Weprin-Menzi v City of New York
2022 NY Slip Op 30117(U)
January 18, 2022
Supreme Court, New York County
Docket Number: Index No. 150263/2017
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR, Justice — PART 05

INDEX NO. 150263/2017

MOTION DATE 05/27/2020, 12/22/2020

MOTION SEQ. NO. 003 004

JANE WEPRIN-MENZI,

Plaintiff,

- v -

THE CITY OF NEW YORK, TEMPLE EMANUEL,

Defendants.

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 108, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 163, 164, 165, 166, 170, 172, 173, 175, 179, 180, 181

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 161, 162, 168, 169, 171, 174, 176, 177, 178

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Plaintiff, Jane Weprin-Menzi (plaintiff), commenced this action seeking damages for personal injuries stemming from a March 7, 2016 trip and fall on the leg of a metal barricade[1] on the sidewalk abutting the premises located at 5th Avenue between 65th and 66th Streets in front of the building located at 1 East 65th Street, New York, New York (the premises). In motion sequence 003, co-defendant Temple Emanuel (Temple), now moves pursuant to CPLR 3212 for summary dismissal of the complaint, and plaintiff cross-moves pursuant to CPLR 3212 for summary judgment on the complaint. In motion sequence 004, co-defendant, the City of New York (the City), now moves pursuant to CPLR 3211(a)(7) and 3212 for dismissal of the complaint, and plaintiff cross-moves to strike the City's affirmation in support of its motion for summary dismissal of the complaint, and for leave to amend the notice of claim and complaint to add a claim that the City owed plaintiff a special duty. The motions and cross motions are opposed. For the following reasons, Temple's motion is granted, the City's motion is granted, and plaintiff's cross-motions are denied.

BACKGROUND

On March 7, 2016, plaintiff and her daughter were walking southbound on 5th Avenue and 65th Street toward the premises to attend a lecture by author David Brooks. The premises, a

[1] The Court uses the terms "barricade" and "barrier" interchangeably herein.

synagogue, was owned by Temple. While walking along the sidewalk, plaintiff tripped on the triangular base of a metal barricade placed on the sidewalk. During her deposition, plaintiff testified that her daughter was on her left side and a column of three barricades on her right. Plaintiff further testified that she was talking with her daughter and looking in her daughter's direction when she walked into the barricade. In describing her collision with the barricade, plaintiff testified at her General Municipal Law § 50–h hearing that her feet and legs became "involved" with the barricade (NYSCEF doc. no. 92 at 15:21-16:14). Plaintiff testified at her deposition that "I remember two impacts, but I can't tell you anything about the impacts. I don't know what part of my body I felt this in. I somehow was vaguely aware of two impacts, one of which was probably landing on the ground" (NYSCEF doc. no. 94 at 39:6-12). Plaintiff further testified that she believed that she walked into the triangular base of the barricade.

According to the director of facilities at Temple, Anton Shkreli (Shkreli), Temple was not aware that barricades were placed along 5th Avenue, and that he became aware of their presence after he heard about plaintiff's accident. According to Shkreli, the type of barricade plaintiff tripped on was the same type that the New York City Police Department (NYPD) usually places along 5th Avenue during parades. Shkreli stated that a NYPD metal barricade depicted in a photograph provided during his deposition, though not the barricade that caused plaintiff's accident, was the same type of barricade he observed outside the premises on the date of plaintiff's accident. Shkreli further testified that Temple does not own or use any metal barricades, and he did not know where the barricades placed in front of the premises came from or how they became placed on the sidewalk. Usually, Shkreli testified, Temple informs the NYPD of high holy days and provides a calendar of events, but Temple does not request that the NYPD place barricades on the sidewalk abutting the premises. Shkreli further stated that the NYPD exercises its own discretion when deciding whether to provide assistance to Temple.

Mark Heutlinger (Heutlinger), who was employed as the administrator of Temple, states that his office "provides a copy of the programming catalogue to the Community Affairs Department of the 19th Precinct by mail and/or by hand delivery" (NYSCEF doc. no 149 at ¶ 9). Heutlinger further states that he normally communicates with the NYPD concerning the high holidays or an event that could require heightened security. Heutlinger states that the David Brooks event did not fall under either category. Heutlinger indicates that the NYPD appears at Temple for events or services at random intervals without notifying Temple. Heutlinger states that the NYPD does not communicate their decision to patrol near the premises to Temple. According to Heutlinger, the NYPD places barricades on the sidewalk abutting the premises for parades and other events taking place on 5th Avenue. Heutlinger states that the NYPD exercises its discretion to place the barricades, and that Temple does not have a say in their placement. Once the NYPD places the barricades, Temple is not responsible for moving the barricades. Heutlinger further states that there are no records concerning whether Temple notified the NYPD of the specific event on the date of plaintiff's accident.

In the course of discovery, the City produced a number of affidavits concerning the search of records for records and documents related to the placement of barricades at or near the premises. The City submits an affidavit from Police Officer John Iannazzo (PO Iannazzo), an officer employed by the NYPD in the barrier section. PO Iannazzo states that he performed a search for NYPD barrier records for the location of 5th Avenue between East 65th Street and

East 66th Street, including for the address of the premises, for the period of March 6, 2018 through March 8, 2018. PO Iannazzo states that the search turned up no barrier records concerning the date of plaintiff's accident.

Police Officer Christoph Helms (PO Helms), an officer assigned to the 19th Precinct Community Affairs Unit, states that he performed a record search for community affairs records. PO Helms stated that he performed a search for NYPD barrier records for the location of 5th Avenue between East 65th Street and East 66th Street, including for the address of the premises, for the period of March 6, 2018 through March 8, 2018. According to PO Helms, the community affairs records indicate whether the NYPD "provided personnel and/or equipment, such as barriers and/or barricades, for a particular event" (NYSCEF doc. no. 138 at ¶ 5). PO Helms indicates that there were no community affairs records for the date in question.

Police Officer Thomas Serino (PO Serino), an officer assigned to the barrier unit, testified that he is assigned to perform searches for records concerning the placement of barriers and to testify about those records when the City is sued. PO Serino testified that he conducted a search for barrier records for 1 East 65th Street from February 1, 2016 to March 7, 2016. PO Serino further testified that the search yielded negative results. The City also submitted an affidavit by PO Serino, wherein he stated that he conducted an additional search for records concerning barricade placement for the locations of 5th Avenue between East 64th Street and 67th Street and Madison Avenue between East 64th Street and 67th Street, for the period of March 1, 2016 to March 7, 2016. PO Serino attests that his supplemental search revealed no records of NYPD barrier placement or removal for those locations in that time frame.

Detective Madeline Melendez (Detective Melendez), a detective employed by the NYPD assigned to the Manhattan North Detective Borough, testified that she conducted a search for all barrier-related documents for 1 East 65th Street from January 1, 2016 to December 31, 2016. Detective Melendez testified that she did not find any responsive documents. Lieutenant David Gomez (Lieutenant Gomez), a Lieutenant in the Patrol Borough Manhattan North, indicated that he performed a search of records regarding barriers for the location of the incident 1 East 65th Street, 5th Avenue between East 64th Street and East 67th Street, and Madison Avenue between East 64th Street and East 67th Street, for the period of February 28, 2016 through March 7, 2016. Lieutenant Gomez attests that his search did not return any results.

Sergeant Abraham Caraballo (Sergeant Caraballo), an NYPD counter-terrorism critical response police officer, testified that he was assigned to the premises on the date of the accident. Sergeant Caraballo testified that he did not recall any details concerning plaintiff's accident, including whether any barriers were placed at the premises on the date of plaintiff's accident.

Plaintiff commenced this action alleging, as relevant herein, that Temple and the City negligently placed the subject barricades on the subject sidewalk, by failing to warn plaintiff of the alleged defect, by failing to have adequate lighting, and by failing to have efficient and sufficient personnel at the premises.

In support of its motion, Temple first argues that it is not liable for plaintiff's accident because it did not own any barricades or control their placement along the sidewalk. Temple also

argues that the placement of the barricades on the sidewalk was not a dangerous condition. And third, Temple argues that it did not have notice of the alleged defective condition. In opposition and in support of her cross-motion, plaintiff argues that whether Temple owned the barricades is irrelevant to the question of liability, since the barricades were present on the sidewalk abutting the premises. Plaintiff also argues, as an additional basis for liability, that Temple made special use of the subject sidewalk by permitting a line to form on the sidewalk, thereby using the sidewalk for a private benefit. Plaintiff further argues that the City created the subject dangerous condition by placing the barricades on the sidewalk.

The City argues, first, that the City did not place any barricades, including the subject barricade, on the sidewalk abutting the premises. The City further argues that even if the City did place the barriers, the placement was an essential government function, and plaintiff failed to plead a special duty in the notice of claim or complaint. The City also argues that even if plaintiff plead and established a special duty, the placement of the subject barricades involves a discretionary government function. In support of the branch of her cross-motion to strike the City's affirmation in support, plaintiff argues that City's thirty-eight-page submission exceeds the twenty-five-page limit imposed by the Court Rules and counsel for the City did not seek Court approval for the filing. In support of the branch of plaintiff's cross-motion for leave to amend the notice of claim and complaint, plaintiff argues that the late amendment to add a special duty will not prejudice the City.

DISCUSSION

Timeliness of plaintiff's cross-motion

Temple first contends that plaintiff's cross-motion for summary judgment is untimely. Pursuant to Executive Order 202.8, issued on March 20, 2020, "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to…the civil practice law and rules… , is hereby tolled from the date of this executive order until April 19, 2020." The tolling provision was thereafter extended to November 4, 2020 by Executive Order 202.72.

Here, the note of issue was filed on March 11, 2020. According to the preliminary conference order, motions for summary judgement were to be filed within sixty days from the note of issue. Temple filed its motion on May 27, 2020, and plaintiff cross-moved for summary judgment on the complaint on September 4, 2020. Following Temple's line of reasoning, Temple's motion for summary judgment would also be untimely since their motion was filed seventeen days beyond the May 11, 2020 deadline. However, in light of the Executive Orders cited above, the time to file dispositive motions was tolled to November 2020. Accordingly, both Temple's motion and plaintiff's cross-motion are timely.

CPLR 3212

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]). 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]).

The Court of Appeals has held that Administrative Code of the City of New York "[s]ection 7–210 unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure" (*Xiang Fu He v Troon Mgmt., Inc.*, 34 NY3d 167, 171 [2019], quoting *Sangaray v W. River Assocs., LLC*, 26 NY3d 793, 797 [2016] [internal quotation marks and citations omitted]). "[S]ection 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" (*Khaimova v City of New York*, 95 AD3d 1280, 1281-1282 [2d Dept 2012]). Thus, "pursuant to § 7–210, liability for an accident on a sidewalk abutting real property will arise when it is established that the owner of said property created the condition alleged or had prior notice" (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010]).

Here, Temple makes its prima facie showing that it did not create the alleged defective condition by submitting Shkreli's testimony indicating that Temple did not own any barricades on the day of plaintiff's accident, and importantly, that Temple did not place any barricades on the sidewalk abutting the premises at any time, including the date of plaintiff's accident. Temple also demonstrates that it did not have actual or constructive notice of the condition. First, there is no evidence on the record to demonstrate how long the barricades were placed in a dangerous condition, or at the very least, how long the barriers were placed on the sidewalk (*see Early*, 73 AD3d at 561–562 ["The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law"]; *Rosa v Food Dynasty*, 307 AD2d 1031, 1032 [1st Dept 2003] ["In the absence of proof as to the length of time the basket was on the sidewalk, the plaintiff failed to raise a triable issue of fact as to whether the defendant had constructive notice of the condition on which the plaintiff fell"]; *see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] ["To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it"]). Further, Shkreli indicated that there were no prior complaints concerning the barricades, that he was unaware of the barricades placed on the sidewalk until after plaintiff's accident, and that Temple lacked control over the barricades.

In opposition, plaintiff and the City fail to raise an issue of fact. Neither plaintiff nor the City present proof demonstrating that Temple affirmatively created the alleged condition by placing the barriers on the sidewalk, by otherwise arranging the barriers, or that Temple had notice of the alleged defective condition.

While Temple has demonstrated its entitlement to dismissal, the Court addresses Temple remaining arguments. In further support of dismissal, Temple argues that the alleged defective

condition was not a dangerous condition. Generally, "whether a dangerous or defective condition exists on the property of another so as to create liability " 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury" (*Trincere v Cty. of Suffolk*, 90 NY2d 976, 977 [1997] [quoting *Guerrieri v Summa*, 193 AD2d 647 [1993]). However, "summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous" (*Przybyszewski v Wonder Works Const., Inc.*, 303 AD2d 482, 483 [2d Dept 2003]). Here, Temple fails to demonstrate that the alleged condition was not dangerous. As discussed above, plaintiff testified that she tripped and fell on the leg of a barricade situated in the walkway where plaintiff was walking.

Temple cites to *Feliciano v State* (13 Misc 3d 1208[A] [Ct Cl 2006]) in support of its contention that the placement of the barricade was not a dangerous condition. The court in *Feliciano* determined, in sum and substance, that "[h]ad [the plaintiff] been employing the reasonable use of her senses, she would have seen where the barricade was located, or any rug, or any barricade foot, *vis à vis* her intended path" (*id.* at 5 [emphasis in original]). *Feliciano* is distinguishable from the instant case because unlike the plaintiff in *Feliciano*, who was unable to identify the cause of her fall, plaintiff here testified that she fell as a result of her collision with the subject barricade.

Temple's argument that plaintiff failed to identify the cause of her fall is also unavailing. Plaintiff clearly identified the cause of her fall during her deposition, wherein she testified that as she was walking, she crashed into the end of the barricade and that "the triangle base is what I walked into and became entangled with" (NYSCEF doc. no. 94 at 41:2-6). Plaintiff's testimony "[e]stablishes a sufficient nexus between the hazardous condition and the circumstances of the fall, so as to establish causation" (*Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp.*, 110 AD3d 637, 638 [1st Dept 2013]).

Plaintiff's argument that Temple's liability is premised on their special use of the sidewalk also fails. The special use doctrine "imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others" (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 298 [1st Dept 1988]). "Inherent in the doctrine of special use is the principle that the duty to repair and maintain the special structure or instrumentality is imposed upon the adjoining landowner or occupier because the appurtenance was installed at their behest or for their benefit" (*Kaufman v Silver*, 90 NY2d 204 [1997]). Further, a special use is typically characterized by " 'the installation of some object in the sidewalk or street or some variance in the construction thereof' " (*Weiskopf v City of New York*, 5 AD3d 202, 203 [1st Dept 2004], quoting *Granville v City of New York*, 211 AD2d 195 [1995]). As discussed above, the unrebutted evidence submitted by Temple demonstrates that Temple did not own, place, or otherwise control the subject barricades. In any event, plaintiff fails to cite to any caselaw supporting her contention that waiting in line to enter the premises while on a public throughway such as a sidewalk constitutes a special use of the abutting sidewalk by the landowner (*see e.g., Tortora v Pearl Foods, Inc.*, 200 AD2d 471, 472 [1st Dept 1994] ["The fact that patrons of the defendant's establishment formed a line on the sidewalk while awaiting entrance did not establish such special use"]; *Balsam*, 139 AD2d at 299).

While an issue of fact exists precluding plaintiff's cross-motion, the Court notes that the affidavit of plaintiff's daughter, Julia Weprin, submitted in opposition to Temple's motion is admissible for the purpose of Temple's motion and plaintiff's cross-motion in response. Plaintiff does not dispute that she failed to disclose the identity of plaintiff's daughter in response to Temple's demands seeking the identity of witnesses to the condition which caused plaintiff's injury. However, plaintiff's testimony that she was walking alongside her daughter at the time of plaintiff's fall sufficiently identifies plaintiff's daughter as a witness (*see Dume v CK-HP 1985 Marcus Ave., LLC*, 136 AD3d 860, 861 [2d Dept 2016] ["Although those defendants failed to name Smith as a witness in their response to the plaintiff's discovery demands, it is evident that the plaintiff had knowledge of Smith's existence"]; *Palomo v 175th St. Realty Corp.*, 101 AD3d 579, 580 [1st Dept 2012] ["Defendants' claim that the affidavits of three notice witnesses should be disregarded because they were not timely disclosed is unpersuasive since one witness was a former employee of defendants, and the other two were identified by plaintiff or his mother in their deposition testimony"]; *Yax v Dev. Team, Inc.*, 67 AD3d 1003, 1004 [2d Dept 2009] ["Although the defendant failed to name (the witness) in response to the plaintiff's discovery demands, it is evident that the plaintiff had knowledge of (the witness') existence, since both the plaintiff and the defendant's project superintendent mentioned (the witness) in their deposition testimony"]).

As for the City's motion, the Court exercises its discretion to consider the City's thirty-seven-page affirmation in support of its motion. After reviewing the substantive arguments made by the City, the Court finds that the City makes its prima facie showing that it did not own or control the subject barricade that caused plaintiff's injury by submitting the affidavits and deposition transcripts demonstrating that the City did not place the barricades at the premises at the relevant time.

In opposition, Temple and plaintiff fail to raise an issue of fact. The proof presented by Temple's employees' indicating that the barricade that caused plaintiff's accident was similar to the barricades usually placed by NYPD in the area and that the NYPD does not provide Temple with notice when the NYPD provides a presence at the premises, does not, on its own, suggest that the NYPD placed barricades on the sidewalk abutting the premises on the date of the accident. Further, the proof submitted by Temple, including the affidavits of its employees, fail to indicate whether the NYPD ever placed barricades on the subject sidewalk for prior events held by Temple.

Temple further argues that the searches performed are unreliable and do not establish that the City did not place barricades at the subject location around the time of plaintiff's accident. Specifically, Temple argues that PO Caraballo's community affairs record search indicates that no records were found, while other discovery demonstrates that police officers were in fact assigned to the premises on the date of the accident. Initially, Temple does not demonstrate that the community affairs record is inconsistent simply because the community affairs records do not include the assignment of the officer. Indeed, plaintiff does not address whether an officer could be assigned to an event at the premises without a record being made within the community affairs log. In any event, even if the court were to find that the community affairs records are

inconsistent, there is no indication that the balance of searches performed by the NYPD revealing no records concerning barricade placement at the subject location are unreliable.

Temple's additional argument that Sergeant Caraballo's testimony compared to the City's records give rise to an issue of fact as to whether the NYPD placed the barricades. Temple appears to take issue of the fact that while Sergeant Caraballo testified that he did not recall seeing barricades on the subject sidewalk, the police report he prepared on the date of the incident indicated that plaintiff fell as a result of tripping on a barricade. These two facts are not mutually exclusive, and thus do not raise an issue of fact.

While the Court finds that the City is entitled to summary dismissal of the complaint, in an abundance of caution, the Court next addresses the City's motion to dismiss the complaint and plaintiff's cross-motion for leave to amend.

CPLR 3211

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman. Spira & Carson. LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "factual allegations ... that consist of bare legal conclusions, or that are inherently incredible.... are not entitled to such consideration" (*Mamoon v Dot Met Inc.*, 135 AD3d 656, 658 [1st Dept 2016] [internal quotation marks and citations omitted]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*London v Kroil Lob. Specialists, Inc.*, 22 NY3d 1, 6 [2013] *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

In determining whether a plaintiff may assert a negligence claim against a municipality, the court must first decide "[w]hether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose. If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [1st Dept 2013]). On the other hand, "[i]f a municipality was acting in a governmental capacity, then the plaintiff must prove the existence of a special duty" (*Turturro v City of New York*, 28 NY3d 469, 478 [2016]). A municipality undertakes a propriety function when its "activities essentially substitute for or supplement traditionally private enterprises" (*Wittorf v City of New York*, 23 NY3d 473, 479 [2014]). On the other hand, a municipality engages in a "[g]overnmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers" (*id.*).

Here, assuming the City placed the subject barricade on the sidewalk abutting the premises, the City's actions were a governmental function. The complaint alleges that the City placed the barricades for crowd control in front of the premises, a quintessential government function (*Balsam v Delma Eng'g Corp.*, 90 NY2d 966, 968 [1997] ["Like crime prevention, traffic regulation is a classic example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers . . . That the function has

traditionally been assumed by police rather than by private actors is a tell-tale sign that the conduct is not proprietary in nature"]; *Devivo v Adeyemo*, 70 AD3d 587 [1st Dept 2010] ["The officers' alleged negligence cannot support municipal liability as it involved discretionary acts in managing pedestrian and vehicular traffic undertaken in furtherance of public safety"]). As the City was engaged in a government function, the Court must next determine whether plaintiff has plead a special duty.

As discussed above, liability for the performance of a discretionary governmental function may arise where a special duty exists between the municipality and the plaintiff. To establish a special duty, the plaintiff must specifically plead that there was:

> "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking"

(*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]).

A review of the complaint reveals that plaintiff fails to plead any of the elements to establish a special duty. For instance, plaintiff does not allege facts in her pleadings that would establish that she engaged in direct contact with any police officer or that plaintiff had any direct contact that led to an affirmative promise to protect her or to take other action on her behalf. Indeed, plaintiff's opposition to the City's motion all but concedes as much. Plaintiff's failure to allege a special duty or the factual predicate of a special duty in either her notice of claim or complaint requires the dismissal of this action against the City (*Peta-Gaye Blackstock v Bd. of Educ. of City of New York*, 84 AD3d 524 [1st Dept 2011] ["Plaintiff's failure to allege or provide the factual predicate for the special relationship theory in her notice of claim or complaint is fatal to maintenance of this action"]). The Court must next examine the branches of plaintiff's motion for leave to amend the notice of claim and complaint.

An action against a municipality to recover damages for personal injury must be commenced within one year and 90-days after the accrual of the claim (CPLR 217–a). Plaintiff's accident occurred on March 7, 2016, and thus, the statute of limitations for her claims against the City expired on June 5, 2017.

The Court notes that plaintiff does not submit a proposed amended notice of claim. To the extent plaintiff relies on the proposed amended complaint, plaintiff alleges that the City, though police officers present on the sidewalk, assumed a duty to safely direct pedestrians into the premises, that the officers were aware that a breach of their duty could lead to harm, that plaintiff justifiably relied on the officers, and that the City breached its duty to direct and control pedestrian traffic near the premises in a safe and reasonable manner. Plaintiff's new allegations alleging that the City owed her a special duty constitutes a novel theory of liability against the City (*see Rollins v New York City Bd. of Educ.*, 68 AD3d 540, 541 [1st Dept 2009] [holding that plaintiff's failure to allege that the City owed special duty in her notice of claim or complaint precluded her from asserting "that theory or the facts underlying it for the first time in opposition

to the motion for summary judgment"]). As plaintiff seeks to amend the notice of claim to add a new theory of liability after the expiration of the statute of limitations, plaintiff's cross-motion must be denied (*Aleksandrova v City of New York*, 151 AD3d 427, 428 [1st Dept 2017]; *see Pierson v City of New York*, 56 NY2d 950, 954–955 [1982] ["To permit a court to grant an extension after the Statute of Limitations has run would, in practical effect, allow the court to grant an extension which exceeds the Statute of Limitations, thus rendering meaningless that portion of section 50–e"]).

Even if plaintiff's application to amend the notice of claim was timely, plaintiff's argument that the notice of claim may be amended pursuant to General Municipal Law § 50-e(6) is unavailing. General Municipal Law § 50-e(6), which provides, in relevant part, that a "[m]istake, omission, irregularity or defect made in good faith . . . may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby." As the City correctly argues, plaintiff's proposed amended complaint attempts to plead a whole new theory of liability—not simply correct a mistake (*Guzman v City of New York*, 190 AD3d 454, 455 [1st Dept 2021] ["An amendment to a notice of claim that creates a new theory of liability does not fall within the purview of General Municipal Law § 50–e(6), which permits a party to correct a notice of claim in certain circumstances"]; *Aleksandrova*, 151 AD3d at 428 ["General Municipal Law § 50–e(6), which 'authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability' "]). The City further correctly argues that plaintiff fails to demonstrate in a meaningful way that that the City would not be prejudiced by the proposed amendment (*see* General Municipal Law § 50–e[1][a]).

In any event, plaintiff fails to cite to any portion of her 50-h hearing or any other evidence on the record revealing the essential facts of plaintiff's claim that the City owed her a special duty. Even if plaintiff cited to her 50-h hearing testimony, she would still be precluded from asserting her new theory of liability (*Perez v City of New York*, 193 AD3d 432 [1st Dept 2021], quoting *Scott v City of New York*, 40 AD3d 408, 410 [1st Dept 2007] ["Nor can plaintiff rely on his General Municipal Law § 50–h hearing testimony to rectify the deficiencies in his notice, where, as here, '(the) amendment would change the nature of the claim' "]).

Plaintiff's claim for failure to provide adequate lighting is also dismissed, as plaintiff does not oppose that branch of the City's motion to dismiss that claim (*see Kronick v L.P. Thebault Co.*, 70 AD3d 648, 649 [2d Dept 2010]).

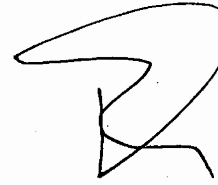
Accordingly, it is hereby

ORDERED that Temple's motion pursuant to CPLR 3212 for summary dismissal of the complaint is granted, and the complaint is dismissed against Temple; and it is further

ORDERED that the branches of the City's motion pursuant to CPLR 3212 and 3211 are granted, and the complaint is dismissed against the City; and it is further

ORDERED that plaintiff's cross-motions are denied.

This constitutes the decision and order of the Court.



1/18/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

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