At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of February 2022.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
P R E S E N T: HON. INGRID JOSEPH, J.S.C

----------X Index No.: 508431/2017

Joan Lane Morris,

Plaintiff,

-against-

Decision/Order

Herald Center Department Store of NY,LLC,
American Industries Corp., Safway Services, LLC, and
Atlantic Hoisting and Scaffold

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of the Motion(s):

Papers	Numbered
Order to Show Cause and Affidavits/Affirmations Annexed	1, 2
Answering Papers	3
Reply	4

Plaintiff, Jane Lane Morris ("Plaintiff" or "Ms. Morris") moves for summary judgment on the issue of liability against the defendants, Herald Center Department Store of NY, LLC,("Herald Department Store") American Industries Corp. ("American Industries"), Safway Services LLC ("Safway") and Atlantic Hoisting and Scaffold ("Atlantic").

Plaintiff commenced this action to recover damages for injuries allegedly sustained on April 2, 2015, when she tripped and fell over an anchor bolt that she alleges was negligently left on a sidewalk located in front of 1293 Broadway. Defendant Herald Department Store is the owner of the premises located at 1293 Broadway. Herald Department Store hired defendant American Industries as general contractor to perform construction work on the premises. American Industries subcontracted with Safway and Atlantic to install and remove the sidewalk fencing and scaffolding.

Ms. Morris argues that since Herald Department Store is the owner of the premises abutting the sidewalk where she fell, they are liable for her injuries pursuant to NYC Administrative Code §§ 7-210, 19-152(a)(6) and 19-152)a)(8). Plaintiff's professional engineer expert witness, Vincent Pici, opined in his affidavit with a reasonable degree of engineering certainty that the sidewalk condition as it existed on the date of the accident and the owner's failure to prevent the defect did not comply with the requirements in §§ 7-210(a), 19-152(a)(6), 19-152(a)(8) and the NYC Department of Transportation Highway Rules SS3-09(f)(1) and 2-09(f)(5)(vi) as they relate to sidewalk maintenance and repairs[1]. Mr. Pici states in his affidavit that because the anchor bolt was not properly removed from the sidewalk when the temporary construction was removed it resulted in an unexpected condition. He further reports that said condition was a defect that constituted a dangerous tripping hazard and was a violation of NYC Building Code § 3307.9 which requires public property to be left in as good a condition following the completion of the construction or demolition work as it was before such work was commenced[2]. Ms. Morris states that Defendants' violations are negligence per se, and she cites *Elliot v. City of NY*, 95 NY2d 730,737 (2001) in support of the argument. Ms. Harris alleges that all of the defendants had actual notice that anchor bolts were negligently left on the sidewalk. In support of this position Ms. Harris submits examination before trial ("EBT") testimony of Mr. Menendez, who was the Chief Engineer and Building Manager at 1293 Broadway. Mr. Menendez attested to the fact that he discovered eight (8) other anchor bolts like the alleged anchor bolt that plaintiff tripped on, extending from the sidewalk[3]. Mr. Menendez also testified that he spoke with a representative of American Industries, Safway and Atlantic about removing the bolts since they created a tripping hazard[4]. Ms. Morris maintains that despite the fact that all defendants had actual notice of the defect none of the defendants corrected the defect. Additionally, Ms. Morris claims that Safway and Atlantic are liable since they were subcontractors and created the defective sidewalk condition. Ms. Morris alleges that American Industries is also liable since it was the general contractor and failed to inspect the premises after the subcontractors completed their work. In a reply to co-defendants Safway and Atlantic's opposition, Ms. Morris highlights the fact that Mr. Menendez testified at his EBT that Safway

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[1] Exhibit M P. 37-41
[2] Exhibit M P. 35-41
[3] Exhibit F P. 46 line 24-25, p 47 line 2-23
[4] Exhibit F P. 53, line 25, P. 54 lines 2-9, P. 56 lines 23-25 P. 57, lines 2-7

and Atlantic removed the sidewalk shed around the time of Plaintiff's accident which corroborates the testimony of Mr. Collins stating that the sidewalk shed was only recently dismantled and removed[5]. Ms. Morris points out the fact that at his examination before trial Safway's and Atlantic's witness, Julian Aleman, the carpenter foreman of Safway Atlantic could not recall where the sidewalk shed was placed nor did he have personal knowledge of when the sidewalk shed was installed or dismantled and he testified that he only inspected a portion of the sidewalk[6]. Ms. Morris in a reply to Herald Industries' opposition state that whether a defect is open and obvious is relevant solely to plaintiff's comparative negligence and not whether Defendant is liable.

Defendants Herald Department Store and American Industries oppose plaintiff's motion through their attorney's affirmation stating that they are not liable for Ms. Morris' alleged injuries. Defendants Herald Department Store American Industries allege that defendants/subcontractors Safway and Atlantic are liable since they created the condition that caused Plaintiff to fall. Herald Department Store and American Industries claim that Safway and Atlantic were directed to remove the protruding bolts and were responsible for returning the sidewalk to the pre-construction condition. Herald Store and American Industries maintain that the condition was open, obvious and readily observable. Herald Industries claim that under Administrative Code Section 7-210 abutting landowners are not required to maintain curbs, tree wells, pedestrian ramps, roadways or other city-owned property outside the scope of the definition of sidewalk. Herald Industries states that Section 7-210 does not supersede pre-existing regulations, nor does it impose liability against abutting landlords for conditions beyond public sidewalks such as temporary sheds. Herald Industries avers that the only exception is when the landlord created the condition which did not occur in this situation. Herald Industries maintain that generally a principle is not liable for the acts of an independent contractors since the principal cannot control the manner in which independent contractors perform their work. Herald Industries state that none of the exceptions to that general rule is applicable here since Herald Store and American Industries were not negligent in selecting, instructing, or supervising the independent contractor, the independent contractor was not hired to do inherently dangerous work and no non-delegable duty existed.

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[5] Exhibit F P. 29 and Exhibit A

[6] Exhibit G P.25 lines 2-5

Safway and Atlantic through their attorney's affirmation oppose Plaintiff's motion and state that the Plaintiff has not tendered sufficient evidence to demonstrate the absence of material issues of fact as to whether Safway and Alantic were the abutting property owners of the location on the sidewalk where the plaintiff alleges, she fell. Safway and Atlantic state that section 7-210 of the Administrative code of the City of New York imposes liability on property owners who fail to maintain city-owned sidewalks in a reasonably safe condition. Safway and Atlantic claim that they were hired to install a sidewalk shed on the site in 2013, two years before Ms. Morris' accident and returned to remove it between late 2014 and early 2015, prior to the accident. Safway and Atlantic maintain that they were not performing any work on site on the day of Plaintiff's accident and had been offsite for several months. Safway and Atlantic argue that there is also a question of fact as to whether Plaintiff fell because of tripping over a nut/bolt condition on the sidewalk or something else. Safway and Atlantic allege that at her EBT Ms. Morris stated that she never saw what she tripped on before or while tripping[7]. Safway and Atlantic claim that Ms. Morris only surmised that she fell over a double lug nut forty minutes after falling and after her co-worker non-party witness Raymond Collins ("Mr. Collins") identified to her what he believed she tripped on. In addition, Safway and Atlantic highlights the fact that Mr. Collins was walking ahead of her at the time of the incident and can only speculate as to the cause of the accident[8]. Safway and Atlantic state that whether Ms. Morris tripped over a lug nut/bolt condition is a question of fact for a jury and not a matter of law to be determined by the court. Safway and Atlantic aver that there is also a question of fact as to who placed the nut/bolt condition on the sidewalk. Safway and Atlantic's non-party witness Mr. Aleman testified at his EBT stating that the claimed lug nut/bolt involved in the alleged accident is not one of the anchors that would have been drilled into the ground by Safway to support their sidewalk shed or bolt[9]. Safway and Atlantic argue that the lineup of the nut/bolts at issue did not match Safway's sidewalk shed configurations. Safway and Atlantic also highlight the fact that American Industries' Director of Field Operations, non-party witness ,James Korycinski, testified at his EBT that there were other entities like Kings County Waterproofing and Paladino that performed sidewalk work at or about the area where Ms. Morris fell. Futher, Safway and Atlantic claims

[7] Exhibit E P. 24-25
[8] Exhibit A P.28
[9] Exhibit G P. 30

that Mr. Korycinski testified that he inspected the sidewalk while and after the shed was removed and did not see any bolts left in the sidewalk. Safway and Atlantic maintain that they are not liable and that the landowner and general contractor are liable.

The proponent of a motion for summary judgment 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 (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] citing Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 [1985], Zuckerman v City of New York, 49 NY2d 557, 562 [1980] and Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Center, 64 NY2d at 853). However, once this 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 the existence of material issues of fact which require a trial in the action (Zuckerman v City of New York, 49 at 562).

Section 7-210 of the Administrative Code of the City of New York provides, in relevant part, that it is a duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition. Section 7-210 also provides notwithstanding any other provision of law, the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury . . . 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 . . . the negligent failure to remove snow, ice, dirt or other material from the sidewalk (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 171 [2019]). Section 7–210 imposes a nondelegable duty of care and shifts civil liability from the City to out-of-possession owners like defendants (*Id*). A contractor may be liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk (*Downing v J. Anthony Enterprises, Inc.*, 189 AD3d 1541, 1542 [2d Dept 2020]).

After a review of all the documents the court finds that section 7-210 of the Administrative Code of the City of New York imposes on Defendant Herald Department Store a non-delegable duty of care to maintain the sidewalk in a safe condition. Additionally, the court finds that there are issues of fact as to whether the remaining defendants are liable. Safway and Atlantic raised an issue of fact as to whether the bolts found in the sidewalk were the bolts that

Safway and Atlantic used when constructing the shed. Plaintiff failed to rebut these issues of fact and therefore, Plaintiff's motion for summary judgment on the issue of liability against defendants American Industries Corp., Safway Services, LLC, and Atlantic Hoisting and Scaffold is denied. Plaintiff's motion for summary judgment on liability against defendant Herald Department Store is granted.

This constitutes the decision and order of the court.

INGRID JOSEPH
J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice