SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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KARLA ROTHMAN-ELSON,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY and MACY'S INC.,

Defendant.

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DECISION AND ORDER

Index #159611/2014

Mot. Seq. 2 & 3

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendant City's Motion / Affirmation in Support	1	32-45
Defendant Macy's Inc.'s Motion/ Affirmation in Support	2	46-58
Defendant Transit/MTA's Cross- Motion/ Affirmation in Support	3	64-76
Defendant City's Supplemental Affirmation	4	118-119
Defendant Macy's Supplemental Affirmation	5	123
Defendant NYCTA/MTA's Supplemental Affirmation	6	120

LISA A. SOKOLOFF, J.

In this action to recover damages for personal injury, Defendant City of New York ("City") moves in motion sequence 2 and Defendant Macy's Inc. ("Macy's") moves in motion sequence 3, for an order pursuant to CPLR § 3212 granting summary judgment in their favor and dismissing the Verified Complaint and any cross-claims against them on the ground that they did not owe duty of care to the Plaintiff. Defendants New York City Transit Authority ("Transit") and Metropolitan Transportation Authority ("MTA") cross-move for summary judgment and to dismiss the complaint and all cross-claims.

On June 2, 2014 at approximately 9:00 AM, Plaintiff Karla Rothman-Elson was walking on the eastern sidewalk of Seventh Avenue between 34th Street and 35th Street when her foot hit a metal access cover, also referred to as a pull hole, in front of the Macy's

department store and she tripped and fell sustaining injury. The issue before the court is which defendant owned the pull hole and bore the duty to repair the area of sidewalk where Plaintiff fell.

A motion for summary judgment shall be granted if "upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR § 3212[b]). The proponent of a summary judgment motion bears the initial burden of establishing the right to summary judgment as a matter of law by tendering sufficient evidence, in admissible form, to eliminate any material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [NY 1985]). Once this showing has been made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Because summary judgment deprives a litigant of the party's day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Sherman v New York State Thruway Authority*, 27 NY3d 1019 [2016]). "But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have their claims promptly adjudicated" (*Andre v Pomeroy*, 35 NY2d 361 [1974]; *Aguilar v City of New York*, 162 AD3d 601 [1st Dept 2018]).

To establish a *prima facie* case of negligence against the City, a plaintiff must prove that the City owed a duty, breached that duty and that the breach proximately caused the plaintiff's injury (*Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301 [1st Dept 2001]). An owner of property has a duty to maintain his or her premises in a reasonably

safe condition (*Basso v Miller*, 40 NY2d 233 [1976]; *Farrugia v 1440 Broadway Associates*, 163 AD3d 452 [1st Dept 2018]). To establish a *prima facie* case of negligence based upon an unsafe condition not created by the defendant a plaintiff must demonstrate that the defendant had either actual or constructive notice of the condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Cruz v New York City Transit*, 19 AD3d 130 [1st Dept 2005]).

The City contends that to the extent the accident occurred as the result of a defective sidewalk condition, Section 7-210 of the New York City Administrative Code applies. Pursuant to § 7-210, owners of property abutting the public sidewalk have the affirmative duty to maintain the sidewalk in a reasonably safe condition and are liable in tort for injuries arising out of its breach of this duty (§ 210 [a], [b]). Failure to maintain a sidewalk in a reasonably safe condition includes 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 (§ 210[b]). The City argues that because it not own the property abutting the location where the accident occurred, it owed no duty to Plaintiff.

Macy's counters that § 7-210 does not elaborate on the term "sidewalk," and asserts that responsibility for the access cover is instead governed by Title 34 of the Rules of City of New York Department of Transportation (RCNY). The applicable sections provide that the owners of covers or gratings on a street are responsible for monitoring and repairing or replacing the covers and gratings as well as the area extending twelve inches outward from the perimeter of the hardware (New York City, NY, Rules, Tit. 34, § 2-07 [b][1] and [2]). Additionally, 34 RCNY § 2–07(b)(3) provides that street hardware must be flush with the surrounding street surface and replaced or adjusted at the owner's expense. The photographs submitted with the motion papers clearly depict a broken, rutted sidewalk

within 12 inches of the access cover on which Plaintiff tripped. The issue is which Defendant owns the access cover and is responsible for the surrounding 12 inches of sidewalk.

Transit contends that 34 RCNY § 2-07 does not apply because this case involves a defective concrete sidewalk which was owned and controlled by Macy's. Transit further asserts that the pull hole is a defunct portion of the subway system, responsibility for which remains with the City, and is no longer utilized by Transit.

However, pursuant to a Master Lease between the City and Transit, dated June 1, 1953, amended April 19, 1960 and March 6, 1962, supplemented by agreement dated March 20, 1962, amended and renewed by agreement dated October 5, 1962, amended April 7, 1965, amended by agreement dated March 31, 1982, amended April 11, 1995 (collectively, "Master Agreement"), submitted with the City's Supplemental Affirmation in Support for Summary Judgment and in Opposition of Transit's Cross-Motion for Summary Judgment, Transit leased all transit facilities that were then owned or acquired by the City, and any other materials, supplies and property incidental to or necessary to its operation (section 1.3). The question arises whether the access cover is "incidental or necessary" to the operation of the transit facilities.

At oral argument of this motion on May 17, 2018, Transit characterized the cover, or pull hole, as an "active fuse," in "active use," qualifying the term "active" to mean as recently as months or as long ago as ten years. Additionally, Transit's witness, Vincent Moschello, identified a photograph of the hardware, inscribed with letters "RTS," standing for "Rapid Transit System" (Ex. E to Aff in Opp, EBT 102:16-103:13) and conceded that the pull hole was part of the transit system and that Transit has maintenance responsibility for the metal portion of the pull hole. Similarly, Victor Green, an employee of the NYC Department of Transportation in the Highways Inspection and Quality Assurance Unit,

inspected the area of Plaintiff's accident and determined that the hardware belonged to the MTA and not the City (Ex. D to Plaintiff's Aff in Opp).

According to section 2.1 of the Master Lease, the City authorizes Transit "to take jurisdiction, control, possession and supervision of such transit facilities, materials, supplies, and property on the effective date." (City's Reply Aff, Ex. A). Accordingly, the City argues, and this Court agrees, pursuant to the Master Lease, Transit is the owner of the pull hole and had the duty to maintain and repair both the metal hardware and the 12-inch perimeter, including the area of broken sidewalk (*Cruz v New York City Transit*, 19 AD3d 130 [1st Dept 2005] [34 RCNY § 2–07 applies to raised corner of sidewalk near subway gratings owned by Transit]).

The City, as an owner out of possession of all transit facilities, cannot be held liable in tort for the negligent acts of others since it does not control or maintain the property and thus has no liability for Plaintiff's injuries (*Yuying Qiu v J & J Grocery & Deli Corp.*, 115 AD3d 627 [1st Dept 2014). Under the Master Lease, the City is a separate legal entity from the MTA, must be separately sued and is not responsible for the other's torts (*Mayayev v Metropolitan Transp. Auth. Bus*, 74 AD3d 910 [2nd Dept 2010]).

Transit argues that Macy's assumed ownership, operation and control of the subject portion of the sidewalk when its contractor, Structure Tone, Inc., replaced the sidewalk citing *Klatz v Armor Elevator*, 93 AD2d 633 [2nd Dept 1983] in support. While evidence of subsequent repairs is generally not admissible in a negligence case (*Corcoran v Vill. of Peekskill*, 108 NY 151, 153 [1888]; *Kaplan v Einy*, 209 AD2d 248 [1st Dept 1994]) an exception to this rule is where there is an issue of control (*Fernandez v Higdon Elevator Co.*, 220 AD2d 293 [1st Dept 1995]).

Klatz merely permits the discovery of records of subsequent accidents or repairs to show the dangerous condition of a place, not for the issue of control. Here, the evidence

establishes that Transit owned the pull hole and Transit cites no law that would relieve it of responsibility under 34 RCNY § 2–07.

Nor is Macy's, as the abutting property owner, concurrently responsible for the defective condition. The First Department has previously stated that Administrative Code § 7-210 was not intended to supplant 34 RCNY § 2-07 by shifting the statutory obligation from Transit to the abutting property owner (*Storper v Kobe Club*, 76 AD3d 426, 427 [1st Dept 2010]). Macy's lack of any duty to maintain the area where Plaintiff fell precludes liability. Nor is MTA liable as "the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility" (*Cusick v Lutheran Med. Ctr.*, 105 AD2d 681 [2nd Dept 1984]; *Delacruz v Metropolitan Transp. Authority*, 45 AD3d 482 [1st Dept 2007]).

The record also makes clear that Transit had constructive notice of the defective condition that caused Plaintiff's accident. As Transit points out, photographs of the defective sidewalk at the exact same location where Plaintiff fell were the subject of discovery and exchanged in the *Matter of Manfredi v Federated Department Stores, Inc., New York City Transit Authority and the City of New York* (Sup Ct, NY Co. Index No. 114612/2006).

While the court recognizes that removal of all extant pull holes from sidewalks and other publicly-accessible areas would require sizeable financial and other resources, this burden does not relieve Transit of its responsibility under 34 RCNY § 2–07(b) to maintain and repair any defective street condition surrounding the metal hardware.

Defendants City, Macy's and MTA have tendered sufficient evidence, in admissible form, to eliminate any material issues of fact regarding which party bore the responsibility of the pull hole.

Given that this was a motion for summary judgment, this Court was authorized to search the record and grant judgment to the non-moving party without necessity of notice or cross motion (CPLR 3212[b]; *Abramovitz v Paragon Sporting Goods Co., Inc.*, 202 AD2d 206 [1st Dept 1994]). It appearing to the court that Plaintiff is entitled to judgment on liability as against Transit only and that the only triable issues of fact arising from Defendants' motions and cross-motions relate to the amount of damages to which Plaintiff is entitled, it is

ORDERED, that the motions for summary judgment of Defendants **City of New York** and **Macy's** are granted and Plaintiff's complaint and all cross-claims against them are dismissed; and it is further

ORDERED, that the cross-motion for summary judgment of Defendant **Metropolitan Transportation Authority** is granted and the complaint and all cross-claims against it are dismissed; and it is further

ORDERED, the complaint is severed and dismissed as against Defendants **City of New York, Macy's** and **Metropolitan Transportation Authority**, and the Clerk is respectfully directed to enter judgment in favor of these Defendants; and it is further

ORDERED, that the cross-motion for summary judgment of Defendant **New York City Transit Authority** is **denied**; and it is further

ORDERED, that partial summary judgment on the issue of liability is **granted** to **Plaintiff Karla Rothman-Elson** against **Defendant New York City Transit Authority** and the balance of the action shall proceed to trial on the issue of damages only; and it is further

ORDERED that Plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties and upon the Clerk of

the General Clerk's Office (60 Centre Street, Room 119) and upon the county clerk's office; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further.

ORDERED that upon service of a copy of this order with notice of entry, the clerk is directed to remove Defendants The City of New York, Macy's Inc., and Metropolitan Transportation Authority from the caption of this action and to place this action on the IAS Trial Part (Part 40) calendar for the next available trial date for a trial on damages.

Any requested relief not expressly addressed has nonetheless been considered and is expressly rejected.

Dated: July 8, 2019
New York, New York

ENTER:

Lisa A. Sokoloff, J.C.C.

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