SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III **PART** IAS MOTION 62EFM

Justice

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ALICIA COX,

Plaintiff,

- v -

2282 SECOND AVENUE LLC,THE CITY OF NEW YORK, NY FLOORING SUPPLIES INC

Defendant.

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INDEX NO. 154472/2015

MOTION DATE 02/14/2019

MOTION SEQ. NO. 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff commenced this action seeking damages from an alleged trip and fall on the sidewalk located at 2282 2nd Avenue, New York, New York, on June 19, 2014. Defendant City of New York ("City") moves this court for summary judgment pursuant to CPLR § 3212, seeking dismissal of all claims and cross-claims asserted against it. Plaintiff opposes the motion.

In support of its motion, defendant City submits copies of the notice of claim, 50-h hearing transcript, summons and complaint, defendant City's answer and discovery demands, amended summons and complaint, defendant City's answer to the amended summons and complaint, plaintiff's bill of particulars, the case scheduling order, defendant City's first response to the case scheduling order, an affidavit by Ms. Larisa Dubina dated June 8, 2016, defendant City's second response to the case scheduling order, plaintiff's deposition transcript, defendant City's third response to the case scheduling order, an affidavit by Ms. Larisa Dubina dated August 9, 2018, an affidavit by Mr. David Atik dated June 14, 2016, photos from the 50-h hearing, and an affidavit by Mr. Victor Green dated November 16, 2018 (NYSCEF Doc Nos. 109-126). In reply, defendant City attaches an order dated December 10, 2015 (NYSCEF Doc No. 130).

Defendant City argues that it is entitled to summary judgment because 1) it is not responsible for the sidewalk pursuant to Administraive Code 7-210 because it does not own the subject premises at 2282 2nd Avenue and the property is not a one-, two-, or three-family solely residential property, 2) it did not cause or create the alleged condition, and 3) it is not responsible for the plate and surrounding twelve-inch perimeter pursuant to 34 RCNY 2-07. In support of its position, defendant City points to the affirmation of David Atik which states that defendant City was not the owner of the property at issue on June 19, 2014, and that the property was classified as a store (Atik aff, NYSCEF Doc No. 124); thus, the property's owners are not exempt from the

duties imposed under New York City Administrative Code § 7-210. Moreover, Victor Green states in his affidavit that the "metal grate at the above referenced location belongs to the MTA" (Green aff, NYSCEF Doc No. 126, at 3). Pursuant to 34 RCNY 2-07, defendant City argues that it is not responsible for the grate and "twelve inches outward from the perimeter of the hardware" (34 RCNY 2-07 [b] [1]; *see Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]). Defendant City argues further that summary judgment should be granted because there is no evidence to support plaintiff's theory of affirmative negligence (*see Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009] citing *Faulk v City of New York*, 16 Misc3d 1108 [A] [Sup Ct, Kings County 2007]; Dubina affs, NYSCEF Doc Nos. 118, 123). According to defendant City, its submission of Department of Transportation ("DOT") records contained in its discovery response (NYSCEF Doc No. 117) indicates that it could not have caused or created the manhole cover condition at issue.

In opposition, plaintiff argues that defendant City failed to submit conclusive evidence on the issues of ownership of the metal grate at issue. Plaintiff argues that the affidavit of Victor Green is defective for purposes of meeting defendant City's *prima facie* burden. Moreover, defendant City's motion is premature under CPLR § 3212 (f).

In reply, defendant City reiterates its initial arguments.

The proponent of a motion for summary judgment must tender sufficient evidence to show the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing, "the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]).

"Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous roadway[, sidewalk, or encumbrance] condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (*Phillips v. City of New York,* 107 A.D.3d 774 [2d Dept 2013] citing *Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *see* New York City Administrative Code 7-201 and 7-210).

"Where the City establishes that it lacked prior written notice under the Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). Additionally, the affirmative negligence exception 'is limited to work by the City that immediately results in the existence of a dangerous condition' (*Oboler v City of New York*, 8 NY3d 888, 889 [2007] [emphasis omitted], quoting *Bielecki v City of New York*, 14

AD3d 301 [1st Dept 2005])" (*Yarborough v City of New York*, 10 NY3d 726 [2008]; *see Chambers v City of New York*, 147 AD3d 471 [1st Dept 2017]).

Pursuant to New York City Administrative Code § 7-210, "[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" and the property owner "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". This provision does not apply to owner-occupied one-, two-, or three-family properties "used exclusively for residential purposes" (New York City Administrative Code § 7-210). Moreover, "the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks" unless the sidewalk abuts an exempted property or city-owned property (*id.*). Finally, pursuant to 34 RCNY 2-07, if defendant City does not own a certain hardware, including manhole covers or grates, defendant City is not responsible for the hardware and "twelve inches outward from the perimeter of the hardware" (34 RCNY 2-07 [b] [1]); rather, owners of hardware are exclusively responsible to maintain the hardware and the twelve-inch perimeter (*see Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]), unless a non-owner affirmatively created the condition (*see Kearney v Capelli Enterprises*, 151 AD3d 521 [1st Dept 2017]) or derives a special use from the hardware (*see Patterson v City of New York*, 1 AD3d 139 [1st Dept 2003]; *Posner v New York City Transit Authority*, 27 AD3d 542 [2d Dept 2006]; *see generally Kleckner v Meushar 34th Street, LLC*, 80 AD3d 478 [1st Dept 2011]).

