

Balsamo v New York City Tr. Auth.

2014 NY Slip Op 30495(U)

February 25, 2014

Supreme Court, New York County

Docket Number: 103420/11

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN

PART 21

Justice

Index Number : 103420/2011
BALSAMO, VICTORIA F.
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 013
SUMMARY JUDGMENT

INDEX NO. 103420/11

MOTION DATE 11/15/13

MOTION SEQ. NO. 013

The following papers, numbered 1 to 9 were read on this motion for summary judgment

Notice of Motion – Affirmation – Affidavit of Service; Exhibits A-G, H [Affidavit] _____ | No(s). 1-3; 4

Affirmation in Opposition – Exhibits 1-3, 4 [Affidavit] – Affirmation of Service _____ | No(s). 5-7

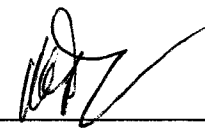
Reply Affirmation – Affidavit of Service _____ | No(s). 8-9

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendants Century 21 Department Stores, LLC and 175-177 Broadway LLC is decided in accordance with the annexed memorandum decision and order.

FILED

MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK



J.S.C.

Dated: 2/25/14
New York, New York

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

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
VICTORIA F. BALSAMO,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY,
WDF, INC., CENTURY 21 DEPARTMENT
STORES LLC, MAYORE ESTATES LLC,
SORBARA CONSTRUCTION CORP.,
PROFESSIONAL PAVERS CORP., D-STAR
WATERPROOFERS, INC., and 175-177
BROADWAY LLC,

Defendants.

Index No 103420/11

Decision and Order

FILED

MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. MICHAEL D. STALLMAN, J.:

Under motion sequence number 013, defendants Century 21 Department Stores LLC (Century 21) and 175-177 Broadway LLC (Broadway LLC) jointly move for an order, pursuant to CPLR 3212, dismissing all claims, cross claims and counterclaims against them. Under motion sequence number 014, defendant D-Star Waterproofers, Inc. (D-Star) moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor and dismissing all claims and cross claims against them, and defendants New York City Transit Authority (NYCTA) and WDF, Inc. (WDF) jointly cross-move for a summary judgment dismissal of all claims and cross claims against them. Under motion sequence number 015,

* 3]

defendant Professional Pavers Corp. (Pro Pavers) similarly moves for an order pursuant to CPLR 3212, granting summary judgment in its favor and dismissing all claims and cross claims against it. The motions and cross motion, under motion sequence numbers 013, 014 and 015, are consolidated for disposition.

BACKGROUND

In this personal injury action, plaintiff Victoria F. Balsamo (Balsamo) alleges that on October 7, 2010, she was caused to trip and fall due to a 1½-2 inch height differential between two contiguous concrete flags of sidewalk in front of the entrance to a shoe store owned and operated by Century 21. Century 21's shoe store is located in adjoining buildings at 175-177 Broadway, New York, New York (175-177 Broadway), which Century 21 leases, in their entirety, from building owner Broadway LLC. 175-177 Broadway is located on the west side of Broadway, between Cortlandt Street, to its south, and Dey Street, to its north. It is undisputed that the entire sidewalk on the west side of Broadway between Cortlandt and Dey Streets was demolished and later restored as part of the Metropolitan Transportation Authority's (MTA) major public works project carried out by NYCTA¹ to improve, through significant reconfiguration and

¹ The MTA is responsible for public transportation financing and planning while the NYCTA is responsible for the operation, maintenance and control of transportation facilities (*see Delacruz v Metropolitan Transp. Auth.*, 45 AD3d 482, 483 [1st Dept 2007]).

* 4]

rehabilitation, the passageways and structures for the underground transit system and transportation hub in lower Manhattan (Fulton Street Project, or Project).² It is also undisputed that construction for the Fulton Street Project commenced several years prior to October 7, 2010, and was ongoing and incomplete at the time of Balsamo's accident.

Plaintiff initially commenced an action in Kings County, under Kings County index No. 30302/10, naming Century 21 LLC, Mayore Estates LLC (Mayore) and Sorbara Construction Corp. (Sorbara), as defendants, to recover damages for the injuries she allegedly sustained on October 7, 2010 (Kings Action). Issue was joined on or about January 21, 2011, by service of Century 21's answer together with cross claims against Mayore and Sorbara.

By filing of a summons and complaint on or about March 21, 2011, plaintiff commenced a second action based on the same October 7, 2010 accident. The second action, which named the NYCTA as a defendant, was commenced here in New York County, under the index No. 103420/11. Shortly thereafter, Balsamo added WDF as a defendant in the New York County action, and then moved to

² The Court notes that, in conjunction with the Fulton Street Transit Center Project, the Metropolitan Transportation Authority sought and obtained condemnation and temporary easements in real property in the Fulton Street area for various phases of the construction. (See e.g. *Matter of Metropolitan Transp. Auth.*, Sup Ct, NY County, Aug. 17, 2005, Schoenfeld, J., index No. 402332/2005; *Matter of Metropolitan Transp. Auth.*, Sup Ct, NY County, Nov. 18 2010, Shulman, J., index No. 401668/2006.)

consolidate it with the Kings Action. By order dated July 19, 2011, this court consolidated the two actions, and ordered the instant caption to be amended to reflect the newly consolidated action venued here in New York County.

As a result of discovery and motion practice, Broadway LLC, Pro Pavers and D-Star were added as party defendants. These newly added defendants served their answers, together with their respective cross claims, and despite a few, relatively minor procedural and/or disclosure-related setbacks, all parties completed their exchange of oral and documentary discovery. The note of issue was filed on May 6, 2013.

By stipulation filed on July 3, 2012, the action and all cross claims were discontinued as against Sorbara, and by stipulation filed on July 3, 2013, the action and all cross claims were also discontinued as against Mayore. Balsamo's causes of action against the remaining defendants, Century 21, Broadway LLC, NYCTA, WDF, Pro Pavers, and D-Star, are based on their alleged ownership, construction, renovation, repair, control, maintenance, management, supervision, inspection and operation of the site of her accident, and each seeks summary dismissal of all claims, cross claims and counterclaims against it.

DISCUSSION

It is well settled that to obtain summary judgment, movants 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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citation omitted]).

The proofs submitted in support of, and/or in opposition to, the motions include copies of the pleadings, party deposition transcripts, sworn affidavits, a commercial lease for 175-177 Broadway, an expert affidavit, several photographs of the area and of plaintiff, daily work records, payroll records, blueprints for the planned reconstruction of Broadway between Cortlandt and Dey Streets; the ambulance call report relating to Balsamo’s accident; and WDF’s subcontract agreement with D-Star.

Balsamo was deposed on three separate occasions (on November 3, 2011, *see* tr I; on May 15, 2012, *see* tr II and on March 26, 2013, *see* tr III), and at each deposition, she was questioned repeatedly about how, where, and under what circumstances her accident occurred. Balsamo testified that on October 7, 2010, she left her office, located at One Liberty Plaza, at or about 12:20 p.m., to get

lunch at the Pret A Manger store, which is on the same block and on the same, west side of Broadway as the Century 21 shoe store (the Block). She stated that she had walked along the stretch of Broadway where the shoe store was located many times prior to her accident, and that she had observed the NYCTA digging and doing construction in that area for quite a while. Balsamo alleges that, on the day of her accident, the sidewalk in front of the Century 21 shoe store was crowded with pedestrians; that just as she was passing the revolving doors of the store's entrance, she had to move from the middle of the sidewalk to her right in order to avoid a woman walking toward her who was talking on her cell phone (Balsamo tr 1 at 62-63); and that when she stepped to the right, she was caused to fall due to a change in level between two concrete sidewalk flags.

When questioned in greater detail about what she observed on the day of her accident, Balsamo testified that she saw construction barriers along the right (street) side of the sidewalk running from Cortlandt Street to Dey Street. She also saw a concrete construction barrier set up across the sidewalk at the north end of the Century 21 shoe store, beyond which she noticed that the sidewalk had been dug up (Balsamo tr at 63). She stated that the barrier rerouted pedestrians away from the construction/work zone, and into a fenced-in area on the public street (Broadway). She also recalled seeing barrier-type fencing, imprinted with the

letters “WDF,” set up along the right of the sidewalk, starting at the intersection of Broadway and Cortlandt Street. She also recalled that there were temporary sidewalk bridges set up along the Block which enabled pedestrians to cross over the demolished sidewalk to access the stores north of Century 21. Balsamo described the actual pavement from the Cortlandt Street corner to the end of the Century 21 shoe store as the regular, or normal, concrete sidewalk, and she described an additional strip of concrete pavement running along the outside, or street-side, of the sidewalk from Cortlandt Street to the end of the Century 21 shoe store, as “add-on” sidewalk (Balsamo tr 2 at 42-43). She testified that the add-on sidewalk was 1½-2 inches lower than the regular sidewalk, and that this height differential (*id.* at 47) created an unlevel walking surface.

Balsamo testified that, when she moved to her right to avoid the woman on the cell phone, she happened to place her foot where the differently leveled concrete flags meet. She explained that it was the change in level between the concrete flags that caused her to lose her balance (*id.* at 49), slide into a fence-like construction barrier, and injure her head and right shoulder (*id.* at 55). An ambulance was called to the scene and Balsamo was taken to the emergency room at Beekman Downtown Hospital (*id.* at 63).

When questioned about what she meant by “add-on” sidewalk, Balsamo

stated the following:

“Q. When did the add-on sidewalk appear, to your knowledge?

A. I have no idea.

Q. Was it there the day before your accident?

A. Probably.

Q. Was it there a month before your accident?

A. It was there before the accident because they had added on and cleaned up all of that construction area by Century so people could go into these stores (witness indicating).

Q. Was this add-on sidewalk of a different material than the regular sidewalk?

A. It was concrete. It had grates in it for the - - grates in it for the subway, I guess, ventilation.

Q. Anything else?

A. That's it.

Q. Did this add-on sidewalk go the entire length of the sidewalk between Cortlandt and John?

A. No.

Q. About how far did it go?

A. It ended at Century (Balsamo tr II at 43-44).

Q. Was it a sidewalk that was next to the regular sidewalk?

A. Yes (*id.* at 74).

A. There was a concrete barrier across the whole sidewalk, and you had to go into the street. How this add-on sidewalk was uneven; was it added on; was it part of the sidewalk that was dug up and replaced that they replaced it unevenly; I don't know. All I know is the sidewalk was higher than the other, and that's what I fell on. (*id.* at 77).”

Balsamo also testified that the sidewalk in front of Century 21 had actually been repaired and replaced prior to her accident, and that it was at that recent repair that created the problem of unevenness.

“Q. Could you explain . . . what you mean by add-on sidewalk?”

A. Okay. They dug up the whole street. They fixed Century and Benevenuto, which is now called something else, first.

Q. When you say that they dug up the whole street, do you mean they dug up all of Broadway?

A. They dug up the whole sidewalk from Cortlandt Street to John Street.

Q. It’s the whole sidewalk that they dug and not the whole street?

A. Yes, and they repaired that part first.

Q. Which part?

A. The part from Century and Benevenuto, they repaired that first.

Q. When you say “Benevenuto,” where are you talking about?

A. The store on the corner, right here (witness indicating).

A. The corner of what?

A. Cortlandt.

Q. From Century going south got repaired first, am I right?

A. Right.

Q. Was that repair done before your accident or after your accident?

A. It was done before. (*id.* at 105-106)

Q. Prior to your accident, the sidewalk in front of Century had been repaired; is that correct?

A. Yes, and it was uneven. Part of it was uneven. It was this much of a gap and that’s what I fell on (witness indicating). (*id.* at 107).”

Balsamo acknowledged that she had not noticed any problems with the sidewalk pavement prior to her accident, and that it was not until she was on the ground after her fall, that she first noticed that there was both a height and a color differential between some of the sidewalk flags (Balsamo tr III at 56). Balsamo explained that she did not have any photographs of the misleveled pavement because when she returned to the location the next day with her son-in-law, the conditions had changed and she was unable to take pictures. She stated that there

was a plastic covering, or tarp, covering the spot where she fell and that there were construction barriers which prevented her from getting a close look (Balsamo tr I at 45-46). When shown several photographs of the area in various stages of construction, Balsamo was unable to confirm whether they accurately reflected the site of her accident.

In their respective motions, defendants deny having any responsibility for the condition of the sidewalk in front of 175-177 Broadway on October 7, 2010. They also respond to Balsamo's contention that her accident and injuries were caused by uneven and misleveled sidewalk pavement by referencing the ambulance call report which states: "Pt. sts. she was knocked over by someone walking past her." Defendants point out that the report does not contain any reference by Balsamo to a defective sidewalk condition as a cause of her accident and injuries (*see* NYCTA/WDF notice of cross motion, exhibit R).

Century 21 and Broadway LLC

The basis of Century 21 and Broadway LLC's joint motion is that neither of them: owned or controlled the sidewalk; was responsible for maintaining the sidewalk; created the 1½-2 inch height differential between the flags of concrete; and/or was on notice that the sidewalk was in a defective condition. They support their motion with copies of the pleadings, including those served and filed in the

Kings Action, a copy of Balsamo's deposition transcript, and that of Stefano Lessis (Lesis), an assistant store manager for Century 21, and a sworn affidavit from Kenneth Dubow (Dubow), the Director of Real Estate for nonparty Century Realty. It is undisputed that Century Realty has been, at all relevant times, the managing agent for properties leased by Broadway LLC to Century 21, including 175-177 Broadway.

According to Lessis, Century 21 had a daily maintenance routine. He testified that each morning, both the general and the assistant managers perform a visual inspection of the building, both inside and out (Lesis tr at 12, 13). They walk around the building looking "to make sure all the lights are working, the windows are clean, the garbage is swept, any signs in the window that may have been knocked over, dust in the windows" (*id.* at 16). Lessis stated that if, during an inspection, he noticed something dangerous, he would alert maintenance personnel, or if the problem was more extensive or there was some other problem with the building, he would call a construction supervisor, the landlord, or Dubow of Century Realty (*id.* at 17, 18). He had no specific recollection as to which days, in October 2010, he performed the visual inspection walks around the buildings (*id.* at 22). Lessis also testified that Century 21 has its own maintenance crew which is responsible for cleaning, collecting garbage, and sweeping the sidewalks

in front of its buildings, pursuant to a daily schedule. He stated that Century 21's crew is not responsible for inspecting the sidewalk for defects.

Next, Century 21 and Broadway LLC offer Dubow's sworn affidavit to establish that neither of them was responsible for creating the alleged defect, nor were they on notice that there was a defect in the sidewalk. The affidavit provides, in relevant part:

"6. That on October 7, 2010 [Century 21] and 175-177 Broadway LLC were not aware of and were not contacted with any defects on or about the sidewalk outside of the shoe department of the Century 21 Stores located at or near 175-177 Broadway . . .

7. [Century 21] and 175-177 Broadway LLC received no complaints about defects on or about the sidewalk outside of the shoe department . . .

9. That I saw numerous construction work and replacement of the alleged subject sidewalk outside the shoe department of the Century 21 stores prior to the date of the plaintiff's accident on October 7, 2010.

10. Neither [Century 21], Century Realty or 175-177 Broadway LLC had control of the work that was performed on the sidewalk outside of the Century 21 shoe department.

11. Neither [Century 21] or 175-177 Broadway LLC made any repairs to the sidewalk . . .

12. Neither [Century 21], Century Realty or 175-177 Broadway LLC were advised that any alleged tripping defects were on or about the sidewalk outside the Century 21 shoe department before . . . October 7, 2010.

13. Neither [Century 21] or 175-177 Broadway LLC received any complaints about any alleged tripping defects on the sidewalk outside of the Century 21 shoe department before . . . October 7, 2010."

Relying on the affidavit, on the deposition transcripts and on certain cases decided prior to the effective date of Administrative Code § 7-201 of the City of New York, Century 21 and Broadway LLC claim entitlement to summary judgment. They argue that the evidence establishes, as a matter of law, that neither of them was responsible for maintaining the sidewalk, neither of them created the 1½-2 inch height differential between sidewalk flags that allegedly caused Balsamo to fall, and that neither of them was on notice that the sidewalk was in a defective condition.

Balsamo opposes this motion with copies of the Lease, Dubow's deposition transcript, a report prepared by her expert engineer, and post-accident photographs of the sidewalk in the area where she fell. Her claim with respect to Broadway LLC is that section 7-210 of the Administrative Code of City of New York places the responsibility for maintaining the sidewalk abutting 175-177 Broadway on Broadway LLC, rather than the City of New York (City), based on its ownership of the buildings. Her claim with respect to Century 21 is based on language contained in the lease between Century 21 and Broadway LLC, in effect at the time of her accident (the Lease), that suggests that Century 21, as tenant, had a contractual duty to maintain the sidewalk outside its store in a safe condition. Alternatively, Balsamo asserts that Century 21 can be held liable for her injuries

because it derived a special use from the sidewalk due to the sidewalk's proximity to the entrance to the shoe store. Lastly, as to both of these defendants, Balsamo contends that they were on constructive, if not actual, notice of the defect in the sidewalk prior to her accident and she supports this claim with a report prepared by her expert engineer, Nicholas Bellizzi (Bellizzi).³

It is undisputed that prior to September 14, 2003:

“the City, as the owner of the sidewalks, generally remained liable for injuries to pedestrians caused by defective sidewalk flags, subject to the requirements of the prior written notice law An abutting landowner could be held liable only if the owner affirmatively created the dangerous sidewalk condition, negligently made repairs or used the sidewalk in a special manner for its own benefit”

(*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520 [2008]). However, the New York City Council, in an effort to transfer responsibility for the repair and maintenance of sidewalks, including the sidewalk flags, from the City to the owners of properties abutting its sidewalks, enacted Section 7-210, effective September 14, 2003. Section 7-210 provides, in relevant part:

“a. 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.

³ Bellizzi's report, which relies on Balsamo's bills of particulars, post-accident/post-sidewalk repair photographs, deposition transcripts, and various City code regulations for its conclusions, is not, for the purpose of summary judgment, probative on the issue of notice.

“b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for . . . personal injury, including death, 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”

Accordingly, Broadway LLC’s attempt to shift responsibility to the City for the condition of the sidewalk abutting its building, is without merit.

However, a tenant, such as Century 21, “has no statutory obligation to maintain the public sidewalk adjacent to its store” (*O’Brien v Prestige Bay Plaza Dev. Corp.*, 103 AD3d 428, 429 [1st Dept 2013]). “Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff.” (*Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011].) In any event, contrary to plaintiff’s assertions, the Lease does not impose a contractual duty upon Century 21 to do so. Lease § 10 (B), which sets forth Century 21’s obligations to maintain and repair the Leased Premises, provides, in relevant part:

- “2. maintain and make all necessary repairs and replacements of (i) the heating, air-conditioning and air-cooling equipment and (ii) all other personal property and equipment owned by Landlord and used by Tenant in the operation of the Leased Premises. . .
3. make all repairs necessitated by the negligence of Tenant, its invitees, licensees, agents and employees;
4. replace all plate glass broken and damaged;

5. maintain the Leased Premises, including the open space areas, in a clean and sanitary condition, free from snow, ice or debris;”

Absent from these terms, is any obligation to maintain the sidewalk abutting the store, other than to keep it clean and clear of snow, ice and other debris.

It is well settled that liability for the defective condition of an abutting sidewalk can be imposed upon a tenant only upon proof that the tenant created the defect or when it makes special use of the sidewalk “such as when an appurtenance [is] installed for its benefit or at its request (*Kaufman v Silver*, 90 NY2d 204, 207 [1997]), contemplating a purpose different from that of the general public (*Otero v City of New York*, 213 AD2d 339, 340 [1st Dept 1995])” (*Thomas v Triangle Realty Co.*, 255 AD2d 153, 153 [1st Dept 1998]). Here, not only has plaintiff failed to offer any proof that Century 21 created the alleged defect, she has not put forth competent evidence for asserting that the sidewalk conferred a special benefit on Century 21. The mere fact that Century 21’s customers use the sidewalk abutting 175-177 Broadway as they enter and exit the shoe store is insufficient to establish special use (*see Jordan v City of New York*, 23 AD3d 436, 437 [2d Dept 2005]). Other than speculation, plaintiff has not offered a basis for holding Century 21 liable for her accident and injuries. She has failed to demonstrate, by admissible evidence, that a factual issue exists requiring a trial as

to this defendant, and “[m]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to forestall summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

On the other hand, under Section 7-210, liability, while not strict, can be imposed upon the owner of 175-177 Broadway (Broadway LLC) for injuries stemming from unsafe sidewalk conditions (*see Harakidas v City of New York*, 86 AD3d 624, 627 [2^d Dept 2011]; *Martinez v Khaimov*, 74 AD3d 1031, 1032 [2^d Dept 2010]). To hold a property owner liable for injuries sustained due to the condition of an abutting sidewalk, there must be proof that the property owner created the defective condition, or proof that it had actual or constructive notice of the condition but failed to remedy the condition within a reasonable period of time (*see Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010]). Conversely, to demonstrate a lack of constructive notice, a property owner has an obligation to produce “evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell” (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

To make this showing, Broadway LLC relies on Dubow’s affidavit and deposition testimony. According to Dubow, he was responsible for managing

175-177 Broadway and the contact person at Century Realty if Century 21 had any mechanical or structural issues in or about the buildings, or if there was something wrong with the sidewalk that was not Century 21's responsibility under the Lease (Dubow deposition at 62, 64). Dubow acknowledged that he did not keep a log of his activities with respect to 175-177 Broadway. He was also unable to recall, or he had no personal knowledge about: building inspections; the 175-177 Broadway buildings themselves; the Lease; how 175-177 Broadway was managed; his own walks around the buildings leased to Century 21, and what he did or did not observe during those walks; whether any work had been done on the sidewalk in front of 175-177 Broadway in the five years before October 7, 2010, either by the owner of the buildings or by a contractor on its behalf; whether there were any accidents involving someone who fell in front of the building during the five years prior to plaintiff's accident; whether he had a role in drafting or signing the Lease; whether a maintenance man was employed to handle maintenance at 175-177 Broadway; and whether work was performed on or about the sidewalk outside the shoe store, either by Broadway LLC or by a contractor on its behalf, or whether there was anyone else who would have such knowledge (*id.* at 9, 35-40, 43, 64-65, 67). Upon further questioning, Dubow testified that there should have been records containing information as to maintenance and inspections of 175-177

Broadway, as well as communications about any work being done on the sidewalk, and that such records would have been kept at Century Realty's office, but that the records had been destroyed in a fire (*id.* at 38, 65, 66).

Broadway LLC's denials as to notice and control notwithstanding, it has failed to "make a prima facie showing of entitlement to judgment as a matter of law" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). Dubow's demonstrated lack of recall or knowledge, coupled with Broadway LLC's failure to provide any records or logs pertaining to maintenance activities and/or communications about construction or repair work, on or before October 7, 2010, in or about the area of sidewalk where plaintiff allegedly fell, whether due to a fire in Century Realty's office or otherwise, does not establish a lack of actual and/or constructive notice of the alleged condition as a matter of law (*see Baines v G&D Ventures, Inc.*, 64 AD3d 528, 529 [2d Dept 2009]).

Additionally, a review of Dubow's transcript reveals that plaintiff's counsel's questions pertaining to issues of notice and control, were routinely thwarted by defense counsel, whose frequent objections were, in many instances, speaking objections and/or they were accompanied by directions to the witness not to answer counsel's questions. A number of these questions pertained to: whether Broadway LLC owns the entire building that Century 21 leases; who was

responsible for maintaining the subject sidewalk; whether Dubow is aware of a property owner's responsibilities, under New York law, as to the sidewalk in front of its building; the address of the shoe store; whether Century Realty employs or directs someone to maintain the sidewalk in front of Century 21; whether he saw the sidewalk being ripped up and/or cement being poured; whether he noticed a lighter colored sidewalk flag next to a darker colored sidewalk flag; whether he had observed any conditions on the sidewalk prior to the accident that he thought were dangerous or needed repair; and whether he knew of any other accidents that had occurred in front of the Century 21 store on or around October 7, 2010 (*id.* at 8, 9, 16, 19, 23, 31-32, 35, 42, 55). Although Broadway LLC urges this Court to hold those involved in the Fulton Street Project liable for the condition of the sidewalk, counsel's frequent interruptions rendered Dubow's responses to the very questions which might have resolved issues of notice and control, unavailing and/or meaningless, and his post-deposition affidavit, purporting to address the same questions left unresolved or unanswered at his deposition, is inadequate to remedy the problem. Accordingly, questions of fact remain as to whether Broadway LLC, or another entity under its control, was responsible for creating and/or for failing to correct, the alleged defective/unlevel condition in the pavement over which plaintiff allegedly fell. Whether, and/or to what extent any

of the other co-defendants had control of, and/or were responsible for, the condition of the sidewalk in front of the Century 21 shoe store prior to Balsamo's accident, is addressed below.

Accordingly, the motion (motion seq. 013) is granted only as to Century 21 and denied as to Broadway LLC.

NYCTA, WDF, D-Star and Pro Pavers

The basis of the motions of the NYCTA, WDF, D-Star and Pro Pavers (together, Construction Defendants), under motion sequence numbers 014 and 015, is that the evidence establishes, as a matter of law, that none of them performed any work in the specific location identified by Balsamo as the site of her accident, prior to October 7, 2010, precluding a finding of liability against any of them for her injuries. Each of the Construction Defendants asserts that, pursuant to the Fulton Street Project, the demolition and reconstruction of the sidewalk on the west side of Broadway between Cortlandt and Dey Streets, commenced at the corner of Dey Street and progressed southward towards Cortlandt Street. By October 7, 2010, the work on that Block had advanced only as far as 179 Broadway, which is the building adjacent to 175-177 Broadway to its north, and that active work area was fully barricaded to prevent public access.

Each of the Construction Defendants asserts that the sidewalk pavement in front of the Century 21 shoe store was, as of October 7, 2010, untouched by any of their workers and insists that, if there was a defect in the sidewalk at the time of Balsamo's accident, the defect had to preexist their work.

To this end, the Construction Defendants offer the depositions of their witnesses Jodh Singh (Singh), an inspector with the NYCTA, Harry Harris (Harris), the project manager for WDF, the general contractor on the Project, Joseph Foley (Foley), project manager and part owner of Pro Pavers, the subcontractor hired to lay concrete and curbs for the sidewalk, and Antonio W. Ramirez (Ramirez), the owner of D-Star, the subcontractor hired to perform waterproofing under the sidewalk. Also submitted are copies of WDF's Daily Work Reports from September 7, 2010 through October 7, 2010, WDF's Quality Daily Reports for the period of September 7, 2010 through October 30, 2010, the MTA's Capital Construction Daily Construction Reports for the period of September 7, 2010 through October 7, 2010, blueprints for the planned reconstruction of the Block, copies of subcontracts and the ambulance call report pertaining to Balsamo's accident, and a written affidavit from Harris.

At the NYCTA's deposition, Singh testified that he was charged with inspecting the work of the general contractor, WDF, on the Fulton Street Project,

including the work WDF and its subcontractors performed on or about October 7, 2010, on and/or underneath Broadway's sidewalk between Cortlandt and Dey Streets. Singh testified that, as part of the Project, the sidewalk on the entire Block was demolished and then restored. He explained that structural work was performed on the vaults under the sidewalk, waterproofing was performed subterranean (directly beneath the sidewalk), and that gratings were changed and curbs were installed prior to the laying of the new sidewalk flags. Singh testified that he was responsible for ensuring that the work was progressing in accordance with the specifications and approved drawings provided to WDF by the NYCTA (Singh tr at 14-15), and he denied noticing any gaps or uneven conditions in the pavement prior to October 7, 2010 (*id.* at 36-37).

Singh testified that daily construction reports were prepared each day by inspectors such as him, assigned to the Fulton Street Project, and that according to the reports for the period between September 7, 2010 and October 7, 2010, inclusive, the work started at the north end of the Block at Dey Street and progressed southward to Cortlandt Street (*id.* at 18, 66, 68-69, 80). Singh stated that the Daily Construction Reports for that Block for the period of September 7, 2010 to October 7, 2010, list the work performed by WDF and by the various subcontractors, as taking place north of the Century 21 shoe store. Pro Pavers is

listed on the reports as working in front of Payless shoe store, some 130 feet north of Century 21 (*see* Daily Construction Report dated October 6, 2010) and D-Star is listed as working in front of 183 Broadway (*see* Daily Construction Report dated October 7, 2010). The closest any of the contractors got to the sidewalk in front of the Century 21 shoe store on or before October 7, 2010, was certain concrete patchwork involving the vaults in front of neighboring Pret A Manger, which, Singh explained, needed to be completed prior to the replacement of the sidewalk pavement (*id.* at 82, 88-92).

At WDF's deposition, its project manager (Harris), confirmed that WDF was the NYCTA's general contractor for the Fulton Street Project, that work on the Block started at the corner of Broadway and Dey Street and ran south to Cortlandt Street, and that the work had not yet reached the location in front of the Century 21 shoe store by October 7, 2010. Frequently referencing the Daily Work Reports and Quality Daily Reports prepared by WDF on a daily basis, Harris provided detailed explanations about the work being performed on the Block prior to October 7, 2010, including work involving on the vaults beneath the sidewalk, the installation of curbs at the sidewalk /street edge, and subterranean waterproofing. He denied the installation of any new flags of pavement prior to October 7, 2010 (Harris tr at 32), explained about the use of barricades, pedestrian

bridges and the addition of temporary ramps, usually made of black asphalt, to help pedestrians negotiate around the work zone.

When asked about the condition of the existing sidewalk in front of the Century 21 shoe store and whether he had noticed any unevenness, Harris stated that: “[t]he existing sidewalk was far from perfect, I can tell you that. Requiring replacement. That’s why we were replacing it . . . I recall there was [sic] discontinuities, cracks and things like that” (*id.* at 52). When asked whether there were uneven portions of the sidewalk, Harris said “there might have been,” and when asked whether pedestrians walked on the unreplaced sidewalk on or about October 7, 2010, Harris again stated yes (*id.* at 52-53). Despite plaintiff’s counsel’s numerous questions aimed at getting an acknowledgment from Harris that work had been performed in front of the Century 21 shoe store on or prior to October 7, 2010, Harris repeatedly testified that the daily reports state otherwise, emphasizing that he could find no indication on any of the reports of the placement of any concrete in the area where plaintiff fell prior to October 7, 2010 (Harris tr at 18, 32).

The witnesses for subcontractors D-Star and Pro Pavers, Ramirez and Foley, respectively, confirmed that their companies were hired to perform work on the Block as part of the Fulton Street Project, and both denied ownership or control

over the subject sidewalk.

Ramirez testified that his waterproofing company furnished and installed a sheet membrane waterproofing system beneath the sidewalk, but had little recall as to specific dates. He explained that, because the work D-Star was hired to do was subterranean, pedestrians never actually walk on the waterproofing materials, and that the laying of new sidewalk concrete cannot be done until the waterproofing work is complete (Ramirez tr 9). According to Foley, Pro Pavers was hired to lay sidewalk and construct curbs. He testified that the work on Broadway progressed from north to south, and that “as the contractor progressed the work, we followed” (Foley tr at 17). Referring to the daily reports, Foley confirmed that, in the month prior to Balsamo’s accident, Pro Pavers worked in front of 195 Broadway, 185 Broadway and 179 Broadway. It did not do any work in front of 175-177 Broadway. Foley explained that the pouring of sidewalk concrete cannot occur until after the subterranean waterproofing work is completed, adding that “[b]ased on our records, we didn’t pour any concrete in the sidewalk before that [October 7, 2010 date]” (*id.* at 9-10, 56).

Both D-Star and Pro Pavers argue that it is not possible that either of them created or contributed to the alleged defect in the sidewalk simply because the waterproofing could not have been performed before the sidewalk was

demolished, the concrete/curb work could not have been performed until after D-Star finished, and there is no evidence that the sidewalk in front of the Century 21 shoe store had been demolished as part of the Fulton Street Project prior to October 7, 2010. Therefore, they, as well as the NYCTA and WDF, claim entitlement to a summary judgment dismissal of all claims and cross claims against them.

In opposition to the Construction Defendants' motions, plaintiff insists that, at some point prior to her accident and as part of the Fulton Street Project, the area in front of the Century 21 shoe store had been dug up and replaced, albeit unevenly, and then immediately following her accident, the same area was repaired and/or replaced once again. Balsamo insists that there were two sidewalks in front of Century 21 shoe store on the day of her accident - the regular sidewalk and the add-on sidewalk, and that they were not of the same level. As she stated at her deposition, "the sidewalk had two different levels, and I don't know when they replaced them. But they were uneven, and they were all new sidewalks (Balsamo tr II at 108). And "[t]he whole thing is new because they dug up the whole sidewalk. They just didn't make it even" (*id.* at 109). Alternatively, Balsamo asserts that Construction Defendants were working the area in front of the Century 21 shoe store at the time of her accident. Plaintiff also supports her

opposition with references to portions of the Construction Defendants' deposition testimony, and to reports of work performed either in front of 179 Broadway or in front of stores further up the Block, and asserts that certain inferences should be made from this evidence which raise questions of fact as to each of the Construction Defendants' involvement and responsibility.

An examination of the testimonial evidence relied upon by plaintiff reveals that the quotations and references are, to a large extent, taken out of context and/or were selectively edited to give the impression that sidewalk demolition and reconstruction performed pursuant to the Fulton Street Project, had, in fact, occurred in front of the Century 21 shoe store prior to October 7, 2010. Despite this attempt to create a question of fact by misstating the evidence, neither the defense witnesses nor Balsamo seemed confused at their depositions about whether the area in which she allegedly fell in front of the Century 21 shoe store was part of the active construction zone (Balsamo tr I at 63). Other than her own testimony regarding a reconstruction of the sidewalk between the Century 21 shoe store and Cortlandt Street both prior to October 7, 2010, and prior to the reconstruction of the sidewalk north of the Century 21 shoe store, Balsamo offers no evidence to support that claim or to rebut the evidence of the Construction Defendants. Moreover, and despite plaintiff's contentions to the contrary, it

cannot be inferred from Ramirez's inability to recall which day D-Star did waterproofing in front of the Century 21 shoe store that the subject sidewalk must have been demolished and broken up prior to October 7, 2010. It also cannot be inferred from the fact that Pro Pavers had already performed some of its curb work further up the Block, and was working in front of 179 Broadway on October 7, 2010, that the sidewalk pavement in front of the Century 21 shoe store must have been dug up prior to that date, and/or that the repairs on that sidewalk had already been performed, and had been performed improperly. In her arguments in opposition to the motions, plaintiff fails to distinguish between work being performed at different locations on the Block. Balsamo's confusion of the issues, much like her reliance on inferences, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d at 562).

However, despite the abundance of evidence tending to show that the Fulton Street Project work proceeded from the north end of the Block to south, and that by October 7, 2010, it had progressed only as far as the storefront adjacent to the Century 21 shoe store, it is unclear which entity had control of the sidewalk in front of the Century 21 shoe store on, and just prior to, October 7, 2010. While the proof is conclusive that neither Pro Pavers nor D-Star had any responsibility or

control over the subject sidewalk, the same cannot be said for Broadway LLC, the NYCTA or WDF.

Pursuant to section 7-210, Broadway LLC has a duty to maintain the abutting sidewalk, yet, as acknowledged by Harris, the NYCTA and WDF were authorized and/or had the responsibility for repairing the sidewalk. In his above quoted testimony, Harris stated “[t]he existing sidewalk was far from perfect, I can tell you that. Requiring replacement. That’s why we were replacing it” (Harris tr at 52). Accordingly, questions of fact exist as to which entity was responsible for the subject sidewalk. More specifically, questions remain as to whether at the time of, and/or just prior to, plaintiff’s accident, the NYCTA and/or WDF had control over the subject sidewalk to the exclusion of Broadway LLC. And if they did, at what point in time did they obtain control of the sidewalk pavement so as to render one or both of these defendants responsible for the condition of the sidewalk and liable to pedestrians for injuries sustained due to defective sidewalk flags, based upon actual or constructive notice of that condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). In view of the ongoing nature of this major public works project, it is surprising that none of the parties present evidence or directly address this issue in their papers. Therefore, having failed to “tender[] sufficient evidence to demonstrate the absence of any material

issues of fact” as to questions pertaining to control over the subject sidewalk (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), the joint cross motion of the Transit Authority and WDF, as well as the motion of Broadway LLC, must be denied.

CONCLUSION

Accordingly, it is

ORDERED that the joint motion of Century 21 Department Stores LLC and 175-177 Broadway LLC for summary judgment (motion seq. 013) is granted only as to Century 21 Department Stores LLC and the complaint and all cross claims and counterclaims are dismissed as to 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 Clerk is directed to enter judgment in favor of Century 21 Department Stores LLC accordingly; and it is further

ORDERED that the motion of D-Star Waterproofers, Inc. for summary judgment (motion seq. 014) is granted and the complaint and all cross claims are dismissed 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 Clerk is directed to enter judgment in favor of D-Star

Waterproofers, Inc. accordingly; and it is further

ORDERED that the motion of Professional Pavers Corp. for summary judgment (motion seq. 015) is granted and the complaint and all cross claims are dismissed 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 Clerk is directed to enter judgment in favor of Professional Pavers Corp. accordingly; and it is further


ORDERED that the joint cross motion of New York City Transit Authority and WDF, Inc. for summary judgment (motion seq. 014) is denied; and it is further

ORDERED that the balance of defendants' motions as they pertain to 175-177 Broadway LLC, New York City Transit Authority and WDF, Inc. are denied; and it is further

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

Dated: February 25, 2014
New York, New York

ENTER:



J.S.C.

FILED

MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK