SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** **PART** **IAS MOTION 5**

Justice

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INDEX NO. 158500/2016

LORRAINE MOSES,

Plaintiff,

MOTION SEQ. NO. 001

- against-

THE CITY OF NEW YORK, AFTERNOON DELIGHT FIFTH AVENUE ASSOCIATES, LLC, FIFTH AVENUE DELI MART,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

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

Plaintiff commenced this action seeking relief for personal injuries sustained on September 7, 2015, when she tripped and fell due to an allegedly defective condition on the sidewalk in front of the Fifth Avenue Deli Mart located at 1318 Fifth Avenue,[1] New York, NY. Defendant, The City of New York ("City") now moves pursuant to CPLR § 3212 seeking summary judgment dismissing the complaint and any cross-claims as against it on the grounds that the City is not the owner of the abutting property, that it never received prior written notice of the defect, and that it did not cause or create the condition.

Plaintiff and defendants, Afternoon Delight Fifth Avenue Associates, LLC, as well as, Fifth Avenue Deli Mart, Inc. oppose the motion.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. See, *Alvarez v Prospect Hospital*, 68 NY2d 320 (NY 1986) and *Winegrad v New York University Medical Center*, 64 NY2d 851 (NY 1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989).

Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk, unless the property is exempt. (See Admin. Code § 7-210[c]).

[1]1318 Fifth Avenue is also known as 2 West 111th Street.

In order to hold the City liable for injuries resulting from sidewalk defects, a plaintiff must demonstrate that the City received prior written notice of the subject condition. (See Admin Code of the City of New York § 7-201(c)(2); *Amabile v City of Buffalo*, 93 NY2d 471 [1999].) The only recognized exceptions to the prior written notice requirement are where the City's actions caused or created the defect through an affirmative act of negligence or where the defect resulted from a special use by the municipality. (See *Oboler v City of New York*, 8 NY3d 889 [NY 2007], quoting *Amabile*, supra.

Here, the City maintains that it is not responsible for plaintiff's injuries caused by the subject defect given that it is not the owner of the subject premises and the property is not exempt under the liability shifting provisions of Administrative Code of the City of New York § 7-210 as it is not a one-, two-, or three- family solely residential property. In support of the motion, the City asserts that plaintiff's pleadings, allegations, testimony, and photographs establish that the alleged accident occurred on the sidewalk abutting the Fifth Avenue Deli Mart located at 1318 Fifth Avenue, a/k/a 2 West 111th Street, New York, NY. The City relies upon the affirmation of David C. Atik who conducted a search of the Real Property Assessment Division database which revealed that 1318 Fifth Avenue/2 West 111th Street is located at Block 1594 and Lot 40 and the City is not the owner of the property. The search also revealed that the property is classified as a Building Class C7 (walk-up apartments with stores), and not as a one-, two-, or three-family solely residential property. (City's *Exhibit H.*) The City further relies upon the affidavit of Lester Payawal of the Department of Transportation (DOT) who conducted a record search for work related to the sidewalk abutting the subject premises. (City's *Exhibit J.*) This search revealed that the City did not perform work on the sidewalk at the subject location for two years prior to and including the date of the alleged accident. *Id.*

Alternatively, the City argues that pursuant to § 7-201(c)(2) of the Administrative Code, it is not liable as it did not receive prior written notice of the defect nor caused or created same as the search performed by Mr. Payawal confirms. The City asserts that the search revealed one permit, one Corrective Action Request (CAR), three inspections, three complaints, five sidewalk inspections, and four Big Apple maps labeled Volume 7N, pages 56 and 61, and Volume 8N, pages 61 and 62 (*Exhibit J,* supra) and that none establish that the City had prior written notice of the defect alleged. The City asserts that the permit was issued to Con Edison. Furthermore, the three inspections were in connection with the permit issued to Con Edison and contained no mention of the subject defect, specifically, one inspection resulted in a CAR for a "loose and noisy" gas valve which was corrected as of December 28, 2013 (prior to the subject incident) and the two remaining inspections resulted in passing conditions. In addition, the three complaints were unrelated to the subject defect alleged and were regarding an illegally placed clothing donation bin; a broken sidewalk at 2 West 111th Street which is around the corner from the 1318 Fifth Avenue entrance; and a cracked sidewalk at 2 West 111th Street. (City's *Exhibit I.*) The City also asserts that the Big Apple Maps did not contain any relevant symbols representing a broken sidewalk where plaintiff's accident occurred. (City's *Exhibit N.*)

Additionally, the City avers that records from the New York City Department of Environmental Protection (DEP) failed to provide the City with prior written notice. The City relies upon the affidavit of Kisha Miller, Claims Specialist for the DEP, who conducted a search of DEP electronic databases, water and sewer records including maintenance, repair records, inspection records, and complaints for the subject location for two years prior to and including the date of the alleged accident. (City's *Exhibit L.*) The search revealed two customer service requests (CSR) and

one daily activity report. *Id.* All of the records produced by DEP refer to 53 West 111th Street which has no connection to the subject location. *Id.* Finally, the City contends that there are no records to establish that the City caused or created the defect.

In opposition, plaintiff concedes that the City is not the abutting landowner and that the City submitted proof that they did not immediately cause or create the alleged defective condition causing plaintiff's injuries but argues that the City erroneously asserts it is only required to produce two years of records and thus, this motion is premature in that the City has failed to provide discovery as ordered. However, plaintiff maintains that the City received prior written notice of the defect, specifically through the Big Apple Maps submitted by the City, which depict symbols for a raised or uneven portion of sidewalk, a cracked sidewalk, and the existence of cobblestones near the accident location which plaintiff argues establishes that the City received notice of the defect in 2003, prior to the plaintiff's accident, and failed to correct the condition. (Plaintiff's *Exhibit A.*) Plaintiff also relies upon the deposition testimony of Franklin Jose Pimentel-Castillo, a manager for Fifth Avenue Deli Mart (Fifth), who testified that he made several complaints to the City and that City personnel responded and explained that the condition was caused by water leaking from the nearby fire hydrant. (Fifth's *Exhibit A*). Mr. Pimentel-Castillo also testified that the subject defect was not repaired until 2016. *Id.*

Similarly, defendant Fifth also opposes the motion relying on the testimony of Mr. Pimentel-Castillo who testified that he lodged complaints about the subject location to the City, and that the City installed pavers in the mid-1990s which began to deteriorate in 2013 or 2014. Additionally, defendant Fifth contends that the City negligently installed, maintained, and repaired said pavers which led to plaintiff's accident.

Finally, defendant Afternoon Delight Fifth Ave. Associates Inc. (Afternoon Delight) opposes the motion on various grounds. Specifically, Afternoon Delight asserts that the motion is premature as discovery remains outstanding; that the City owns the abutting sewer cover and thus, has a duty under 34 RCNY §2-07 to maintain a twelve inch perimeter around the cover; that the City had prior written notice of the subject defect through Big Apple Maps; that the City's installation of the pavers creates a question of fact as to whether the City caused or created the condition; and, finally, that the City has made a special use of the sidewalk, which is an exception to the prior written notice rule.

After careful review of the record, the court finds that the City has met its burden in demonstrating entitlement to summary judgment. While the court takes note of the contentions in opposition as to the City's repeated failure to comply with direct discovery orders,[2] the record overwhelmingly establishes that the City has demonstrated as a matter of law that it neither owned nor controlled the property where the incident occurred and therefore owed no duty to plaintiff as Admin. Code § 7-210 does not provide for the delegation of duty of property owners. See, *White v NY City Tr. Auth.*, 308 AD2d 341 [1st Dept 2003]. Moreover, the court finds the arguments proffered in opposition unavailing as it is undisputed that the City is not the abutting landowner; there are no written records of the complaints purportedly made by Mr. Pimentel-Castillo to afford the City prior written notice; special use was not pleaded in the initial pleadings nor made out in

[2] The court agrees that discovery dating back to two years prior to and including the date of the incident is sufficient. However, inasmuch as the parties are purportedly receiving their response to discovery requests for the first time via the City's motion and exhibits, the court acknowledges the belated nature of the disclosure.

defendant Afternoon Delight's opposition papers;[3] and the testimony concerning the pavers purportedly installed by the City establishes that the pavers did not begin to deteriorate until approximately twenty (20) years after installation. Thus, the opposition fails to raise an issue as to whether the City caused the condition through affirmative negligence which immediately resulted in a defective condition. See *Carlebach v City of New York*, 168 AD3d 472, 473 [1st Dept 2019]. Further, the twelve-inch perimeter requirement under 34 RCNY §2-07, asserted by Afternoon Delight, pertains to utility corporations and not the City (see 34 RCNY §2-14); and, as the City correctly points out in its reply, the Big Apple Maps notation "CS" in front of the 1318 Fifth Avenue indicates cobblestones which does not, in and of itself, denote a defect. (City's *Exhibit N*; Plaintiff's *Exhibit A.*) Based on the foregoing, it is hereby

ORDERED that the complaint and all cross-claims are dismissed as against The City of New York, and the clerk is directed to enter judgment accordingly in favor of said defendant, and it is further

ORDERED that this action is severed and continued under this index number against all remaining defendants, and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the Court bear the amended caption, and it is further

ORDERED that the City is directed to serve a copy of this order with notice of entry upon the Clerk of the Court and the Trial Support Office within twenty days of receipt of this order, and it is further

ORDETED that since the City is no longer a party to this action, the Trial Support Office shall reassign this action to the inventory of a General IAS Part; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the decision and order of the Court.

November 25, 2019

HON. VERNA L. SAUNDERS, JSC

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

[3] Afternoon Delight alleges that because the pavers were installed pursuant to the Duke Ellington/Frawley Circle improvement project there is a question of fact as to whether the City was conferred a special use. The improvement project by its very nature is for the public benefit and the opposition fails to demonstrate how the City derived a special benefit that is unrelated to the public use.