**Supreme Court of the State of New York**
**County of Kings**

**Index Number 505479/2018**
Seqs. 005–007, 009

Part 91

**DECISION/ORDER**

PATRICIA CORDELL,

Plaintiff,

against

BROOKLYN UNION GAS, individually and d/b/a NATIONAL GRID NEW YORK, NEW YORK PAVING INC., VERIZON NEW YORK INC., A N W PROPERTIES LLC, LOS PAISONOS INTERNATIONAL INC., and HALLEN CONSTRUCTION COMPANY, INC.,

Defendants.

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

| Papers Numbered | |
|---|---|
| Notice of Motion and Affidavits Annexed | 1–4 |
| Order to Show Cause and Affidavits Annexed | |
| Answering Affidavits | 5–11 |
| Replying Affidavits | 12–16 |
| Exhibits | |
| Other | |

Upon the foregoing papers, defendant New York Paving, Inc.'s motion for summary judgment (Seq. 005), defendant ANW Properties LLC's motion for summary judgment (Seq. 006), The Brooklyn Union Gas Company's motion for summary judgment (Seq. 007), and Los Paisonos International Inc.' motion for summary judgment (Seq. 009)[1] are decided as follows:

**Introduction**

This action arises from an alleged accident that occurred on April 14, 2017, when the plaintiff claims that she tripped and fell on the sidewalk in front of 79-16 Roosevelt Avenue, Elmhurst, N.Y. On March 19, 2018, the plaintiff commenced an action against the abutting property owner, ANW Properties LLC ("ANW"), its lessee-deli store, Los Paisonos International Inc. ("Los Paisonos"), and The Brooklyn Union Gas Company, d/b/a National Grid NY ("National Grid") and Hallen Construction Company ("Hallen"). Plaintiff alleges that the

[1] Sequence 008, also a motion by Los Paisonos for summary judgment, was withdrawn at oral argument as a duplicate of Sequence 009.

accident was caused by the negligence of the defendants, including National Grid and Hallen, in that they created a dangerous condition on the sidewalk or allowed that condition to remain unrepaired and hazardous to pedestrians.

This action was discontinued against Los Paisonos and New York Paving by stipulation on June 3, 2022. Accordingly, motion sequences 005 and 009 are denied as moot.

**Factual Background**

The plaintiff testified that she was walking eastbound on the south side of Roosevelt Avenue when she tripped over a defect in the pavement (Cordell EBT at 26–27). Ms. Cordell testified that she tripped on a lump of asphalt that "dipped and . . . rose" with a maximum height of approximately four inches and was about the size of a dinner plate (*id.* at 27). Ms. Cordell testified that a series of pictures provided to her at her deposition depicted the correct location of her accident but did not reflect the condition of the sidewalk where she fell, commenting that "it looks like somebody has filled in the hole" (*id.* at 69, 78).

ANW is a limited liability corporation ("LLC") that was created for the purpose of acquiring and owning 79-16 Roosevelt Avenue, the premises abutting the relevant stretch of sidewalk in this action (Anthony Fong, manager and member of ANW, EBT at 15–16). The members of the LLC are Anthony Fong and his mother, Ngai Cheng (*id.*). Mr. Fong and Ms. Cheng's responsibilities as managers extended to collecting the monthly rent from the commercial tenant, Los Paisonos, and reviewing any reports of structural or roof damage (*id.* at 17, 21). Other responsibilities, including repairs of the units, cleaning, and trash disposal were the obligation of the commercial tenant (*id.* at 21–22). Mr. Fong testified that ANW did not undertake any repairs to the condition of the sidewalk prior to April 2017. Mr. Fong further submitted an affidavit affirming that "ANW did not want to interfere with what had been an

ongoing gas main project being conducted by those other entities" (Fong Aff. at ¶ 7–8).

National Grid received a work permit from the City of New York to excavate this stretch of sidewalk for the purpose of replacing a gas main on Roosevelt Avenue between 79th and 80th Streets (Walter Stone, a consultant for National Grid, EBT at 25–26). Hallen was the sub-contractor with which National Grid sub-contracted to perform the demolition of the sidewalk and to run the service line from the main line to an abutting building (*id.* at 37–38; see also paving contract). Mr. Fong testified that he observed a National Grid truck at the location of the accident in March of 2017 and that the sidewalk had been excavated (Fong EBT at 25).

**Analysis**

On a motion for summary judgment, the moving party bears the initial burden of making a prima facia showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facia showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Section 7-210 of the New York City Administrative Code "imposes liability on property owners for personal injuries caused by the owner's failure to maintain the sidewalk abutting its premises in a reasonably safe condition" (*Gyokchyan v City of New York*, 965 NYS2d 521, 524 [2d Dept 2013]). However, third-party contractors are ordinarily liable for their own negligence (*Shusterich v Kleinman*, 171 AD3d 1236 [2d Dept 2019]). New York property owners have a general duty of reasonable care under the circumstances to maintain their property in a safe condition free from foreseeable risks (*see Stern v Madison Square Garden Corp*, 226 AD2d 444, 445 [2d Dept 1996]; *see also Sabrak v Sementeilli*, 51 AD3d 1001, 1002 [2d Dept 2008]). Trivial defects are generally not actionable because a prudent person would not

reasonably anticipate that they present a danger (see *Sanna v Wal-Mart Stores, Inc*, 271 AD2d 595, 595 [2d Dept 2000]).

**ANW's Motion for Summary Judgment (Seq. 006)**

Defendant ANW argues that the plaintiff's claims against it should be dismissed as the defects were caused and created by the negligence of defendants National Grid, Hallen, and New York Paving. Additionally, ANW argues that it should not be liable irrespective of its status as an owner because National Grid was engaged in a complicated and dangerous undertaking that was sanctioned by the City of New York, and therefore beyond the control of ANW. ANW argues that these circumstances rendered it unable to engage in remedial measures beyond those about which Mr. Fong testified—calling 311 multiple times and attempting to communicate his concerns about the pavement to workers who appeared to be excavating sidewalks (in this instance, workers employed by Consolidated Edison) (Fong EBT at 29–31; 33).

ANW effectively concedes that it did indeed bear a duty to maintain the sidewalk abutting its property. Accordingly, the question before the court is whether ANW breached that duty by failing to remediate the condition of the sidewalk in front of its property, and thereby "maintain [the] sidewalk in a reasonably safe condition" (Administrative Code § 7-210). Here, ANW did not retain the contractor who undertook the excavation of the sidewalk and did not control that project. ANW also argues that it was prohibited from interfering with National Grid's project both because of the sensitive nature of laying gas lines and because National Grid was operating within the parameters of a permit issued by the City. While Administrative Code § 7-210 does create a non-delegable duty for owners, it does not impose strict liability on them for injuries that pedestrians sustain on abutting sidewalks (*see Martinez v Khaimov*, 74 AD3d 1031, 1032 [2d Dept 2010]).

ANW does not marshal any caselaw to support its argument that public works or utility projects abrogate an owner's duty to maintain the abutting sidewalk. Ultimately, a question of fact exists as to whether ANW had a responsibility to remediate the condition of the sidewalk despite the work of a public utility. For example, the court has held that the owner of a premises was responsible for maintaining a defective gas valve cap embedded in the abutting sidewalk (*Rojas v Edison*, 34 Misc.3d 69, 70–71 [2d Dept 2011]). In the instant action, it is possible that there were alternative maintenance options available to ANW and that, by failing to effect these measures, ANW breached its § 7-210 duty to the plaintiff. Accordingly, ANW's motion is denied due to questions of fact.

**National Grid's Motion for Summary Judgment (Seq. 007)**

In its motion for summary judgment dismissing the plaintiff's claims against it, National Grid first argues that the area where the plaintiff fell was a trivial defect, and the plaintiff's claim is therefore precluded. In determining whether a defect is trivial as a matter of law, the court cannot consider "size alone" (*Hutchinson v Sheridan Hill House Corp*, 26 NY3d 66, 77 [2015]). Instead, the court must examine all the specific facts and circumstances presented, "including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place, and circumstance of the injury caused by the condition" (*id.*). Thus, a "small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or surrounding circumstances magnify the dangers it poses, so that it 'unreasonably imperils the safety of a pedestrian'" (*id.* at 78).

Here, the defendants did not meet their prima facie burden of entitlement to judgment as a matter of law. The defendants' reliance on the defect as depicted in the photographs presents a question of fact, as the plaintiff contends that the photographs are not an accurate representation

of the defect she tripped over on the day of her accident (Cordell EBT at 78), but rather after the hole was filled (*id* at 69). A defendant moving for summary judgment may produce photographs that are acknowledged to "fairly and accurately represent the accident site to establish that a defect is trivial and not actionable" (*see Schenpanski v Promise Deli, Inc*, 88 AD3d 982, 984 [2d Dept 2011]). As the accuracy of the photographs is disputed they are inadequate to bear the defendants' burden on a motion for summary judgment.

The defendants also argue that the condition upon which the plaintiff allegedly fell was "open and obvious," and that the defendants are therefore free from liability. The defendants contend that the patch was readily visible to the plaintiff as she walked home the night of the accident. National Grid provides an affidavit from Stan Pitera, a utilities construction expert, who opines that the contrast in the colors of the sidewalk would provide persons with "a sharp visual cue of an impending change in the sidewalk" (Pietra Aff. at 9). However, the plaintiff testified that "the lighting was very poor" and that she did not see the defect before she fell (Cordell EBT at 29). The plaintiff's testimony creates a question of fact about the obviousness of the defect such that a triable issue of fact exists as to whether the condition was open and obvious.

Finally, National Grid contends that the plaintiff is unable to identify the cause of her own fall without engaging in speculation (*see Viviano v KeyCorp*, 128 AD3d 811, 812 [2d Dept 2015]). The defendant argues that the plaintiff's testimony that she did not see any defect until after her fall, that she did not take photographs of the defect, and that she could not identify the exact dimensions of the defect preclude her claims under a theory of common-law negligence. However, the plaintiff testified that she tripped on "a lump of asphalt" that was approximately four inches high and the size of a dinner plate (Cordell EBT at 27–28). The plaintiff was also

able to identify the location of the defect (Cordell EBT at 80). The plaintiff contends that she could not see the defect from the photos presented at the deposition because these photos were not an accurate representation of the defect which she fell over (*id.* at 78). Looking at the evidence in the light most favorable to the plaintiff, the plaintiff has, at a minimum, demonstrated a triable issue of fact as to the description, location, and approximate dimensions of the specific defect that caused her fall (*see Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]).

**Conclusion**

Defendant NY Paving's motion for summary judgment (seq. 005) is denied as moot.

Defendant ANW's motion for summary judgment (seq. 006) is denied.

Defendants National Grid's and Hallen's motion for summary judgment (seq. 007) is denied due to questions of fact.

Defendant Los Paisono's motion for summary judgment (seq. 009) is denied as moot. Sequence 008 was previously withdrawn.

This constitutes the decision and order of the court.

October 7, 2022
**DATE**

**DEVIN P. COHEN**
Justice of the Supreme Court

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