* Pilsudski Institute, exh. M), as evidence that it is merely a tenant in PNA's building, occupying space on the second, third and fifth floors, without any responsibility for maintaining the exterior of the building. Pilsudski Institute supports its position with reference to section 4 of the PNA/Pilsudski Lease, entitled "Maintenance and Repairs" which states, in relevant part, that the "[o]wner shall maintain in good working order and repair the

exterior and structural portions of the building, including structural portions of the demises premises" (*id.*).

Pilsudski Institute also submits the deposition transcript of its executive director, Dr. Iwona Drag Korga (Korga), who testified that neither the institute nor, to her knowledge, does PNA, employ maintenance workers to care for the building. She also stated that she is not aware of anything in the lease, or in any other written communication between Pilsudski Institute and PNA that pertains to the building's management, but did acknowledge that she would sometimes alert PNA about a major problem in the building so that it (PNA) could handle it (Korga dep. at 52-53).

Korga testified that she first learned of Murphy's accident a few months after it occurred when she spoke with a man who came to photograph the area. She contacted PNA to advise them about the accident and about the condition of the tree well, and she then spoke with Ninth Ward owner, Robert Morgan (Morgan), about possible solutions for the problem with the tree well. She stated that Morgan offered to handle it because it appeared to be a simple repair, and that a repair was, in fact, made to the tree well a few months later. Upon further questioning, Korga stated that, prior to speaking with the photographer, she had never noticed the hardened chunk of cement or any other problem with the tree well.

Korga also testified that she did not know of any complaints to Pilsudski Institute about the sidewalk or the tree well, nor did she know of any complaints to PNA about the sidewalk or tree well. Korga also stated that she was unaware of any violations issued by the City to either Pilsudski Institute or PNA with respect to the sidewalk in front of 180 Second Avenue, adding that as the person to whom PNA 's mail at 180 Second Avenue is directed, she would have seen any citations had any been issued. Finally, Korga stated that she never noticed the difference in height between

the two flags of pavement at the property line and denied being aware of anything else in or about the front of the building that might be dangerous to pedestrians.

Pilsudski Institute contends that it is entitled to summary judgment because as merely an upstairs tenant, it is not responsible for any defect involving the sidewalk or tree well, nor does it owe any duty to Murphy. Rather, it is PNA, as owner, who is responsible under the statute and/or the PNA/Pilsudski Lease and/or the policies and procedures of the Parks Department to maintain the sidewalk abutting the building and surrounding the tree well in a safe condition, while the responsibility for repairing defects within in the tree well, rests with the City (*see Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d 517, 521 [2008]; *Fusco v. City of New York*, 71 A.D.3d 1083, 1084 [2nd Dept. 2010]).

Murphy's opposition, based solely on speculation and on the same charges and accusations as it asserts against PNA, without distinguishing between PNA's obligations as a property owner and Pilsudski Institute's obligations as a tenant, is inadequate to forestall summary judgment (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Inasmuch as Pilsudski Institute has demonstrated prima facie entitlement to judgment as a matter of law, the complaint and all cross claims, including those of The City of New York which did not oppose the motion, must be dismissed as against it. Additionally, the cross claims of Pilsudski Institute as against Eldorado, Judex/Pangea, PNA and The City of New York are dismissed (*see Dunham v. Hilco Constr. Co.*, 89 N.Y.2d 425, 429-430 [1996]).

In their joint motion, PNA and Ninth Ward argue that there is no basis for holding them liable for Murphy's accident because: (1) the raised flag was on 178 Second Avenue's side of the property line, which they had no duty to maintain; and (2) the city-owned tree and tree well are the

City's responsibilities.

Annexed to their papers is a transcript of Morgan's deposition during which he testified about his role as the president of Church & Louis, the entity that leased the ground floor retail space from PNA. Morgan explained that Church & Louis used the retail space to operate Ninth Ward, its New Orleans-themed restaurant and bar, and that Ninth Ward operated a sidewalk café out in front. He testified that, under the terms of the lease, it is his responsibility to maintain the leased space, both inside and out, and that inspecting the sidewalk and making sure there were "no holes" on their property are part of those responsibilities (Morgan dep. at 13, 19). He stated the City issued a permit for the sidewalk café[2] setting forth the location and overall dimensions of the seating area, and that the café was open at the time of plaintiff's accident.

Morgan testified that he was unaware of any repairs done to the sidewalk prior to Murphy's accident, and that he learned of her accident "through the grapevine" (*id.* at 14). He denied having any conversation with either the tenants or the owners of 178 Second Avenue about the sidewalk or tree well prior to Murphy's accident, but recalled speaking with either Shanaghan or Caballero about the sidewalk and tree well at some point after the accident had occurred. According to Morgan, he and either Shanaghan or Caballero discussed the drop off between the sidewalk and tree well, the misleveled pavement, and the tree roots pushing up the sidewalk pavement, but that none of them knew whose responsibility it was to fix the sidewalk. Morgan stated that he had a contractor lay cement in the tree well to level it off and extend the area of smooth sidewalk, and that he later received a fine for having this work done without a permit, which until then, he did not know was required (*id.* at 43, 44, 45, 49).

As set forth in Administrative Code§ 7-210, the obligation to maintain the public sidewalk rests with the property owner, and even where a tenant is obligated under the terms of lease to maintain and repair an abutting sidewalk, such provision "do[es] not impose on the tenant a duty to a third party, such as plaintiff" (*Collado v. Cruz*, 81 A.D.3d 542, 542 [1st Dept. 2011]). Rather, the inclusion of such a provision might obligate a tenant to reimburse the property owner for damages based on a breach of the lease which, depending on the specific terms of their rental agreement, might provide for a defense, indemnification and/or contribution in the landlord's favor (*id.* at 543). However, like Eldorado and Pangea, PNA and Ninth Ward fails to attach to its motion papers a copy of the lease evidencing their relationship as landlord and tenant, and, among other things, establishing their respective obligations with regard to the leased premises and to each other.

Contrary to defendants' arguments, the rule that a New York City property owner's responsibility for maintaining and repairing an abutting sidewalk does not extend to tree wells (*see Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d at 521), and does not, necessarily, relieve defendants of liability for defects in the sidewalk caused by uprooting from a city-owned tree. In addition to omitting a copy of the lease, PNA and Ninth Ward also failed to supply evidence from an expert to support their contention that there were no tree roots raising the sidewalk in front of 180 Second Avenue, and/or that the purported misleveling was not caused or exacerbated by, a drop or lowering of pavement on 180 Second Avenue's side, due to tree roots or some other cause. As a result, PNA and Ninth Ward have failed to tender sufficient evidence in support of their motion, and mere denials of responsibility, through the affidavit of an attorney who is without personal knowledge, are insufficient "to warrant the court as a matter of law in directing judgment in [their] favor" (*Zuckerman v. City of New York*, 49 N.Y.2d at 562; CPLR§ 3212 [b]).

For all the reasons set forth above, as questions of fact remain regarding: (1) PNA and Eldorado's liability as owners; (2) what, if any, liabilities exist as between the owners and their ground floor tenants based on the terms and conditions of their respective leases; and (3) whether there is any basis for holding Judex/Pangea and/or Church & Louis/Ninth Ward liable to Murphy, a finding that would entail proof that either or both of these tenants created the alleged defects, or made special use of the sidewalk through the operation of their sidewalk cafés, an issue which has been alluded to, but not fully briefed (*see Kaufman v. Silver*, 90 N.Y.2d 204, 207 [1997]; *Thomas v. Triangle Realty Co.*, 255 A.D.2d 153, 153 [1st Dept. 1998]; *Otero v. City of New York*, 213 A.D.2d 339, 340 [1st Dept. 1995]).

Accordingly, it is

ORDERED that the motion for summary judgment, under motion sequence number 006, is granted as to Jozef Pilsudski Institute of America and the complaint and all cross claims are dismissed as against this defendant with costs and disbursements to this defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross claims of Jozef Pilsudski Institute of America as against Eldorado Holding Corp., Judex Enterprises Inc. d/b/a Pangea, Polish National Alliance and The City of New York are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Jozef Pilsudski Institute of America; and it is further

ORDERED that the motions for summary judgment, under motion sequence numbers 005 and 007 are granted only to the extent that the cross claims of Jozef Pilsudski Institute of America are dismissed as against them, and are otherwise denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that this constitutes the decision of the Court.

Dated: November 25, 2013

ENTER:

NOV 25 2013

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED
DEC 02 2013
NEW YORK
COUNTY CLERK'S OFFICE