In the instant matter, plaintiff alleges that her injury occurred as a result of a trip and fall near a metal plate on the sidewalk near the corner of 117th Street and 2nd Avenue (NYSCEF Doc No. 110, at 29-30, plaintiff's 50-h transcript, at 12; NYSCEF Doc No. 125, photographs; NYSCEF Doc No. 109, notice of claim).

On this record, it appears that plaintiff's accident occurred near the twelve-inch area of responsibility created by 34 RCNY 2-07 [b] [1] (*see* NYSCEF Doc No. 109, notice of claim ["the trap door and the concrete surrounding it become [sic] and remain in a dangerous condition..."]; NYSCEF Doc No. 125, photographs); however, the record is not conclusive as to whether the cause of plaintiff's alleged accident was within or without the twelve-inch perimeter. Accordingly, under *Storper* (*supra*), *Lewis v City of New York*, 89 AD3d 41 (1st Dept 2011), and *Yarborough* (*supra*), the City cannot be held liable if it did not own the adjacent property, the adjacent property is not an exempted one-, two-, or three-family residential property, and it did not own the subject grate (*Storper*, *supra*). If defendant City establishes its non-ownership and the property's non-exempt status, then the burden shifts to plaintiff to demonstrate the applicability of affirmative negligence or special use (*see Yarborough*, *supra*).

Here, defendant City submitted an affirmation from David Atik, an attorney and employee of the City DOF (NYSCEF Doc No. 124). Mr. Atik's "duties and responsibilities include responding to Freedom of Information Law requests and complying with and responding to subpoenas and other demands for information concerning [DOF]'s various property records" (*id.*). DOF "maintains and operates the Real Property Assessment Division ['RPAD'] database" "[i]n the operation of its statutory mandate", which database "includes property ownership

information and building classification information" (*id.*). Mr. Atik performed a search of the RPAD database, and those records indicated 1) "that 2282 Second Avenue, New York, New York was classified as a Building Class K1 (store building), and not as a one-, two-, or three-family solely residential property" and 2) "that, on June 19, 2014 neither the City of New York nor the Department of Housing Preservation and Development of the City of New York was the owners of the property". Based on this submission, defendant City has established that it was not the owner of the property on the date of the alleged occurrence. However, as discussed *supra*, to establish its *prima facie* burden for entitlement to judgment as a matter of law, defendant City must also establish that it was not the owner of the grate at issue on the date of the occurrence.

Defendant City submitted an affidavit from Victor Green, a training coordinator employed by DOT, who stated that he "personally conducted an on-site inspection of the metal grate located at East 117th Street and 2nd Avenue, in the County, City and State of New York" and that "[a]s a result of my inspection, and based on my years of training and experience, I confirmed that the metal grate at the above referenced location belongs to the MTA" (NYSCEF Doc No. 129).

"Mr. Green's affidavit, standing alone, does not establish that the City did not own the grate on the date of plaintiff's accident. Mr. Green's affidavit is conclusory because it does not explain how his training and experience led him to the conclusion that the City does not own the grate nor does Mr. Green opine that the City did not own the grate on the date of plaintiff's accident which is a critical inquiry" (*Vega v City of New York*, 2016 WL 7489220, 2016 NY Slip Op 32580 [U] [Sup Ct, NY County 2016]). Mr. Green's affidavit describes his duties as general supervision of DOT authorized work and enforcement of DOT policy and regulations (NYSCEF Doc No. 126). It is unclear how Mr. Green's duties for DOT relate to issues of ownership of certain properties or provide him with the ability to determine ownership through visual inspection. Mr. Green does not describe how he came to his conclusion. Furthermore, and crucially, his affidavit does not speak to the issue of ownership on the date of the alleged occurrence (*id.*).

Upon the foregoing, and all papers and exhibits submitted concerning the relief sought herein, this court finds that defendant City has failed to meet its *prima facie* burden to establish its entitlement to judgement as a matter of law, and defendant City of New York's motion for summary judgment dismissing plaintiff's Complaint and all cross-claims against it is denied.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected.

Accordingly, it is ORDERED, that this motion for summary judgment is denied, and it is further,

ORDERED, that defendant City of New York is to serve a copy of this Order with Notice of Entry upon all parties and the General Clerk's Office.

This constitutes the decision and order of the court.

April 3, 2019

HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	☐	CASE DISPOSED		X	NON-FINAL DISPOSITION		
	☐	GRANTED	X	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE