

**Hames v Manhattan & Bronx Surface Tr. Operating
Auth. (M.A.B.S.T.O.A.)**

2017 NY Slip Op 30542(U)

February 17, 2017

Supreme Court, Bronx County

Docket Number: 310146/10

Judge: Ben R. Barbato

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MELANIE HAMES,

Plaintiff(s),

- against -

DECISION AND ORDER

Index No: 310146/10

MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY (M.A.B.S.T.O.A.), NEW
YORK CITY TRANSIT AUTHORITY (N.Y.C.T.A.),
DARREN BANNISTER, 3400 BOSTON ROAD, INC.,
AND DUBAI FURNITURE CORP., ,

Defendant(s).

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In this action for negligence in the operation of a public bus and in the maintenance of the public sidewalk, defendants MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY (MABSTOA), NEW YORK CITY TRANSIT AUTHORITY (NYCTA), and DARREN BANNISTER (Bannister) move seeking an order granting them summary judgment and dismissal of the complaint and all cross-claims. Movants contend that because they did not have a duty to maintain the public sidewalk upon which plaintiff alleges she fell and because they provided plaintiff with a safe place to alight from their bus, they bear no liability. Plaintiff and defendant 3400 BOSTON ROAD, INC. (3400) oppose the foregoing motion asserting that questions of fact with respect to whether the location at which plaintiff was discharged from the bus was safe precludes summary judgment in favor of MABSTOA, NYCTA and Bannister. Defendant DUBAI FURNITURE, CORP. (Dubai) separately moves seeking an order granting it summary

judgment and dismissal of the complaint and all cross-claims on grounds that as the lessee of the premises abutting the sidewalk upon which plaintiff fell, it was not responsible for the maintenance of the sidewalk nor did it create the defect alleged. Plaintiff and all other defendants oppose Dubai's motion asserting that because Dubai was required to maintain the instant sidewalk under its lease, questions of fact with regard to whether it breached the lease and was therefore negligent preclude summary judgment.

For the reasons that follow hereinafter, the foregoing motions are decided together. MABSTOA, NYCTA, and Bannister's motion is granted, in part and Dubai's motion is denied.

According to the complaint, the instant action is for alleged personal injuries sustained by plaintiff when she tripped and fell on the public sidewalk. Specifically, it is alleged that on March 10, 2010, upon exiting a bus, plaintiff tripped and fell on a defective portion of the sidewalk located in front of 3402 Boston Road, Bronx, NY. Plaintiff, alleges that defendants owned, controlled, and were required to maintain the sidewalk, that MABSTOA and NYCTA owned the bus, and that Bannister, employed by MABSTOA and NYCTA, operated the bus. Plaintiff alleges that defendants were negligent in failing to maintain the sidewalk in a reasonably safe condition, that Bannister failed to provide her with a safe place to alight from the bus, and that as a result of

the foregoing negligence, plaintiff sustained injuries.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

[t]o obtain summary judgment it is necessary that the movant establish his

cause of action or defense sufficiently to warrant the court as a matter of law in directing summary judgment in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

Supreme Court erred in resolving issues of credibility in granting defendants'

motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(see also *Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). When the proponent of a motion for summary judgment fails to establish prima facie entitlement to summary judgment, denial of the motion is required "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

MABSTOA, NYCTA, and Bannister's Motion for Summary Judgment

MABSTOA, NYCTA, and Bannister's motion seeking summary judgment is granted, in part. To the extent that movants seek dismissal of the causes of action against them sounding in premises liability for failing to maintain the instant sidewalk, their motion is granted. Significantly, on this issue movants establish that because they neither owned, controlled, or maintained the sidewalk in question or the premises abutting the same, they cannot be liable under Section 7-210 of the New York City Administrative Code. However, movants' motion seeking dismissal of those causes of action for alleged negligence in failing to provide plaintiff with a safe place to alight from their bus, the motion is denied

insofar as the very evidence they submit raises an issue of fact with respect to whether Bannister provided plaintiff with a safe place to alight from the bus owned by MABSTOA and/or NYCTA and operated by Bannister. Significantly, while Bannister testified that he did not see the defect on the sidewalk alleged to have caused plaintiff's fall prior to the fall, both he and plaintiff testified about the existence of the defect immediately after the fall. This, of course, raises a sharp question of fact sufficient to preclude summary judgment.

On September 14, 2003, with the passage of § 7-210 of the New York City Administrative Code, maintenance and repair of public sidewalks and any liability for a failure to perform the same, was shifted, with certain exceptions, to owners whose property abutted the sidewalk (*Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009], *revd on other grounds* 14 NY3d 779 [2009]; *Klotz v City of New York*, 884 AD3d 392, 393 [1st Dept 2004]); *Wu v Korea Shuttle Express Corporation*, 23 AD3d 376, 377 [2d Dept 2005]).

Specifically, §7-210 states, in pertinent part, that

[i]t 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. . . [, that] the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure

of such owner to maintain such sidewalk in a reasonably safe condition. . . [, that][f]ailure 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 and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. . . [,and that] [t]his subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

As noted above, because of § 7-201, prior to that the passage of § 7-210, the duty to repair and maintain the public sidewalks in a reasonably safe condition rested with the municipality within which the sidewalks were located (*Ortiz* at 24; *Weiskopf v City of New York*, 5 AD3d 202, 203 [1st Dept 2004]; *Belmonte v Metropolitan Life Insurance Company*, 304 AD2d 471, 474 [1st Dept 2003]). Before § 7-210, an abutting landowner had no duty to maintain the public sidewalk and was not liable for an accident occurring thereon unless he/she created the dangerous condition alleged or derived a special use from the sidewalk (*Weiskopf* at 203; *Belmonte* at 474). Accordingly, whereas tort liability for an accident involving a defective condition on a public sidewalk was once premised only upon the abutting owner's affirmative acts in making the sidewalk more hazardous, i.e., causing or creating a dangerous condition (*Ortiz* at 24), with the enactment of § 7-210, it is now well settled that an owner of property abutting a public sidewalk is

liable for a dangerous condition upon said sidewalk even in the absence of affirmative acts (*id.* at 25; *Martinez v. City of New York*, 20 A.D.3d 513, 515 [2d Dept 2005]).

Despite the enactment of § 7-210, the City nevertheless remains responsible to maintain certain sidewalks such as those abutting "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (New York City Administrative Code § 7-210[c]), and is liable for defects existing on the sidewalks abutting exempt properties (*id.*). Additionally, the City remains liable to maintain the curbs abutting public sidewalks because § 7-210 only shifted the responsibility of sidewalk maintenance to an abutting landowner, which is defined as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians" (New York City Administrative Code § 19-101(d); see also *Ascencio v New York City Hous. Auth.*, 77 AD3d 592, 593 [1st Dept 2010] [Defendant, abutting property owner granted summary judgment in an action arising from an accident on a defective portion of the sidewalk when the evidence established that the accident occurred on the curb.]; *Garris v City of New York*, 65 AD3d 953, 953 [1st Dept 2009]). For this reason, "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells"

(*Vucetovic v Espom Downs*, 10 NY3d 517, 521 [2008]), and, provided there is prior written notice of a defect existing thereon, the City remains liable (*id.* ["Here, sections 19-152 and 16-123, the provisions whose language section 7-210 tracks, contemplate the installation, maintenance, repair and clearing of sidewalks or sidewalk flags. Significantly, tree wells are not mentioned in sections 19-152, 16-123 or 7-210. And while section 7-210 employs the phrase 'shall include, but not be limited to,' this clause applies to the types of maintenance work to be performed, not the specific features of what constitutes a sidewalk. Given the statutory silence and the absence of any discussion of tree wells in the legislative history, it seems evident that the City Council did not consider the issue of tree well liability when it drafted section 7-210. If the City Council desired to shift liability for accidents involving tree wells exclusively to abutting landowners in derogation of the common law, it needed to use specific and clear language to accomplish this goal."]). The City also remains responsible for the maintenance of the sidewalk within 12 inches of any covers or gratings upon a sidewalk, such as a fire hydrant's gate box (*Flynn v City of New York*, 84 AD3d 1018, 1019 [2d Dept 2011], *lv denied* 17 NY3d 709 [2011]) ["Accordingly, the responsibility for maintaining the condition of the area where Flynn fell lies with the City, and not the Estate. We agree with the Appellate Division, First Department, that there is nothing in

Section 7-210 of the Administrative Code of the City of New York indicating that the City Council intended to supplant the provisions of 34 RCNY 2-07(b) and to allow a plaintiff to shift the statutory obligation of the owner of the cover or grating to the abutting property owner.”)). In such case, of course, meaning cases where the City remains responsible for the maintenance of the sidewalks despite § 7-210, liability against the City requires evidence that the City had prior written notice of the condition alleged or that the City caused or^t created the defect alleged (*Adamson v City of New York*, 104 AD3d 533, 533 [1st Dept 2013]; *Batts v City of New York*, 93 AD3d 425, 427 [1st Dept 2012]; *Tucker v City of New York*, 84 AD3d 640, 644-645 [1st Dept 2011])).

Additionally, despite § 7-210, owners of exempt property remain liable for injuries caused by defective sidewalks if they caused or created a dangerous condition thereon or derived a special use from the public sidewalk (*Meyer v City of New York*, 114 AD3d 734, 734-735 [2d Dept 2014] [Court granted motion by defendants for summary judgment on grounds that the property was exempt under § 7-210 and because they established that they neither created the condition alleged to have caused plaintiff’s accident nor did they derive a special use from the public sidewalk.])).

As is the case with any action sounding in premises liability, an owner of real property abutting a public sidewalk is now liable if it is proven that he or she created the dangerous condition, had

prior actual or constructive notice of its existence (*Weinberg v 2345 Ocean Associates, LLC*, 108 AD3d 524, 525 [2d Dept 2013]; *Anastasio v Berry Complex, LLC*, 82 AD3d 808, 809 [2d Dept 2011]), or enjoyed a special use of the public sidewalk (*Terilli v Peluso*, 114 AD3d 523, 523 [1st Dept 2014]; *Rodriguez v City of Yonkers*, 106 AD3d 802, 803 [2d Dept 2013]). As in any case premised on the negligent maintenance of real property, it is well settled that a prerequisite for the imposition of liability for a dangerous condition within, or, on real property, is a defendant's occupancy, ownership, control or special use of the premises (*Balsam v Delma Engineering Corporation*, 139 AD2d 292, 296-297 [1st Dept. 1998]; *Hilliard v Roc-Newark Assoc.*, 287 AD2d 691, 693 [2d Dept 2001]). Absent evidence of ownership, occupancy, control, or special use, liability cannot be imposed (*Balsam* at 297).

Generally, unless a tenant creates the condition alleged, such tenant is not liable under § 7-210 for the failure to maintain the public sidewalk (*Zorin v City of New York*, 137 AD3d 1116, 1117 [2d Dept 2016][“Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property.”]). However, a tenant will be liable under § 7-210, under the well settled principles of third-party liability.

Specifically, unlike the owner of real property, a contractor hired to perform work at a premises is not generally liable to a

third-party - such as a plaintiff who sustains injuries within the premises - either in tort or for the breach of an underlying contract which injures a third party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 139 [2002] ["Under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party."]); *Moch v Rensselaer Water Co.*, 247 NY 160, 161 [1928]; *Bugiada v Iko*, 274 A.D.2d 368, 368-369 [2d Dept 2000]). Thus, while a contractor is liable to the person who hired him, e.g., the owner of premises, for a breach which causes injury to a third-party, the contractor is not generally liable to third-party whose injured by the contractor's breach of his contractual obligation unless (1) the contracting party, in failing to exercise reasonable care in the performance of his duties, creates a dangerous condition; (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties; or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Espinal* at 140; *Moch* at 168; *Eaves Brooks Costume Company, Inc. v. Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]; *Palka v Servicemaster Management Services Corporation*, 83 NY2d 579, 587 [1994]; *Bugiada* 368-369).

Thus, "where a lease agreement is 'so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk, the tenant may be liable

to a third party" under § 7-210 for an accident premised on the failure to maintain the public sidewalk (*Paperman v 2281 86th St. Corp.*, 142 AD3d 540, 541 [2d Dept 2016]; see, *Hsu v City of New York*, 145 AD3d 759, 759 [2d Dept 2016]; *Abramson v Eden Farm, Inc.*, 70 AD3d 514, 514 [1st Dept 2010]).

It is well settled, that "[a] common carrier owes a duty to an alighting passenger to stop at a place where the passenger may safely disembark and leave the area" (*Miller v Fernan*, 73 NY2d 844, 846 [1988]; *Smith v Sherwood*, 16 NY3d 130, 133 [2011]; *Fagan v Atlantic Coast Line R.R. Co.*, 220 NY 301, 306 [1917]; *Kasper v Metropolitan Transp. Authority Long Island Bus*, 90 AD3d 998, 999 [2d Dept 2011]). Thus, any duty owed by a common carrier to its passengers generally ends upon that passenger's exit from the common carrier's vehicle (*Wisoff v County of Westchester*, 296 AD2d 402, 402 [2d Dept 2002] ["duty to the infant plaintiff as a passenger terminated when the infant plaintiff alighted safely onto the sidewalk"]; *Sigmond v Liberty Lines Transit, Inc.*, 261 AD2d 385, 387 [2d Dept 1999]). Whether a location is safe enough to allow a passenger to alight, turns on whether there is an appreciable and foreseeable risk of harm which precludes a discharge thereat (*Fagan* at 305).

Thus, where the evidence establishes that bus operator discharged a passenger at or near a defective sidewalk, such operator has breached the duty owed to a disembarking passenger and

a question of fact exists precluding summary judgment in favor of the common carrier (*Conetta v New York City Tr. Auth.*, 307 AD2d 333, 333 [2d Dept 2003] [Summary judgment in favor of common carrier denied when plaintiff testified that "the bus driver, an employee of the defendant, breached his duty to provide her with a safe place to disembark because, as she attempted to exit the bus, she was caused to fall when her right foot stepped down onto the uneven, sloped part of a curb that had been cut for a driveway."]; *Bryant v New York City Tr. Auth.*, 29 AD3d 844, 844 [2d Dept 2006]).

In support of their motion, MABSTOA, NYCTA, and Bannister submit plaintiff's 50-h hearing and deposition transcripts wherein she testified, in pertinent part, as follows: On March 30, 2010, plaintiff tripped and fell on the sidewalk located at a bus stop on Boston Road and Wilson Avenue and in front of a furniture store. Immediately prior to to her accident, plaintiff had been a passenger on the M30 bus. She had boarded the bus on 205th Street, sat in the rear, intending to get off at the aforementioned bus stop. When the bus came to a stop at the aforementioned stop, plaintiff exited through the rear doors. As she stepped off the bus' steps and onto the sidewalk, she stepped directly into a "ditch" on the sidewalk, tripped, and fell. Plaintiff testified that the sidewalk on which she fell was abutted by a furniture store.

MABSTOA, NYCTA, and Bannister also submit several photographs,

which at her deposition plaintiff indicated fairly and accurately depicted the location of her accident on the date of her accident.

The photographs depict a portion of the public sidewalk located in front of a store bearing the name "Dubai Furniture." The photographs also depict a bus stop which is so-identified by a pole and a sign. Approximately five feet from the bus stop, the photographs depict a fairly large and fairly deep hole. Said hole is on the sidewalk, near the curb.

MABSTOA, NYCTA, and Bannister submit Bannister's deposition transcript wherein he testified, in pertinent part, as follows: On March 10, 2010, Bannister was employed by NYCTA as a bus operator, and had been so-employed for approximately 18 years. On the foregoing date, he was operating a BX30 bus. At some point, he was alerted that passengers wanted to get off at the stop located on Boston Road and Wilson Avenue. As he was trained, Bannister observed the sidewalk at or near the stop, noted no defects thereon, and brought the bus to stop within six inches of the curb. As plaintiff exited the bus through the rear doors, Bannister saw her fall. He exited the bus and walked over to plaintiff. He then saw that the portion of the sidewalk where plaintiff fell had a large hole. Bannister testified that he had never seen that hole prior to plaintiff's fall.

MABSTOA, NYCTA, and Bannister also submit an affidavit from Calvin Alston (Alston), Supervising Claims Examiner, wherein he

states that NYCTA does not own, operate, or maintain any sidewalks in the City of New York, including the sidewalk located on Boston Road, near its intersection with Wilson Avenue.

