Ferrer v 120 Union Ave. LLC
2020 NY Slip Op 30526(U)
February 10, 2020
Supreme Court, Kings County
Docket Number: 517943/2016
Judge: Dawn M. Jimenez-Salta

At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of February, 2020.

PRESENT:

HON. DAWN JIMENEZ-SALTA,
Justice.

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INES FERRER,

Plaintiff,

- against -

Index No.: 517943/2016
Motion Seq. 3

120 UNION AVENUE LLC AND DAYNA CEBUS CONSTRUCTION, LLC,

Defendants.

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

1) Defendants 120 Union Avenue LLC and Danya Cebus Construction's ("Defendants") motion for an order, pursuant to CPLR 3211, granting summary judgment dismissing the complaint, with accompanying affidavits, dated November 30, 2018;
2) Plaintiff Ines Ferrer's ("Plaintiff") affirmation in opposition, with accompanying affidavit, dated February 20, 2019;
3) Defendants' reply affirmation, dated March 27, 2019;
4) Plaintiff's amended affirmation in opposition, dated April 8, 2019; and
5) Defendants' amended reply affirmation, dated April 18, 2019, all of which submitted May 29, 2019.

Papers Considered:	NYSCEF No.:
Notice of Motion, Affirmation, Affidavits and Exhibits Annexed	Defendants 56-68;
Answering Affirmation, Affidavit and Exhibits Annexed	Plaintiff 70-78; 83-86;
Reply Affirmation, and Exhibits Annexed	Defendants 80-82; 88-93.

Upon the foregoing cited papers, the Decision/Order is as follows: Defendants' motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint is granted (motion sequence number 3).

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Ines Ferrer ("Plaintiff" or "Ferrer"), when she tripped and fell on a concrete cinder block in a temporary walkway provided for pedestrians while the sidewalk abutting the premises at 120 Union Avenue in Brooklyn, New York was closed due to construction (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

In her verified bill of particulars, Plaintiff alleges that defendants Danya Cebus Construction ("DCC"), the general contractor for the construction project, and 120 Union Avenue LLC ("120 Union"), the owner of the premises at the time of the accident (collectively, "Defendants"), were negligent in, among other things, placing or failing to remove a concrete cinder block in the pedestrian walkway on Union Avenue (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Defendants now move for summary judgment, pursuant to CPLR 3212, dismissing the complaint in its entirety arguing, *inter alia*, that they did not cause or create the alleged condition and that they did not have actual or constructive notice of the cinder block in the walkway (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

At her deposition, Plaintiff testified that the accident occurred on July 18, 2016 while she was walking northbound along Union Avenue in the afternoon. Plaintiff and her daughter were walking side-by-side on a path or walkway abutting the construction site to view an apartment building. Plaintiff indicated that there was a wood panel fence to her right separating the construction site from the walkway. To her left, there were orange and white plastic barriers separating the walkway from the traffic on the street. Plaintiff testified that she had never visited the premises before the date of the accident (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

While she was walking, Plaintiff was looking "upwards" at the fence for a sign with contact information for the building owner or management. Plaintiff's daughter was walking to her left. Plaintiff then tripped and fell over a white or gray piece of concrete, which she identified as a cinder block. Plaintiff did not observe the cinder block before she fell. After she fell, she asked her daughter what happened and her daughter informed her that she tripped on the cinder block. The cinder block was on the ground in the walkway closer to the fence. Plaintiff could not recall whether the cinder block was weathered, discolored, or chipped (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

After the accident, Plaintiff left the cinder block on the ground in the walkway and called her father to pick her up. She did not observe any workers at the site on the date of the accident (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Plaintiff later returned to the site and took photographs of the cinder block with her cell phone.[1] The photographs depict a cinder block on the ground in the pedestrian walkway. She stated that the cinder block in the photographs was in the same place as it was on the date of the accident, but she could not confirm whether it was the same cinder block that she tripped over. Plaintiff did not complain to anyone associated with the building or construction (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

In support of their summary judgment motion, Defendants submit the affidavits of Matt Dabney ("Dabney"), the site superintendent for DCC, and Moran Shay ("Shay"), an employee of the project manager representing 120 Union[2] (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

In his affidavit, Dabney stated that construction activity at the project site was halted on May 10, 2016 in anticipation of a pending project redesign. The concrete subcontractor at the project stopped work in "early May 2016." Dabney averred that he locked all entrances to the site after construction stopped and that he was the only individual in possession of the keys to access the site. During the shutdown, Dabney visited the site with subcontractors for weekly inspections in preparation of the redesign work. As part of his inspections, Dabney averred that he walked through the pedestrian footpath on Union Avenue and did not observe a cinder block on the path (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

There was no further construction activity at the site of any kind until July 19, 2016 when construction resumed. Dabney was personally present at the site on that date and noted that he did

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[1] At her deposition held on March 22, 2018, Plaintiff initially testified that she returned to the accident two weeks after the accident to take photographs of the cinder block, which remained in the same location. In the attached errata sheet, dated May 30, 2018, she indicated that she returned to site "about two to three days" after the accident (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

[2] The Court was not provided with a complete affidavit from Shay, as the second page containing paragraphs five through nine was missing; thus, this document was not considered (*see, e.g., Gao v City of New York*, 145 AD3d 939, 940 [2d Dept 2016]; *see also* CPLR 2214[c]). The e-filed version of the affidavit (document # 66 on NYSCEF) is also incomplete. The parties did not stipulate to Defendants' submission of a complete version and Defendants failed to otherwise correct the deficiency (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

not observe the cinder block in the walkway (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Dabney prepared daily reports regarding activity at the site. He stated that no complaints were made regarding the cinder block or the condition of the abutting pedestrian walkway. If there were any complaints made about the condition of the walkway, said complaints would have been brought to his attention and included in the daily logs[3] (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Defendants assert that the statutory violations asserted by Plaintiff in the bill of particulars, including New York City Administrative Code §§ 19-138, entitled "Injury to or defacement of streets," and 19-139, entitled "Excavations for private purposes," are without merit as the enumerated sections are inapplicable to facts of this case. Given that the accident occurred on the walkway, and not the sidewalk, and in light of Plaintiff's failure to allege any other applicable Administrative Code sections placing an affirmative duty on Defendants to maintain the area, Defendants argue that they may not be held liable for the accident in the absence of evidence that they created or caused the condition, or had actual or constructive notice of it (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Defendants argue that summary judgment should be granted because they established *prima facie* that neither 120 Union nor DCC caused or created the alleged dangerous condition of the cinder block in the temporary walkway. Defendants state that the affidavits, supporting documentation, and Plaintiff's deposition testimony and photographs demonstrate that the incident occurred on a public roadway, that they did not have any employees engaged in construction activities at the project for two months prior to and including the accident, and that they did not engage in any construction activity that involved work with cinder blocks in the area of where Plaintiff fell. They also note that, for reasons unrelated to the project, the concrete subcontractor stopped work at the site prior to Plaintiff's accident in early May 2016 (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Defendants further contend that they lacked actual or constructive notice of the alleged condition. First, Defendants argue that the affidavits of Shay and Dabney, along with their other submissions, such as the daily activity logs, establish that neither 120 Union or DCC had actual notice of the cinder block in the walkway (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

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[3] Attached to the affidavit, Defendants provide copies of the daily activity logs from April 19, 2016 to May 10, 2016 and July 19, 2016. In his affidavit, Dabney states that the records were maintained by DCC in the regular course of business. He further states that said reports accurately reflect his recollection of construction activity at the project, including the dates for site inspections conducted before the shutdown (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Defendants contend that the record is devoid of evidence that the complained of condition existed for sufficient length of time prior to the accident to permit Defendants to have an opportunity to discovery and remedy it (*Spano v Apogee Retail NY, LLC*, 164 AD3d 1495, 1496 [2d Dept 2018], citing *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Citing Dabney's affidavit, Defendants assert that the they performed weekly inspections of the site, including the walkway on Union Avenue, during which no concrete debris was discovered. They contend that these facts establish that Defendants did not have constructive notice of the cinder block in the walkway (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Defendants further argue that, even if they caused or created the condition, they are entitled to summary judgment on the ground that they had no duty to warn Plaintiff of the cinder block because the alleged condition was open and obvious, and not inherently dangerous, in light of the surrounding circumstances (*see Twersky v Incorporated Vil. of Great Neck*, 127 AD3d 739, 740 [2d Dept 2015]; *Russo v Home Goods, Inc.*, 119 AD3d 924, 926 [2d Dept 2014]) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

In opposition, Plaintiff argues that there is a question of fact as to whether Defendants had constructive notice of the alleged condition. In addition to Plaintiff's deposition testimony, Plaintiff relies upon the affidavit of Plaintiff's daughter, Alexis Ferrer ("Alexis"). Alexis stated that she was walking with Plaintiff on a walkway abutting a construction site located at 120 Union Avenue in Brooklyn, New York when Plaintiff suddenly fell. After she fell, Alexis observed a cinder block in the walkway near the fence. She indicated that the cinder block appeared to be "gray, relatively old" and "beaten up." Alexis further stated that she reviewed the photographs taken after the accident and that they depict "the same cinder block that [Plaintiff] tripped over in the same location on the walkway abutting 120 Union Avenue, Brooklyn, New York" (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Plaintiff contends that the affidavit indicating that the cinder block was chipped and weathered raises a triable issue of fact as to whether the condition had been in existence for a sufficient length of time to permit Defendants to discover and remove it from the walkway (*see George v New York City Tr. Auth.*, 306 AD2d 160, 161 [1st Dept 2003]) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Plaintiff also challenges the affidavits proffered by Defendants in support of their summary judgment motion. Plaintiff argues that the affidavits of Shay and Dabney are defective and should not be considered because they do not specifically state that they were "sworn to under penalty of perjury." Plaintiff also argues that Shay's affidavit is incomplete and should not be considered because the second page containing paragraphs five through nine is missing. Plaintiff contends that the characterization of the walkway as a roadway in the affidavits is also inaccurate (Defendants 1

[Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

In addition, Plaintiff preemptively argues that the Court should reject any attempt by Defendants to correct omissions or deficiencies in the aforementioned affidavits in their reply papers (*see Sanford v 27-29 W. 181st Assn., Inc.*, 300 AD2d 250, 251 [1st Dept 2002]) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Based upon Dabney's statement that there was a concrete subcontractor at the project, Plaintiff asserts that it is reasonable to infer that the cinder block was being used by the concrete subcontractor at the site prior to the accident. Plaintiff theorizes that the cinder block was debris left behind by the concrete subcontractor and argues that Defendants' failure to observe and remove the cinder block in the course of the weekly visits detailed in Dabney's affidavit demonstrates that Defendants failed to properly inspect the walkway. Plaintiff asserts that these facts raise a triable issue of fact as to whether Defendants created the dangerous condition (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

In addition, Plaintiff contends that the condition of the cinder block was not open and obvious and that it was inherently dangerous. Plaintiff cites the photographs of the cinder block in support, which she argues contradict Defendants' assertions that the cinder block was readily observable. Plaintiff asserts the presence of the cinder block on a walkway meant for the travel of pedestrians, together with the fact that Plaintiff was distracted while looking for a sign that could provide contact information for the building, rendered the condition a dangerous trap (*see Stoppeli v Yacenda*, 78 AD3d 815, 816 [2d Dept 2010] ["A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted"]; *Villano v Strathmore Terrace Homeowners Assn., Inc.*, 76 AD3d 1061, 1062 [2d Dept 2010]). Even if the condition was open and obvious, Plaintiff argues that Defendants still had an obligation to keep the walkway, as part of their property, in a reasonably safe condition (*see Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Plaintiff further argues that Defendants' summary judgment motion should be denied because the depositions of the parties have not been completed and facts necessary to oppose the motion are exclusively within Defendants' knowledge and control[4] (*see Matter of Fasciglione,* 73 AD3d 769, 770 [2d Dept 2010]; *Juseinoski v New York Hosp. Med. Ctr. of Queens,* 19 AD3d 769, 770 [2d Dept

[4] Plaintiff filed the note of issue and certificate of readiness for trial, in which Plaintiff noted that depositions and physical exams were outstanding, on June 6, 2018. Defendants thereafter moved to vacate the note of issue and the resultant order provided that depositions were to be completed by September 16, 2018. The order also extended the time to file summary judgment motions, but did not strike the note of issue (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

2010]; *Urcan v Cocarelli*, 234 AD2d 537, 537 [2d Dept 1996]) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Finally, Plaintiff asserts that DCC, as general contractor, is liable for damage that results from construction at the site pursuant to Administrative Code § 19-110, which provides that "[i]n all cases where any person shall engage in any activity for which a permit is required pursuant to this subchapter, such person shall be liable for any damage which may be occasioned to persons, animals or property by reason of negligence in any manner connected with the work." Thus Plaintiff's argue that even if DCC did not create the condition, it can still be found liable for negligence in connection with construction work at site (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Plaintiff also cross-moved, in motion sequence four, to strike defendants' answer and compel Defendants' depositions[5] (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

In reply, Defendants argue that Plaintiff failed to raise a triable issue of fact as to their constructive notice of the cinder block. Defendants assert that Plaintiff's claim that the cinder block in question appeared "beaten" and "chipped" is a "feigned issue of fact" in that the condition of the cinder block itself is not probative of the length of time it was on the ground in the walkway. They further contend that Plaintiff failed to provide any evidence in rebuttal that the cinder block was present on the walkway for a sufficient length of time for Defendants to discover and remove it (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Defendants also reiterate their arguments that the site was locked down for nearly two months prior to and including July 18, 2016 and that they conducted weekly inspections of the site that did not reveal any concrete debris on the walkway. They also cite Plaintiff's deposition, in which she states that she did not observe any workers at the site, in support of their claim that there was no activity at the site prior to and at the time the incident occurred. They further contend that plaintiff's theory that the cinder block was debris from concrete work performed at the site or that the concrete subcontractor left the cinder block behind on the walkway is impermissible speculation insufficient to raise a triable issue of fact (*see Powell v Cedar Manor Mut. Hous. Corp.*, 45 AD3d 749, 750 [2d Dept 2007]) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N])

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[5] Plaintiff's cross motion was referred to the Central Compliance Part and resolved by Hon. Lizette Colon by short form order, dated April 3, 2019, directing the parties to complete Defendants' depositions on or before April 18, 2019 (NYSCEF Doc. No. 87). Defendants' depositions were completed in accordance with the order on April 11, 2019 (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

With regard to the form of the affidavits, Defendants argue that the affidavits of Dabney and Shay, which were "duly sworn" and notarized, are admissible and may be considered by the Court. Defendants also annex the deposition transcripts of Dabney and Shay to their reply, which they allege corroborate the contents of their earlier affidavits[6] (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Defendants argue that Plaintiff failed to allege the aforementioned violation of Administrative Code § 19-110 in the bill of particulars and that said statute is merely a codification of common-law negligence. In addition, they observe that Plaintiff failed to address or oppose Defendants' arguments as to the other Administrative Code sections in the bill of particulars (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

DISCUSSION

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]). The burden then shifts to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere speculation or unsubstantiated allegations are insufficient to raise a triable issue of fact (*see Kwang Bok Yi v Open Karaoke Corp.*, 161 AD3d 971, 972 [2d Dept 2018], citing *Zuckerman v City of New York*, 49 NY2d at 562).

Liability for a dangerous condition on property is "generally predicated upon ownership, occupancy, control, or special use of the property" (*Reeves v Welcome Parking Ltd. Liab. Co.*, 175 AD3d 633, 634 [2d Dept 2019], quoting *Bartlett v City of New York*, 169 AD3d 629, 630 [2d Dept 2019] [internal quotation marks omitted]). A defendant moving for summary judgment in a trip-and-fall case has the initial burden of establishing it neither created the alleged hazardous condition, nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it; to sustain that burden, the defendant must offer some evidence as to when the area in question was last inspected relative to the accident" (*Bergin v. Golshani*, 130 AD3d 767, 767 [2d Dept 2015], citing *Gordon v American Museum of Natural History*, 67 NY2d at 837; *see also Spano v Apogee Retail NY, LLC*, 164 AD3d at 1496; *Baines v G&D Ventures, Inc.*, 64 AD3d

[6] The Court declines to consider the portions of Defendants' reply containing new evidence or arguments seeking to remedy deficiencies in the initial submission or to introduce new arguments in support, such as the deposition transcripts (*see Jaklitsch v Kelly*, 176 AD3d 792, 793 [2d Dept 2019], citing *Damas v Valdes*, 84 AD3d 87, 96 [2d Dept 2011]) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N])

528, 529 [2d Dept 2009]; *Starling v Suffolk County Water Auth.*, 63 AD3d 822, 823 [2d Dept 2009]; *Arzola v Boston Properties Ltd. Partnership*, 63 AD3d 655, 656 [2d Dept 2009]).

Here, Defendants have made a *prima facie* showing of entitlement to summary judgment on the ground that they did not have a statutory duty to Plaintiff under any of the rules or regulations alleged in the bill of particulars. In their papers, Defendants address each Administrative Code section in sequence, including §§ 19-138 (Injury to or defacement of streets), 19-139 (Excavations for private purposes), 19-143 (Excavations for public works), 19-146 (Prevention of disturbances of street surface), and 19-147 (Replacement of pavement and maintenance of street hardware), demonstrating that they are inapplicable to the facts of this case or fail to articulate a duty on the part of 120 Union[7] or DCC to Plaintiff (*see Reeves v Welcome Parking Ltd. Liab. Co.*, 175 AD3d at 634; *see also Metzker v City of New York*, 139 AD3d 828, 829 [2d Dept 2016]; *Buonviaggio v Parkside Associates LP*, 120 AD3d 460, 461-462 [2d Dept 2014]; *Stoloyvitskaya v Dennis Boardwalk, LLC*, 101 AD3d 1106, 1108 [2d Dept 2012]) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Plaintiff failed to rebut Defendant's *prima facie* showing as to the inapplicability of the enumerated Administrative Code sections by her failure to address or defend them in her opposition papers (*see Breuer v Friedlander*, 147 AD3d 717, 717-718 [2d Dept 2017]; *Thriftway Services Corp. v Shevchenko*, 35 AD3d 442, 443 [2d Dept 2006]). The only section that Plaintiff discusses in her papers is Administrative Code § 19-110, entitled "Liability for damage," which was not alleged in the bill of particulars. Moreover, § 19-110 may not serve as a predicate for liability or basis for a private action as it does not create a right or a cause of action for an injured person but, rather, only allocates liability between a contractor and the City for injuries due to work for which a permit is required (*see, e.g., Maldonado v 527 Lincoln Place LLC*, 173 AD3d 730, 731 [2d Dept 2019]; *Corwin v NYS Bike Share, LLC*, 2017 WL 1318010, *6 [SDNY 2017] [applying New York law] ["The fact that [the plaintiff] cannot cite to a single federal or state court decision that has interpreted the statute to provide an implied right of action against such contractors supports the Court's construction that [Administrative Code] § 19–110 does no more than provide that 'the City may seek contribution for damages to third parties occasioned by a negligent contractor or property owner conducting work pursuant to a municipal permit'"]) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

To the extent that Defendants may be liable for creating the condition or failing to inspect or remedy it, they have also made a *prima facie* showing by submitting evidence, including Dabney's affidavit and the attached documentation,[8] that they neither created the condition nor had actual or

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[7] It is undisputed that 120 Union was the owner of the property at the time of the accident, though Plaintiff challenges Defendants' characterization of 120 Union as an out-of-possession owner (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

[8] The Court finds that Dabney's affidavit is in admissible form and may be considered in support of Defendants' summary judgment motion because it was "duly sworn," signed, and notarized (*see*

constructive notice of it (*see Mandarano v PND, LLC*, 157 AD3d 664, 666-667 [2d Dept 2018]; *Gadzhiyeva v Smith*, 116 AD3d 1001, 1002 [2d Dept 2014]; *Arslan v Richmond North Bellmore Realty, LLC*, 79 AD3d 950, 951 [2d Dept 2010]). In his affidavit, Dabney states that DCC's role at the project was supervisory and that no DCC employees were engaged in construction at the project. He further states that DCC did not receive any complaints regarding the cinder block and that Dabney personally conducted weekly inspections of the walkway during the two-month period when there was no construction at the site prior to Plaintiff's accident, which revealed no concrete debris (*see Mandarano v PND, LLC*, 157 AD3d at 666) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Plaintiff failed to rebut Defendants' *prima facie* showing that they did not create or cause the condition and that they lacked actual or constructive notice (*see Spano v Apogee Retail NY, LLC*, 164 AD3d at 1496; *cf. Khalique v The New York Hotel Trades Council and Hotel Assn of New York City Health Center, Inc.*, 2017 WL 7519191, *1 [Sup Ct, Queens Cty 2017] [wherein the court denied defendants' summary judgment motion in a factually similar trip-and-fall case on a temporary pedestrian walkway because defendants failed to submit proof as to when the area where plaintiff fell was last inspected]). The affidavit of Alexis Ferrer fails to rebut Defendants' claimed lack of actual or constructive notice in that her observations regarding the condition of the cinder block do not establish that the cinder block was left on the walkway for any length of time (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Plaintiff's theory that the cinder block was left on the walkway by a departing contractor is speculative and insufficient to raise an issue of fact (*see Laskowski v 525 Park Ave. Condominium*, 93 AD3d 822, 824 [2d Dept 2012]; *Belvedere v AFC Const. Corp.*, 21 AD3d 390, 391 [2d Dept 2005]). Even if the Court considered the theory, in the absence of a specific, nondelegable duty or other exceptions not alleged here,"[t]he general rule is that [a party] who hires an independent contractor is not liable for the independent contractor's negligent acts"(*see Lusik v 27 Prospect Park W. Tenants Corp.*, 19 AD3d 557, 557 [2d Dept 2005])[9] (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

Plaintiff also failed establish that additional discovery was necessary to oppose the motion. The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered

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Siegel, N.Y. Prac. § 205 [6th Ed.] [an affidavit is a written statement subscribed and sworn to before a notary public]; *Furtow v Jenstro Enterprises, Inc.*, 75 AD3d 494, 494 [2d Dept 2010] ["Here, Ching submitted an affidavit which recited that he was 'duly sworn' and contained a jurat stating that the affidavit was 'sworn to before' a notary public, who signed and stamped the document. On the record presented here, the form of the affidavit was adequate"]) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

[9] The Court notes that Plaintiff does not allege in her bill of particulars or papers any violations of Administrative Code § 7-210 or related regulations regarding the maintenance of public sidewalks by property owners (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

during further discovery is not a sufficient ground to deny the motion (*see Bartlett v City of New York*, 169 AD3d 629 at 630; *Northfield Ins. Co. v Golob*, 164 AD3d 682, 683-684 [2d Dept 2018]). The cases cited by plaintiff in support are inapposite (*see, e.g., Juseinoski v New York Medical Center of Queens*, 29 AD3d at 770 [involving the performance of an unauthorized autopsy where the decision to proceed with the procedure, which had a direct bearing on liability, was uniquely within the possession of one party]). The Court is instead guided by *Westport Ins. Co. v Altertec Energy Conservation, LLC* (82 AD3d 1207, 1212 [2d Dept 2011]), in which the Appellate Division, reversing the decision of the lower court denying summary judgment, stated that the plaintiff "failed to submit any affidavits establishing that facts existed which were essential to justify opposition to the motion but were not in its possession in light of the fact that discovery had yet to be completed" (*see also Boorstein v 1261 48th Street Condominium*, 96 AD3d 703, 704 [2d Dept 2012]) (Defendants 1 [Exh. A-J]; Plaintiff 2 [Exh. A-B]; Defendants 3 [Exh. K]; Plaintiff 4 [Exh. A-B]; Defendants 5 [Exh. K-N]).

CONCLUSION

Defendants motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing Plaintiff's complaint is granted (motion sequence number 3).

This constitutes the Decision/Order and Judgment of the Court.

Dated: February 10, 2020
Brooklyn, New York

Ines Ferrer v 120 Union Avenue LLC and Danya Cebus Construction
Index No. 517943/2016

ENTER,

Dawn Jimenez-Salta, J.S.C.
Hon. Dawn Jimenez-Salta
Justice of the Supreme Court

KINGS COUNTY CLERK
FILED
2020 FEB 19 AM 8:00