SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33**

Justice

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LISA BRINKMANN

Plaintiff,

- v -

HERALD CENTER DEPARTMENT STORE OF NEW YORK LLC,

Defendant.

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INDEX NO. 154479/2020

MOTION DATE 06/07/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

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

Upon the foregoing documents, and oral argument which took place on August 9, 2022 where Christopher G. Conway, Esq. appeared for Plaintiff Lisa Brinkmann ("Plaintiff") and Sylvester Yavana, Esq. appeared for Defendant Herald Center Department Store of New York LLC ("Defendant"), Plaintiff's motion for partial summary judgment on the issue of liability is granted.

I. Factual and Procedural Background

Plaintiff is seeking compensation for alleged injuries sustained from a slip and fall on a sidewalk owned by Defendant (NYSCEF Doc. 1). The note of issue was filed on May 12, 2022, and Plaintiff now seeks partial summary judgment on the issue of liability (NYSCEF Docs. 14-15).

Defendant owns the building located at 1293 Broadway, New York, New York (the "Building") (NYSCEF Doc. 5). The Building is also known as Macy's Herald Square. Plaintiff claims she was walking on the sidewalk in front of the Building on January 29, 2020, when she

fell on West 34th Street between Sixth and Seventh Avenues (NYSCEF Doc. 19 at page 35, lines 4-9). The cause of the fall is alleged to be a triangular shaped hole in the sidewalk (*id.* at page 38, lines 4-10). During her deposition, Plaintiff testified that she fell "to the right of the H&M Store (*id.* at page 36, lines 5-6). She provided further detail of the location of the fall by testifying that the triangular shaped hole was to the right of a subway station (*id.* at page 42 lines 19-21).

The deposition of Joe Menendez ("Mr. Menendez") was taken. (NYSCEF Doc. 21). Mr. Menendez testified that he is the chief engineer of Defendant *(id.* at page 20, line 5). While Mr. Menendez states he is responsible for overseeing the operations of the property, his role does not include inspections or maintenance of the sidewalks located adjacent to department stores (*id.* page 20, lines 2-17). As such, there are no reports or logs kept on the conditions of the sidewalks adjacent to the Building (*id.*). There were no formal inspections, procedures, or protocol for inspecting the sidewalks at the time of Plaintiff's alleged fall (*id.* at page 17 lines 7-11). Instead, Mr. Menendez testified that "If there is a complaint or I see something that I notice, I will patch it if necessary" (*id.* at page 13, lines 3-5). Mr. Menendez has no formal training related to sidewalk maintenance (*id.* at page 14, line 12).

When shown a photo of the sidewalk with the triangular hole where Plaintiff allegedly fell, Mr. Menendez testified that he most likely had done patchwork on the triangular hole depicted in the photo (*id.*at page 32 lines 16-25; page 35-36). Mr. Menendez also testified that the triangular hole depicted in the photo was in between a Verizon Store and H&M store (*id.* at page 35 line 17-21). Mr. Menendez further testified that the triangular hole depicted in the photo shown to him was near a subway, substantiating Plaintiff's version of the fall (*id.* at page 32 lines 16-25). Mr. Menendez testified that based on the materials he used to do patchwork, the patchwork would

eventually erode due to expansion because of the change in weather from hot to cold (*id.* at page 40 lines 18-23).

In support of its motion for summary judgment, Plaintiff submitted the affidavit of Adam C. Cassel, P.E., DFE ("Mr. Cassel") (NYSCEF Doc. 23). Mr. Cassel has been a licensed professional engineer in New York since 2011 and testified that he has conducted thousands of forensic investigations for insurance carriers, building owners, attorneys, and other clients to determine the causes of accidents related to premises liability (*id.* at ¶ 2). Mr. Cassel observed the area where Plaintiff reportedly fell and observed a triangular shaped cavity (*id.* at ¶ 7). Mr. Cassel found that the cavity and patch work done on said cavity created an uneven condition with a height differential between 5/8 and 1-1/4 inches high (*id.*). Mr. Cassel testified that this height differential violated §2-09(f)(5)(iv) of the New York City Department of Transportation Highway Rules and §19-152 of the New York City Administrative Code (*id.* at ¶ 9). Both of those laws state that a trip hazard where the height differential is greater than or equal to ½ inch is a substantial defect. Based on the statutory definitions and Mr. Cassel's measurements, he classified the triangular cavity where Plaintiff fell to be a substantial defect (*id.* at ¶ 10). Mr. Cassel also testified that the defective condition existed for several years as a result of a failure to maintain the sidewalk in a good and safe condition (*id.* at ¶ 11). Indeed, images from both 2014 and 2020 showed the existence of the sidewalk defect (*id.*).

