SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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MICHAEL SCHWEINSBURG,
Plaintiff,

- v -

113 WILLOW AVENUE REALTY COMPANY, LLC,
Defendant.

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113 WILLOW AVENUE REALTY COMPANY, LLC,
Plaintiff,

-against-

THE CITY OF NEW YORK,
Defendant.

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INDEX NO. 161151/2015

MOTION DATE 9/29/20

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

Third-Party
Index No. 595082/2017

The following e-filed documents, listed by NYSCEF document number, were considered on this summary judgment motion: (sequence 002): 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56, 57, 58, 59, 60, 61, 62, 63, 64

Plaintiff commenced this action to recover damages allegedly stemming from a February 9, 2015 fall on ice and/or snow on the sidewalk abutting 90 Avenue C, New York, New York, property owned by Defendant 113 Willow Avenue Realty Company, LLC ("Willow"). Willow then commenced a third-party action against Third-Party Defendant the City of New York (the "City). The City now moves, pursuant to CPLR 3212, for summary judgment, arguing that the City is not liable for Plaintiff's injuries because the incident occurred on the sidewalk abutting Willow's property, not the curb, and because the City did not cause or create the condition. Willow opposes, and Plaintiff has not taken any position. For the reasons below, after oral argument, the motion is granted.

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]).

N.Y.C. Administrative Code § 7-210(b) provides:

> Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, 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. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, 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.* This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes (emphasis added).

N.Y.C. Administrative Code § 7-210(c) provides, in relevant part:

> Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition.

In support of its motion, the City attaches the affidavit of David Atik, an employee of the New York City Department of Finance, which maintains the Property Tax System ("PTS") database (*NYSCEF 47* ["Atik Aff"] ¶¶ 1-3). Atik avers that his PTS database search for 90 Avenue C, located at Block 376 Lot 1 in New York County, revealed that on February 9, 2015, the City did not own the property, which was designated as vacant land, not a one-, two-, or three-family solely residential property (*Atik Aff* ¶¶ 4-6). Accordingly, N.Y.C. Admin. Code § 7-210 shifts liability for the subject property to Willow.

Willow argues, in opposition, that there is an issue of fact as to whether Plaintiff fell on the pedestrian ramp and/or curb abutting 90 Avenue C, relying on medical records referencing a "slip and fall off icy curb" and a photograph of the fall location marked by Plaintiff at his deposition (*NYSCEF 57* ["Willow Opp"], citing *NYSCEF 57-59*). As the City argues in reply, however, the medical records are inadmissible hearsay because the statements were not germane to diagnosis or treatment (*see e.g. Edelman v City of New York*, 81 AD2d 904, 904 [2d Dept 1981] [holding that it was error to admit statement reading that plaintiff "fell getting out of a cab" because the cause of an accident is not admissible unless germane to diagnosis or

treatment"]). Indeed, the orthopedist who treated Plaintiff in the hospital acknowledged that unlike the difference between a 20-foot fall from a ladder and fall from a curb, there is no germane difference, for the purposes of diagnosis, between a fall on a sidewalk or curb (*NYSCEF 59* ["Capagna EBT"] ¶ 22:25-23:24).

Willow also argues for several hearsay exceptions justifying admission of the statement—again, without citation to support. First, Willow argues that the records could constitute an inconsistent statement, without elaborating further or citing to any support. However, as the City argues in reply, "there must be evidence that connects the party to the entry" (*Grant v New York City Tr. Auth.*, 105 AD3d 445, 446 [1st Dept 2013] ["The hospital record indicating that she slipped on wet ground should not have been presented to the jury since there was no proper foundation for its admission, inasmuch as it was unclear whether plaintiff was the source of that information."]). Here, at the deposition of treating orthopedic resident Dr. Capagna, Capagna testified that his preference and practice would be to record a patient's exact words where possible, *i.e.* "patient states that…" (*Capagna EBT* ¶ 26:5-17). Dr. Capagna testified, however, that he "couldn't tell" from the relevant records "whether or not those were the exact words today" (*Capagna EBT* 35:11-23). Accordingly, in the absence of any other submissions, there is no support for justifying consideration of the records as an inconsistent statement.

As to Willow's other asserted hearsay exceptions, the assertion that the hospital statement could qualify as a statement against interest is unavailing because there is no evidence that "the declarant knew [the statement] was contrary to the declarant's pecuniary or proprietary interest, or tended to subject the declarant to criminal liability" or that "the declarant is unavailable as a witness" (NY State Unified Court System Guide to NY Evidence Article 8.11[1]). Similarly, Plaintiff's statement is not an excited utterance because it was made at least two hours after the fall, and not a state of mind declaration showing "intent, plan, motive, design, or mental condition and feeling" (NY State Unified Court System Guide to NY Evidence Article 8.41[1]). Finally, the statement cannot be a party admission against the City because Plaintiff is not a City witness (NY State Unified Court System Guide to NY Evidence Article 8.03[1]).

Willow's reliance on the photograph marked by Plaintiff (*NYSCEF 57*) for the proposition that Plaintiff's fall may have occurred on the curb, thereby imputing liability to the City, is similarly misplaced. To the extent that the precise location of the circle drawn on the photograph may be unclear, any ambiguity is clarified by Plaintiff's unequivocal deposition testimony (*NYSCEF 41* 32:5-15, 38:11-39:13):

> Q. … Did your incident or accident occur on a flat portion of the sidewalk, a portion of the sidewalk that sloped towards the street or something else?
> A. On the sidewalk, the flat 10 portion of the sidewalk.
> Q. Is there a curb also that runs along Avenue C, a curb that separates the 13 sidewalk from the street?
> A. Yes.
> Q. Were you on any portion of the curb when your accident occurred?

A. No.

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Q. The area that you have circled on the sidewalk in Defendant's Exhibit A, is that an area of the sidewalk that slopes down for say the handicapped area? Can you tell from that photograph?

[Pl Counsel]: Did you ask the 17 question earlier where he fell was that area flat or sloped and he said flat. I think that was asked and answered already.

Q. Referring back to your testimony I know you indicated that the area where your incident occurred was flat. The area to me that you circled in the photocopy of the photograph marked Defendant's Exhibit A appears to be at a portion where the sidewalk kind of slopes towards the street?

A. Was I in the pedestrian ramp, no.

Q. Were you at an area just before the pedestrian ramp?

A. Yes. That is what I was trying to indicate.

Q. You were circling an area just before the pedestrian ramp starts?

A. Yes.

Based on this testimony, and the lack of any evidence in opposition, the City has demonstrated that it does not bear liability for the location of Plaintiff's fall. Where the City has met its burden on summary judgment, the burden shifts to the plaintiff to demonstrate 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" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Here, Willow relies on the deposition testimony of Department of Sanitation supervisor Denny Brito (*NYSCEF 43*) to argue that the City removed snow at the subject location. While the City and Willow dispute whether crosswalk shoveling included pedestrian ramps, the distinction is, as the City argues in reply, a red herring because Plaintiff has testified unequivocally that he fell on the "area just before the pedestrian ramp," not the ramp itself where the City might have shoveled. Accordingly, Willow has failed to demonstrate that the City caused or created the subject condition, and the City is entitled to summary judgment. It is therefore

ORDERED that the City's motion for summary judgment (sequence 002) is GRANTED, and the Clerk of Court shall enter judgment dismissing the Third-Party Complaint; and it is further

ORDERED that the City having been dismissed from this action, the Clerk of Court shall transfer this action to a justice of a non-City part; and it is further

ORDERED that the City shall, within 30 days of this order, e-file and serve upon all parties a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

9/29/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

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