SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART 5**

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MARSHALL SORGEN, JOAN SORGEN,
Plaintiffs,

- v -

MTA METRO NORTH RAILROAD, THE NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK, MIDTOWN TRACKAGE VENTURES LLC,
Defendants.

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INDEX NO. 150634/2013

MOTION DATE 8/11/20

MOTION SEQ. NO. 006, 007

DECISION + ORDER ON MOTION

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THE CITY OF NEW YORK,
Plaintiff,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY, METRO-NORTH COMMUTER RAILROAD COMPANY AKA MTA METRO-NORTH RAILROAD COMPANY,
Defendants.

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Third-Party
Index No. 595697/2018

The following e-filed documents, listed by NYSCEF document number, were read on these motions to dismiss/for summary judgment: 170-217, 219, 221, 223-241.

Plaintiffs Marshall and Joan Sorgen commenced this action to recover damages stemming from Marshall Sorgen's January 26, 2012 trip and fall in the roadway of East 48th Street between Park Avenue and Madison Avenue adjacent to 270 Park Avenue at or near an expansion joint, New York, New York (the "Defect Location"). Defendants MTA Metro-North Commuter Railroad ("Metro North") and Midtown Trackage Ventures LLC ("Midtown")[1] move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint (006). Defendant City of New York (the "City") also moves, pursuant to CPLR 3211(a)(7), to dismiss the Complaint for Plaintiff's alleged failure to comply with General Municipal Law (GML) § 50-e(2), and all cross-claims against the City (sequence 007). Both motions are opposed. For the reasons below, the Court denies both motions.

BACKGROUND AND PROCEDURAL HISTORY

Sorgen, a chauffeur, stopped his vehicle at 280 Park Avenue, across from 270, exited his vehicle to cross the street, and asked the driver of the vehicle parked in front of 270 to move forward or back to allow Sorgen to maneuver into a parking spot in front of 270, where he was picking up a client (*NYSCEF 176/Metro North Exh E* ["50-h"] 15-16). When the other driver began to move the car, Sorgen "walked around him … to the back and … stepped off into the

[1] Metro North and Midtown share counsel.

hole .. by 270 and … went flying across the street" (*50-h* 16:8-12). Sorgen further described the alleged defect as a hole "right next to the expansion joint" (*50-h* 19:20-20:3). In a photograph presented to him at the 50-h hearing, Sorgen identified the hole and expansion joint as they existed on the day of his fall, further explaining that his foot "went into that piece" near the intersection of the expansion joint and curb (*50-h* 21:14-23:13; *NYSCEF 177*). Plaintiff repeated this testimony at a subsequent deposition (*NYSCEF 178* ["EBT"]).

On April 19, 2012, Plaintiffs served Metro North and the City with notices of claim (*NYSCEF 172, 199*]). Plaintiffs subsequently served Defendants with an Amended Summons and Complaint alleging, in relevant part, negligence in maintenance of the expansion joints at the Defect Location (*NYSCEF 173*, *200* [the "Complaint"] ¶¶ 20, *et seq.*).

The Court (Stallman, J.) previously granted a previous motion for summary judgment by Metro North and Midtown Trackage (sequence 001), accepting the movants' representation that they did not own, control, maintain, or hold responsibility for the street or sidewalk at the Defect Location (*NYSCEF 224*; *see NYSCEF 43* ¶ 3["Midtown Trackage has no interest in, or control of or over any part of the property located at 270 Park Avenue … or the streets and expansion joints where the accident … allegedly occurred."]; *NYSCEF 45* ¶ 2 ["To the best of my knowledge, [Metro North] does not own, operate, maintain, repair or control the street and expansion joint in the street in front of 270 Park Avenue … ."]). Later, the Court (Sokoloff, J.) granted former Defendant NYCTA's motion for summary judgment (sequence 002), which was based on a licensed architect's affidavit averring that Metro North, not NYCTA, operated a train line under the Defect Location (*NYSCEF 225*).

On the same grounds, the Court (Sokoloff, J.) then granted Plaintiff's renewal motion (sequence 004) and reinstated the action against Metro North and Midtown Trackage, holding that "[t]hose defendants may move for [summary judgment] after completion of discovery" (*NYSCEF 226*). Upon reinstatement, Plaintiff sought information about the expansion joint (*NYSCEF 159*). Metro North and Midtown identified Beaver Concrete Breaking Company as expansion joint contractor, but stated that, "due to [the] passage of time," Metro North "is not in possession of any additional records concerning the contract" other than diagrams (*NYSCEF 160*). Plaintiff moved to strike and/or preclude, arguing that the records were unavailable due largely to Metro North and Midtown's earlier misrepresentations; the Court (Saunders, J.) denied the motion (*NYSCEF 218*).[2]

DISCUSSION

I. Midtown/Metro North motions for summary judgment

A. Midtown

Midtown moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint against it, arguing that it owns only the subterranean property beneath 270 Park Avenue, and therefore has no duty to Plaintiff with respect to injuries caused in the above-ground roadway.

[2] Plaintiff's appeal of that decision remains pending.

Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact (*id.*). To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant's initial burden is a heavy one; on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

In support of its argument, Midtown attaches documents evidencing a series of conveyances at or near the Defect Location: first, a 1976 conveyance by the Trustees of the Property of Penn Central Transportation Company and the New York and Harlem Railroad Company (collectively "Penn Central") to Union Carbide Corporation ("Union Carbide") (*NYSCEF 184; see also NYSCEF 187,* p 41 at ¶ [II][2][g]); and second, Union Carbide's 1981 transfer to Manufacturers Hanover Trust Company ("Hanover"), excluding subterranean property (*NYSCEF 185* pp 2-4). The subterranean property was conveyed to Penn Central's non-bankrupt subsidiaries/successors, American Premier Underwriters, Inc. ("American Premier") and Owasco River Railway, Inc. ("Owasco") pursuant to a bankruptcy reorganization plan, who in turn conveyed the subterranean property to Midtown in 2006 (*NYSCEF 186-189; NYSCEF 187,* p 41 at ¶ [II][2][g]). Midtown argues and Metro North agrees, through their shared counsel, that Metro North is responsible for the expansion joint, which "was installed to protect ... Metro North's" subterranean tracks (*NYSCEF 171* ¶ 11, 28). This, together with the documented conveyances, is sufficient to find that Midtown did not own the Defect Location, and thus had no responsibility to maintain it and no duty to Plaintiff (*see Burns v New York*, 156 AD2d 256, 258 [1st Dept 1989] [affirming dismissal based on similar transfers]).

However, as Plaintiff argues, Midtown has not *also* demonstrated, as a matter of law, that it did not cause or create the subject defect—whether the defect was the expansion plate, adjacent pothole, or both. To the extent that Midtown argues, in reply, that "[u]nder New York law, the Plaintiff and not the Defendants has the burden to come forward with proof that the expansion joint actually created or caused the condition; the street pothole," this Court disagrees. Upon summary judgment, it is *defendant's* burden to demonstrate that it did not cause or create the alleged defect (*Gjeloshaj v 2979 LLC*, 83 AD3d 583, 584 [1st Dept 2011] [reversing grant of summary judgment where defendant "failed to satisfy its initial burden to establish, as a matter of law, that it did not cause or create the alleged defect"]). That Plaintiff has not, at this juncture, conclusively demonstrated the manner in which the expansion joint may or may not have caused, created, or exacerbated the pothole which caused Plaintiff to fall does not merit dismissal (*see Cuevas v City of NY*, 32 AD3d 372, 373 [1st Dept 2006] [affirming denial of summary judgment, holding that, "[a]s it was not [plaintiff's] obligation to prove his claim to defeat the motion for summary judgment, he was entitled to a reasonable inference" that a gap

between the sidewalk and the depressed cable vault cover "caught his foot and caused him to fall," defendant witness "was unaware of whether the installation of the vault was satisfactory," and defendant "failed to produce a witness who would have had direct knowledge of such facts"]). Accordingly, Midtown's motion for summary judgment is denied.

B. Metro North

Metro North also seeks summary judgment, conceding ownership of the expansion joint but arguing that it did not cause or create the adjacent pothole which caused Plaintiff's fall. For similar reasons, Metro North's motion is also denied. As an initial matter, as the City argues in opposition, 34 RCNY § 2-07(b) provides that

> (1) The owners of covers or gratings on a street are responsible for monitoring the condition of the covers, gratings and concrete pads installed around such covers or gratings and the area *extending twelve inches outward from the edge of the cover, grating*, or concrete pad, if such pad is installed.
>
> (2) The owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found *within an area extending twelve inches outward from the perimeter of the cover or grating*. Such owner must obtain a permit to maintain a steel plate that is covering such cover or grating or such street condition (emphases added).

The metal strip/expansion joint cover at the Defect Location in this action falls within the ambit of 34 RCNY § 2-07(b) (*see Robinson v 277 Park Ave. LLC*, 2015 NY Slip Op 31408[U], *6 [Sup Ct, NY County 2015] [Edmead, J.]). To the extent that Metro North argues that "[t]he hole in question was approximately two to five feet from the expansion joint shown in [*NYSCEF 177*]," and therefore is not within the "twelve inches" zone governed by 34 RCNY § 2-07(b), that is plainly an issue of fact. At the 50-h hearing, Plaintiff circled a wide area at the Defect Location, part of which clearly falls twelve inches or less from the expansion joint.

To the extent that Metro North relies primarily upon the testimony of Metro North witness/Assistant Deputy Director of Building Maintenance at Grand Central Terminal Steve Triano, the testimony itself highlights an issue of fact. That is, Triano testified that he was "unaware of any [Metro North] department that would perform any work on roadways" and that Metro North "did not perform any work on street roadways," (*NYSCEF 229* ¶¶ 5-8), Triano could not, when asked, "definitively say that any conditions in the roadway were not caused by the expansion joints"; in his words, "definitively you couldn't tell" (*NYSCEF 182* 92:4-14). Accordingly, Metro North's motion for summary judgment is denied.

II. City motion to dismiss

The City moves, pursuant to CPLR 3211(a)(7), to dismiss, arguing that Plaintiff's notice of claim did not adequately identify the subject defect, and that the City was prejudiced by that omission. As an initial matter, Metro North and Midtown argue in opposition that the City's motion is untimely because summary judgment motions generally be filed within 120 days of the note of issue. While this is correct (*Brill v City of NY*, 2 NY3d 648 [2004]), the City moves under CPLR 3211(a)(7) which, as the City argues in reply, is permitted at any time (CPLR 3211[e]). Accordingly, the Court addresses the motion's substance.

"To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim" (*Brown v City of NY*, 95 NY2d 389, 392 [2000]). GML § 50-e(2) requires, as relevant here, that a notice of claim "be in writing, sworn to by or on behalf of the claimant" and that it set forth (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable (*id.* at 393). "Reasonably read, the statute does not require those things to be stated with literal nicety or exactness" (*id.*). "Nothing more may be required." The test of a notice of claim's "sufficiency is whether it includes information sufficient to enable the city to investigate the claim" (*O'Brien v Syracuse*, 54 NY2d 353, 358 [1981]).

As Plaintiff argues in opposition, the notice of claim here sufficiently identifies the defect location as "the roadway of East 48th Street between Park Avenue and Madison Avenue adjacent to 270 Park Avenue, New York, New York, more particularly the roadway adjacent to 270 Park Avenue, at or near the expansion joint thereat… " (*NYSCEF 199*). As the City itself acknowledges in its motion, the notice of claim identifies, at most, four expansion joints (*NYSCEF 198* ¶ 20). To the extent that the City argues that Plaintiff's 50-h and EBT testimony "further obscure[s]" the location of Plaintiff's fall, the Court disagrees; any confusion about which expansion joint Plaintiff referenced in the Notice of Claim would have been dispelled by the 50-h hearing, where Plaintiff circled a photo of the defect; indeed, the City attached the photo to its opposition to Metro North and Midtown's motion (*NYSCEF 193* ¶ 10). Accordingly, the notice of claim reasonably placed the City on notice of the subject defect such that it could investigate the claim (*see Brown*, 95 NY2d at 393 ["Although the circles centered on the curb and included only a small portion of the sidewalk, claimant's repeated references to a 'defective sidewalk' sufficiently put the City on notice that it was not only the curb but also the immediately adjacent sidewalk that caused his injuries, enabling timely investigation of his allegations"]; *see also Mullen v City of NY*, 2020 NY Slip Op 50903[U] [Sup Ct, NY County, Ramseur, J.] [holding that prior written notice was sufficient where it identified the type of defect and one of four possible street corners, albeit without a specific cardinal direction]).

The complaint here can be differentiated from notices which, for example, "merely stated that the accident occurred at First Avenue between 105th and 106th Streets in New York City" (*Mitchell v City of N.Y.*, 131 AD2d 313, 315 [1st Dept 1987]). Whereas such a notice was held deficient "in view of the lack of reference to any address on the street, which side of the street the accident occurred on, or even if the accident occurred in the street or on the sidewalk," the

universe of possible defects was massive, the notice having ambiguously described the accident occurring "while plaintiff was debarking from a bus" and the defect(s) as "dangerous, defective and trap-like conditions of the public street" (*Mitchell v City of N.Y.*, 131 AD2d 313, 315 [1st Dept 1987]; *see also Ortsman v Town of Oyster Bay*, 178 AD2d 588, 589 [2d Dept 1991] [Prior notice of claim for another action indicating defective condition on basketball court did not constitute prior written notice of plaintiff's injuries on same basketball court where prior defect "could have been anywhere on the basketball court."]; *Harper v City of N.Y.*, 129 AD2d 770, 771 [2d Dept 1987] [description of "Crown Street and New York Avenue" failed to describe the location of the alleged defect with sufficient particularity to enable the defendant to conduct a proper investigation and otherwise assess the merits of the plaintiff's claim, and plaintiff, over a multi-year period, provided three different descriptions of the defect]; *Krug v City of NY*, 147 AD2d 449, 449 [City deprived of opportunity to conduct proper investigation where Notice of Claim provided incorrect address]; *Setton v City of NY*, 174 AD2d 723, 723 [City conducted investigation at wrong site based on misidentification of accident location in original Notice of Claim]). Accordingly, the City's motion is denied.

CONCLUSION/ORDER

For the above reasons, it is

ORDERED that the motion of Metro North and Midtown (006) for summary judgment dismissing the Complaint is DENIED; and it is further

ORDERED that the City's motion to dismiss the Complaint (007) is DENIED; and it is further

ORDERED that Plaintiff shall, within 30 days, serve a copy of this order with notice of entry upon all parties.

8/14/20
DATE

Dakota D. Ramseur, J.S.C.

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