Based on the foregoing, specifically Alston's affidavit, MABSTOA, NYCTA, and Bannister establish prima facie entitlement to summary judgment with respect to plaintiff's cause of action premised on the failure to maintain the public sidewalk where she fell. As is the case with any action sounding in premises liability, an owner of real property abutting a public sidewalk is now liable if, *inter alia*, it is proven that he or she created the dangerous condition, had prior actual or constructive notice of its existence (*Weinberg* at 525; *Anastasio* at 809, or enjoyed a special use of the public sidewalk. As in any case premised on the negligent maintenance of real property, a prerequisite for the imposition of liability for a dangerous condition within, or, on real property, is a defendant's occupancy, ownership, control or special use of the premises abutting the public sidewalk (*Balsam* at 296-297; *Hilliard* at 693).

Here, Alston's affidavit establishes that movants neither owned nor maintained the sidewalk at issue nor the premises abutting the same. Thus, movants' establish that they are not liable for the failure to maintain the sidewalk and, therefore establish prima facie entitlement to summary judgment. Nothing submitted by any parties in opposition to this portion of movants'

motion raises an issue of fact sufficient to preclude summary judgment.

MABSTOA, NYCTA, and Bannister's evidence, however, fails to establish prima facie entitlement to summary judgment. Preliminarily, the Court notes that in their moving papers, the foregoing defendants solely seek summary judgment on grounds that because they were not responsible for the sidewalk on which plaintiff fell, they could not be liable. It was not until the instant motion was opposed by plaintiff and 3400 on grounds that MABSTOA, NYCTA, and Bannister's liability, if any, stem from their negligence in allowing plaintiff to alight at or near the defective sidewalk alleged that MABSTOA, NYCTA, and Bannister sought summary judgment on that cause of action. Notwithstanding that such argument was raised by the moving defendants for the first time in reply, insofar as it is based on the same evidence initially submitted by them¹, the Court considers it but nevertheless and

¹ Generally arguments proffered for the first time within reply papers shall not be considered by the court (*Wal-Mart Stores, Inc., v United States Fidelity and Guaranty Company*, 11 AD3d 300, 301 [1st Dept 2004]; *Johnston v Continental Broker-Dealer Corp.*, 287 AD2d 546, 546 [2d Dept 2001]; *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]. Specifically, the prohibition is meant to proscribe the practice of using reply papers to introduce new evidence in order to cure deficiencies in the moving papers (*Migdol v City of New York*, 291 AD2d 201, 201 [1st Dept 2002] [Court rejected affidavit submitted with reply papers since it sought to remedy deficiencies in initial moving papers rather than respond to arguments made by opponent in opposition.]; *Lumbermens Mutual Casualty Company v Morse Shoe Company*, 218 AD2d 624, 625-526 [1st Dept 1995] [Court rejected defendant's reply papers which included two new documents

denies their motion.

Substantively, MABSTOA, NYCTA, and Bannister's motion must be denied since their own evidence raises a sharp question of fact as to whether plaintiff was provided a safe place to alight from movants' bus. As noted above, it is well settled, that "[a] common carrier owes a duty to an alighting passenger to stop at a place where the passenger may safely disembark and leave the area" (*Miller* at 846; see, *Smith* at 133; *Fagan* at 306; *Kasper* at 999). Thus, where the evidence establishes that bus operator discharged a passenger at or near a defective sidewalk, such operator has breached the duty owed to a disembarking passenger and a question of fact exists precluding summary judgment in favor of the common carrier (*Conetta* at 333; *Bryant* at 844).

Here, while Bannister testified that he did not see hole which is alleged to have caused plaintiff's fall prior to the accident, he also testified that he saw the same immediately after walking to the location of the fall. Thus, the foregoing, establishes that the hole was at or near the location where Bannister stopped the bus in order to allow plaintiff to disembark and that Bannister should have seen it. To the extent a jury could find that this is

provided to support a new assertion not previously made in initial motion]; *cf. Sanford v 27-29 W. 181st Street Association Inc.*, 300 AD2d 250, 251 [1st Dept 2002] [Court held that an affidavit submitted with movant's reply mandated consideration because it was not meant to cure a deficiency in the initial motion]).

tantamount to negligence (*Conetta* at 333; *Bryant* at 844), Bannister's testimony - by itself - raises an issue of fact sufficient to preclude summary. In addition to his testimony, however, plaintiff's testimony and the photographs of the situs of the accident, all of which were submitted by movants bolster the contention that plaintiff was allowed to alight from the bus and into a fairly large and deep hole thereby also raising questions of fact sufficient to preclude summary judgment.

Because movants fail to establish prima facie entitlement to summary judgment, the Court need not consider the sufficiency of any papers submitted in opposition to this portion of movants' motion (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985])

Dubai's Motion for Summary Judgment

Dubai's motion seeking summary judgment is denied. While Dubai establishes prima facie entitlement to summary judgment by tendering evidence that it was merely a lessee of the premises abutting the defect alleged to have caused plaintiff's accident and therefore bears no liability under Section 7-210 of the New York City Administrative Code, the evidence tendered by 3400 in opposition - namely, that under the relevant lease, Dubai assumed all responsibility for the maintenance of the sidewalk - raises an issue of fact as to Dubai's liability under Section 7-210 sufficient to preclude summary judgment.

In support of its motion, Dubai submits much of the same evidence submitted by MABSTOA, NYCTA, and Bannister. Dubai also submits Majdi Nofal's (Majdi) deposition transcript wherein he testified, in pertinent part, as follows: Majdi was president of Dubai, a furniture store located at 3400 Boston Road, New York, NY and owned by his brother Nofal Nofal (Nofal). Dubai leased the premises pursuant to a lease. While Dubai was responsible for clearing snow and ice from the sidewalk abutting the store, Majdi did not know if Dubai was also responsible for the repair and maintenance of the sidewalk.

Dubai also submits Nofal's deposition transcript wherein he testified, in pertinent part as follows: In 2010, Nofal was the manager at the store. Nofal testified that with respect to the hole on the sidewalk abutting Dubai and on which plaintiff fell, the same had existed for some time prior to plaintiff's fall. Nofal testified that the hole was the result of the removal of covered bus stop which was never repaired.

Based on the foregoing, Dubai establishes prima facie entitlement to summary judgment in that it tenders evidence demonstrating that it did not own the premises abutting the instant sidewalk nor created the condition alleged. As noted above, generally, unless a tenant creates the condition alleged, such tenant is not liable under § 7-210 for the failure to maintain the public sidewalk (*Zorin* at 1117). Thus, here, Dubai establishes the

absence of any liability because it was merely a tenant in the premises abutting the defective sidewalk alleged.

3400's opposition raises an issue of fact sufficient to preclude summary judgment in Dubai's favor. Significantly, 3400 submits a copy of the lease² between itself and Dubai, dated September 29, 2008, which indicates that Dubai leased 3402 from 3400 and that Dubai was required to maintain the sidewalk abutting 3402. Specifically, paragraph 30 of the lease required Dubai to "make all repairs and replacement to the sidewalks and curbs," and paragraph 76a of the lease's rider required that Dubai "keep the sidewalk abutting the premises free from all manner of obstruction or hazard to pedestrians."

Accordingly, since a tenant is liable under § 7-210 when a lease agreement is so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk (*Paperman* at 541; *Hsu* at 759; *Abramson* at 514), here, 3400's evidence - namely, the lease - establishes that

² 3400 submits the lease in inadmissible form. While the proponent of a motion for summary judgment must submit all evidence in support thereof in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]), Dubai's failure to do so is irrelevant because no one objects. As such, this Court cannot make the argument for them (*Misicki v Caradonna*, 12 NY3d 511, 519 [2009] ["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made"]), and considers the lease as if submitted in proper form.

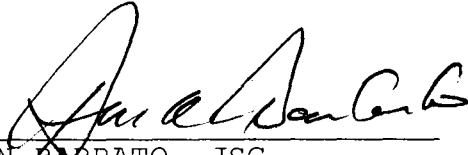
Dubai entirely usurped 3400's responsibility to maintain the sidewalk and could, thus, be liable to plaintiff under § 7-210 . Dubai's motion is, therefore, denied. It is hereby

ORDERED that plaintiff's causes of actions against MABSTOA, NYCTA, and Bannister and any cross-claims premised on the failure to maintain the sidewalk at issue be hereby dismissed, with prejudice. It is further

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : February 17, 2017
Bronx, New York


BEN BARBATO, JSC