II. Discussion

A. Standard

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and

on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

To show prima facie entitlement to summary judgment on a premises liability action, a Plaintiff must show that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it (*Lemonda v Sutton*, 268 AD2d 383, 384 [1st Dept 2000]). Constructive notice is generally found when the dangerous condition is visible and apparent and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition (*Velocci v Stop and Shop*, 188 AD3d 436 [1st Dept 2020]). A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell (*Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 571-572 [1st Dept 2014]). "Reference to a generalized inspection practice 'is insufficient to satisfy defendant['s] burden of establishing that [it] lacked notice of the alleged condition of the sidewalk prior to the accident'" (*Trinidad v Catsimatidis*, 190 AD3d 444 [1st Dept 2021] quoting *Simpson v City of New York*, 126 AD3d 640, 641 [1st Dept 2015]).

Plaintiff's expert affidavit, which shows the size of the trip hazard to be in violation of multiple applicable sidewalk statutes and safety standards, is uncontroverted. Defendant's agent,

Mr. Menendez, also claimed that he most likely conducted patchwork on the trip hazard, and that it is likely the patchwork done would be worn down over time due to the weather, thereby establishing Defendant's notice of the defective condition. Further, even if Defendant did not have actual notice of the defective condition, Defendant has not opposed Plaintiff's expert affidavit which shows a photo indicating the trip hazard has existed since at least 2014. Therefore, Plaintiff has shown its prima facie entitlement to summary judgment by showing that: Defendant owed plaintiff a duty to maintain its sidewalk in a safe manner; Defendant breached that duty by allowing a trip hazard to form; Defendant had actual or constructive notice of the trip hazard, and Plaintiff was injured as a result of the trip hazard. The burden now shifts to Defendant to show a genuine material issue of fact which would warrant denying Plaintiff's motion for partial summary judgment.

Defendant attempts to assert an issue of fact by pointing out that in her written discovery responses, Plaintiff claims she fell in front of a Verizon, but at her deposition she testified she fell "to the right of H&M." The Court finds this is insufficient to deny summary judgment. The record reflects that the Verizon and H&M are right next to one another, and if you are facing the H&M, the Verizon is to the right of the H&M. Therefore, Plaintiff's written discovery responses and her deposition testimony are not inconsistent with one another (*Lopez v 1675 Realty*, ---N.Y.S.3d---, 2022 NY Slip Op. 05500 at *1 [1st Dept 2022] [granting plaintiff summary judgment on liability in sidewalk trip and fall action on the issue of liability and disregarding defendant's contention that plaintiff's 50-h and deposition testimonies as inconsistent]). Moreover, since both H&M and Verizon are tenants of Defendant, Defendant still owns the sidewalk in front of both stores and has a non-delegable duty to repair and maintain said sidewalk.

Defendant also asserts that summary judgment should be denied because Plaintiff's credibility is questionable since she waited until she got to New Jersey to seek medical treatment. The Court finds that Plaintiff's decision to seek medical treatment later goes to Plaintiff's pain and suffering, and since this is a motion for summary judgment only on the issue of liability, when or where Plaintiff decided to get medical treatment does not bear on whether Defendant is liable to Plaintiff for her alleged injuries.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for partial summary judgment on the issue of liability is granted.

This constitutes the decision and order of the Court.

10/18/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, 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:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE