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

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

***Justice***

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KRISTINA BARRICELLI,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Defendant.

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**INDEX NO.** 155356/2016

**MOTION DATE** 10/6/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number, were considered on this summary judgment motion (seq 001): 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39.

Plaintiff Kristina Barricelli commenced this action against Defendants City of New York and New York City Department of Transportation ("DOT," collectively the "City") to recover damages allegedly stemming from an April 26, 2015 incident in which Plaintiff fell off of her skateboard due to a large crack or depression on the sidewalk in front of 199 Chambers Street or 80 North Moore Street (Borough of Manhattan Community College), New York, New York. The City moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint, arguing that: (1) based on the site of Plaintiff's fall, pursuant to N.Y.C. Admin. Code § 7-210, the City is not liable for Plaintiff's injuries: and (2) the City did not cause or create the subject condition. Plaintiff opposes. For the reasons below, after oral argument, the Court grants the motion.

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.

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.

Though Plaintiff, at her deposition, was unable to identify the exact location of her accident, she confirmed that it occurred on the south side of the sidewalk along North Moore Street (*NYSCEF 26/Pl EBT* 37:24-38:22; *NYSCEF 27*). To the extent that Plaintiff's testimony appeared to identify 80 North Moore Street (Block 142, Lot 25) and Plaintiff's pleadings identified 199 Chambers Street (Block 142, Lot 50), City Department of Finance employee David Atik conducted a property search for both in the Property Tax System ("PTS") database (*NYSCEF 30, 33*). Atik avers that the City did not own the property at 80 North Moore Street, an elevator apartment building, or 199 Chambers Street, a City university, and that neither is a one-, two-, or three-family solely residential property. In opposition, Plaintiff's citation to numerous cases regarding actual and constructive notice are unavailing, as notice becomes an issue only as to the owner of a property at issue, which—as discussed above—the City is not. Accordingly, analysis shifts to whether the City created the subject condition or caused it to occur through a special use.

As an initial matter, the Court notes that the City argues, and maintained at oral argument, that the burden shifts to the non-movant to demonstrate a triable issue of fact. The City analogizes the situation here to one where a municipality has demonstrated a lack of prior written notice, thereby shifting the burden to a non-movant to demonstrate an exception to the prior written notice law, such as a municipality's creation of a condition (*City Affirm* ¶¶ 23, *et seq.*).

However, a municipality's creation of a defective condition is an explicit exception to N.Y.C. Admin. Code § 7-201(c)'s prior written notice requirement. Here, no such rule exists, and therefore no exception and burden-shifting exist; rather, it is the City's affirmative obligation to demonstrate that it did not cause or create the subject condition. Phrased another way, it is not, in this context, a plaintiff's initial obligation to prove that the City *did* create the condition, but the City's obligation to prove that it did *not* (*see Gomez v NYC*, 175 AD3d 1502, 1503 [2d Dept 2019] ["Administrative Code § 7-210 does not shift tort liability for injuries proximately caused by the City's affirmative acts of negligence…the City met its prima facie burden for summary judgment…by establishing that the premises did not fall within the exception for one-, two-, or three-family owner occupied residential properties, *and that it did not affirmatively cause or create the alleged defect in the sidewalk.*"] [emphasis added]; *Gjeloshaj v 2979 LLC*, 83 AD3d 583, 584 [1st Dept 2011] [reversing and denying 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]; *Serano v NY City Hous. Auth.*, 66 AD3d 867, 868 [2d Dept 2009] [NYCHA failed to establish its prima facie entitlement to judgment as a matter of law *by demonstrating that it neither created the allegedly defective condition nor caused it to occur through a special use of the sidewalk*] [emphasis added]).

That said, a movant "need not specifically disprove every remotely possible state of facts on which its opponent might win the case" (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]), "particularly when the opponent's theorizing is farfetched" (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160 [2016]). Here, based on Plaintiff's pleadings, testimony, and photographs, DOT Employee Naqi Syed conducted a two-year search for permits, applications for permits, corrective action requests, notices of violation, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, and Big Apple Maps for the subject segment of the sidewalk (*NYSCEF 29/Syed Aff* ¶¶ 3-4). The DOT search revealed 30 permits, 20 applications, 2 Office of Construction, Mitigation and Coordination ("OCMC") files, 2 corrective action requests ("CARs"), 5 notices of violation ("NOVs"), 29 inspections, 10 complaints, 1 sidewalk inspection, and 2 Big Apple Maps labeled as Volume IS, Page 37 and Volume IN, Page 39 (*NYSCEF 21, 28*), which, reveal unrelated work in the area and several passed inspections.[1]

In opposition, Plaintiff argues that the subject area is "directly next to a tree well," and that the City "ignores…the possibility that the planting work that was performed created the condition and/or exacerbated the condition that was present on the sidewalk prior to Plaintiff's accident" (*NYSCEF 37/Pl Opp* ¶¶ 8-9). As the City argues in reply, however, the work which Plaintiff references, permit M01-2013261-088 issued to Olson's Creative Landscaping, does not prove that any work was actually performed, or that notice was given (*see Bermudez v City of NY*, 21 AD3d 258, 258 [1st Dept 2005]; *Bolanos v City of New York*, 29 AD3d 455, 456, 816 NYS2d 30 [1st Dept 2006] [the issuance of a work permit does not establish that the City had notice of a defect]; *DeSilva v City of NY*, 15 AD3d 252, 253 [1st Dept 2005] ["The work permits issued by the City to Con Edison and Empire give no indication that the City was aware of the

[1] Notably, there are anonymous 311 reports on September 2, 3, and 11, November 30, and December 23, 2014, and other dates that the "[w]hole block is cracked in many places," though this has no bearing on whether the City caused or created the subject condition (*NYSCEF 21* p 257). According to the reports, the property owner was notified (*id.* at 266).

defective condition that allegedly caused plaintiff's fall so as to constitute a 'written acknowledgment' within the meaning of the Pothole Law."]).[2]

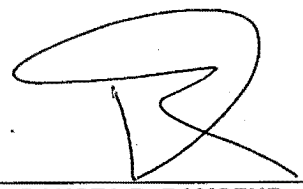
Moreover, as the City also argues in reply, the City is not liable to third parties for an independent contractor's acts or omissions (*Am. Guar. & Liab. Ins. Co. v Federico's Salon, Inc.*, 66 AD3d 521, 522 [1st Dept 2009]). Finally, even if the City planted the subject tree, or were responsible for its planting, "the planting of a tree does not, of itself, constitute an act of affirmative negligence" (see *Gitterman v City of New York*, 300 AD2d 157 [1st Dept 2002]; *accord Zawacki v Town of North Hempstead*, 184 AD2d 697 [2nd Dept 1992]). Accordingly, it is

**ORDERED** that Defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that Defendants shall, within 30 days, e-file and serve upon all parties a copy of this decision with notice of entry.

This constitutes the decision and order of the Court.



10/6/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

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

[2] Plaintiff could not, in response to several Court inquiries at oral argument, provide any support for the contention that the existence of permits demonstrated that work was actually performed, and therefore that the City caused or created the subject defect. Plaintiff also conceded that the issue of notice was not relevant.