SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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ALICIA DAVIS,

Plaintiff,

-against-

90-75 SUTPHIN REALTY, LLC,

Defendants.
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Index No. 707755/19

Motion
Date: October 18, 2021

M# 6 & 7

The following papers numbered EF 97-203 read on this motion by the defendant 90-75 Sutphin Realty, LLC for summary judgment dismissing the complaint insofar as asserted against it; and cross motion by defendant W & L Group Construction for summary judgment on the claims for contractual and common law indemnification (Seq. No. 6); and separate motion by defendant W & L Group Construction, Inc. for summary judgment dismissing the complaint insofar as asserted against it (Seq. No. 7).

	PAPERS NUMBERED
2 Notices of Motion - Affidavits - Exhibits....	EF 97-147
Notice of Cross Motion - Affidavits - Exhibits.	EF 148-163
Affirmations in Opposition - Exhibits.....	EF 164-198
Replying Affirmations.....	EF 199-203

Upon the foregoing papers it is ordered that these motions by the defendant 90-75 Sutphin Realty, LLC ("90-75") and defendant W & L Group Construction, Inc. ("W & L") for summary judgment (Seq. No. 6) and cross motion by defendant W & L Group Construction, Inc. ("W & L") for summary judgment (Seq. No. 6 and 7) are jointly decided as follows:

At the outset, the court notes that pursuant to stipulation dated June 14, 2021, which was so-ordered by this court, motions for summary judgment were to be made returnable no later than September 20, 2021. The motion for summary judgment by defendant W & L was originally made returnable on October 18, 2021 and, thus, was untimely. (*see Kennedy v Bae*, 51 AD3d 980, 981 [2d

Dept 2008].) However, the motion can be considered since it is based upon nearly identical grounds as the motion by defendant 90-75, which was timely. (*see Bicounty Brokerage Corp. v Burlington Ins. Co.*, 101 AD3d 778, 780 [2d Dept 2012]; *Teitelbaum v Crown Heights Assn. for Betterment*, 84 AD3d 935, 937 [2d Dept 2011]; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007].)

Plaintiff allegedly sustained serious injuries as the result of a trip and fall accident on the sidewalk abutting premises located at 90-75 Sutphin Boulevard in Queens County on February 16, 2019. The premises was undergoing construction at the time of the accident. It was being renovated from a six or seven story building to a 19-story structure. Plaintiff alleges that she fell on a portion of the sidewalk that was raised approximately 1½ to 2 inches. There was a scaffold covering the area where the plaintiff fell, which was installed by the subcontractor. Defendant 90-75 was the owner of the premises, and defendant W & L was the contractor who performed interior renovation work at the premises pursuant to subcontract signed on July 30, 2017. Plaintiff alleges that the defendant and its contractor damaged the sidewalk while renovating the premises. Plaintiff commenced the instant action to recover damages for negligence. Defendants now move, separately, for summary judgment dismissing the complaint. W & L asserts that it did not cause any defect in the sidewalk that led to the plaintiff's fall nor was it obligated to perform any work on the sidewalk.

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 demonstrate the absence of any material issues of fact. (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (*Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005].)

Administrative Code of the City of New York § 7-210 imposes liability on the owners of real property to maintain an abutting sidewalk in a reasonably safe condition. (*Zamora v David Caccavo, LLC*, 190 AD3d 895, 896 [2d Dept 2021]; *Vasquez v Giandon Realty, LLC*, 189 AD3d 1120, 1120 [2d Dept 2020].) An owner out of possession cannot shift the duty, nor exposure and liability

for injuries caused by negligent maintenance of the property, imposed under Administrative Code § 7-210. (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 174 [2019].) However, § 7-210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable. (*Vasquez v Giandon Realty, LLC*, 189 AD3d at 1120; *Muhammad v St. Rose of Limas R.C. Church*, 163 AD3d 693, 693 [2d Dept 2018].)

Further, a defendant who moves for summary judgment in a trip and fall case has the initial burden of making a prima facie showing that 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. (*Maloney v Farris*, 117 AD3d 916, 916 [2d Dept 2014]; *Jackson v Jamaica First Parking, LLC*, 91 AD3d 602, 602-603 [2d Dept 2012]; *Nagin v K.E.M. Enters., Inc.*, 111 AD3d 901, 903 [2d Dept 2013]; *Arzola v Boston Props. Ltd. Partnership*, 63 AD3d 655, 656 [2d Dept 2009].) In order to sustain the burden on the issue of the lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the accident. (*Francis v Super Clean Laundromat, Inc.*, 117 AD3d 898, 898-899 [2d Dept 2014]; *Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456 [2d Dept 2013]; *Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949, 949-950 [2d Dept 2009].)

Defendants argue that the alleged sidewalk defect, which plaintiff claims was raised 1½ to 2 inches, is too trivial to be actionable. Whether a particular condition is dangerous or defective depends on the particular facts of each case and is generally a question of fact for the jury. (*See Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]; *Sahni v Kitridge Realty Co., Inc.*, 114 AD3d 837 [2d Dept 2014]; *Cardona-Torres v City of New York*, 109 AD3d 862 [2d Dept 2013].) Although a defect alleged to have caused an injury to a pedestrian may be trivial as a matter of law, and thus not actionable, a holding of triviality must be based not on the size or dimensions of the defect exclusively, but upon an examination of all the specific facts and circumstances presented, including the width, depth, elevation, irregularity and appearance of the defect as well as the time, place and circumstances of the injury. (*See Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]; *Trincere*, 90 NY2d at 978; *Shmidt v JPMorgan Chase & Co.*, 112 AD3d 811 [2d Dept 2013]; *Cardona-Torres*, 109 AD3d at 863; *Guidone v Town of Hempstead*, 94 AD3d 1054 [2d Dept 2012].) Even a physically insignificant defect is actionable "if its intrinsic characteristics or the surrounding circumstances magnify the

dangers it poses." (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 78.) Factors recognized as capable of rendering a small defect actionable include a rough, irregular surface; the presence of other defects in the vicinity; or a location such as a parking lot or heavily traveled walkway where pedestrians would naturally be distracted from looking down. (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 78.)

At bar, the evidence submitted, including the photographs of the alleged defect, do not establish that the sidewalk defect is too trivial to be actionable as a matter of law.

The court finds that there are factual issues as to whether defendant W & L has constructive notice of a defect in the sidewalk. At his deposition, the representative of W & L, Qinyuan Li, testified that he was a site super and along with a site safety manager, would check the condition of the sidewalk daily. He testified that if there was an unsafe condition on the sidewalk, it would be noted in the Daily Log. In addition, Mr. Li testified that he would inspect the sidewalk to see if there were any raised portions, defects or hazards on the sidewalk. However, upon questioning, he stated that W & L would not perform repairs or restoration if a defect was observed. He also stated that he would not bring the defect to anyone's attention. He also stated that W & L built a wooden fence on the sidewalk, which required anchor bolts to be filled into the asphalt. Based upon this testimony, the court finds that W & L should have known about a hazardous condition on the sidewalk.

Defendant W & L further contends that as a contractor not in privity with the plaintiff, it cannot be held liable. Under the general rule, a breach of a contractual obligation by a contractor does not give rise to tort liability to others not in privity with the contractor. However, the Court of Appeals, in *Espinal v Melville Snow Contrs.*, (98 NY2d 136 [2002]), carved out three exceptions under which a contractor may be liable in tort to third parties. Under the *Espinal* rule, a contractor can be held liable where (i) in failing to exercise reasonable care in the performance of its duties, the contractor launches a force or instrument of harm; (ii) the plaintiff detrimentally relies on the continuing performance of the contractor's duties; and (iii) the contracting party has entirely displaced the other contracting party's duty to maintain the premises safely. (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *Arana v Kish*, 144 AD3d 616, 617 [2d Dept 2016]; *Santos v Deanco Servs. Inc.*, 142 AD3d 137, 140 [2d Dept 2016].)

Here, the court finds that there are issues as to whether W & L launched a force or instrument of harm. As noted above, Mr. Li testified that W & L did not repair any defects in the sidewalk even if it was aware of such defects. As such, the court finds that W & L, thus, possibly allowed a dangerous condition to remain and therefore, launched an instrument of harm.

With respect to defendant 90-75, however, the court finds that 90-75 did not create any defect or have notice of the defect on the sidewalk. Thomas Wang, the representative of 90-75, testified at his deposition that he never received any complaints or reports of a defect in the sidewalk. Thus, 90-75 is entitled to summary judgment. Plaintiff has not submitted any evidence raising a triable issue of fact as to any negligence by 90-75.

Inasmuch as summary judgment is being awarded to defendant 90-75, the branch of the motions for common law and contractual indemnification are denied as moot.

Accordingly, this motion by the defendant 90-75 Sutphin Realty, LLC for summary judgment is granted, and the complaint and all cross claims as against defendant 90-75 Sutphin Realty, LLC are dismissed, and the action is severed and continued as against the remaining defendant. (Seq. No. 6).

The branch of the motion and cross motion by defendant W & L Group Construction, Inc. for summary judgment on the claims for contractual and common law indemnification are denied as moot. (Seq. No. 6).

The motion by the defendant W & L Group Construction, Inc. for summary judgment is denied.

Dated: December 23, 2021

CARMEN R. VELASQUEZ, J.S.C.