At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of February, 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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MARIA RANGEL,

Plaintiff,

-against-

CALL REALTY CO. LLC and 1176 LIBERTY FOOD CORP.

Defendants.

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Index No.: 517525/2019

DECISION AND ORDER

Motion Sequence #3, #4

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

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	39-55, 57-66,
Opposing Affidavits (Affirmations)	68, 72,
Reply Affidavits (Affirmations)	77,
Memorandum of Law	73, 75

After a review of the papers and oral argument, the Court finds as follows:

The instant action concerns an alleged trip and fall incident that occurred on May 15, 2019. The Plaintiff, Maria Rangel (hereinafter "the Plaintiff") allegedly injured herself after tripping on a broken, uneven, cracked, sidewalk flag located adjacent to the property known as 1176 Liberty Avenue, Brooklyn, New York (hereinafter "the Premises"). The Premises are owned by Defendant Call Realty Co. LLC. (hereinafter "Call Realty") and leased by Defendant 1176 Liberty Food Corp. (hereinafter "Liberty").

The Plaintiff now moves (motion sequence #3) for an order pursuant to CPLR 3212, granting her motion for partial summary judgment on the issue of liability as against Call Realty. Specifically, the Plaintiff contends that Call Realty had a duty to repair the sidewalk flag at issue and that Call Realty had notice of the alleged condition prior to the Plaintiff's accident given the length of time it apparently

existed. The Plaintiff also raises the making of multiple complaints to Call Realty in relation to the condition of the sidewalk. In support of this position, the Plaintiff relies on her own deposition, the deposition of Clifford Weinstein, a member and manager of Call Realty, and the affidavit of Scott Silberman, P.E..

Both Defendants Call Realty and Liberty oppose this motion and cross move for separate relief. In opposition to the Plaintiff's motion, the Defendants contend that the Plaintiff failed to properly plead a violation of the New York City Administrative Code Sections 7-210 and 19-152 in her initial Bill of Particulars and that the supplemental Bill of Particulars, which included these code sections, filed by the Plaintiff was untimely. The Defendants also contend that the Plaintiff's affidavit contradicts her earlier deposition testimony relating to her taking measurements of the alleged defect at issue. Finally, the Defendants contend that the Plaintiff has failed to show that Defendant Call Realty had actual or constructive notice of the defect at issue. The Defendants also cross-move (motion sequence #4) for an Order striking Plaintiff's Supplemental Bill of Particulars dated December 21, 2020. The Defendants contend that this supplemental Bill of Particulars should be considered a nullity as it was filed in violation of CPLR 3025 and 3042 since it was filed without leave of Court and after the filing of the Note of Issue.

As an initial matter, the Court denies the Defendants motion (motion sequence #4) seeking to strike the Plaintiff's supplemental Bill of Particulars. As stated above, the Defendants argue that this supplemental Bill of Particulars should be deemed a nullity and contend that it was filed in violation of CPLR 3025 and 3042. However, "[a] plaintiff may serve a supplemental bill of particulars, even without leave of court, to assert statutory violations which merely amplify his or her theories of liability." *Balsamo v. City of New York*, 287 AD2d 22, 27, 733 N.Y.S.2d 431, 435 [2d Dept 2001]; *see also Scherrer v. Time Equities, Inc.*, 27 AD3d 208, 209, 810 N.Y.S.2d 454, 455 [2d Dept 2006]. In the instant matter, the Plaintiff is claiming that the Defendants were negligent for failing to maintain the sidewalk adjacent to

the Premises. The supplemental bill reflecting New York City Administrative Code Sections 7-210 and 19-152 merely serves to amplify this claim and poses no surprise and results in no prejudice. Moreover, Plaintiff acknowledges that the complaint and Bill of Particulars alleges that Call Realty failed to comply with statutes, ordinances, rules and/or regulations in relation to the alleged sidewalk condition. Accordingly, the Plaintiffs supplemental Bill of Particulars was permissible and the Defendant's motion (motion sequence #4) is denied.

Motion Sequence #3

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

The Sidewalk Law

Sidewalk liability is covered by §7-210 of Administrative Code of City of N.Y. (hereinafter "the Sidewalk Law"). The Sidewalk Law provides in pertinent part that:

> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, 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, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.
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> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

Turning to the merits of the motion made by the Plaintiff (motion sequence #3), the Court finds that the Plaintiff has established that Defendant Call Realty had actual or constructive knowledge of the condition of the sidewalk at issue. In support of her motion, the Plaintiff relies on the deposition testimony of the Plaintiff, the deposition testimony of Clifford Weinstein (manager and member of Call Realty), an affidavit from Scott Silberman, P.E., and images of the alleged sidewalk defect. As part of the Plaintiff's deposition, she states that she was walking in front of the Premises and tripped after she got "into the hole and bend my ankle and my knee and fell into the ground." (See Plaintiff's Motion, Exhibit E, Page 28). During her deposition, the Plaintiff identified the defect by referencing photographs of the defect and she authenticated the photographs as fairly and accurately depicting how the sidewalk looked during the time of the alleged incident. (See Plaintiff's Motion, Exhibit E, Page 32). Clifford Weinstein, as member and manager of Call Realty, who testified on its behalf, acknowledged in his errata sheet that Defendant Call

Realty received complaints regarding the sidewalk prior to the incident on both September 2017 and January 2018. (See Plaintiff's Motion, Exhibit F, Pages 68-70). Even assuming, *arguendo*, that this acknowledgment does not specify whether the complaints were concerning the same defect, the Plaintiff provided evidence that the defect at issue had existed for years prior to the Plaintiff's alleged injury. While aspects of the report by Scott Silberman, P.E. are of limited probative value, as Mr. Silberman did not physically inspect the area, he includes and references a google street view image from September of 2013 that shows the alleged defect at issue, which was identified by the Plaintiff during her deposition. As per CPLR 4532-b the Court can take judicial notice of this photograph. See CPLR 4532-b; *see also Rodriguez v. The City of New York*, No. 29129/2018E, 2021 WL 6195620, at *1 (Sup. Ct., Bronx County 2021). This evidence, taken together, is sufficient for the Plaintiff to establish that Call Realty had notice of the condition of the sidewalk.

However, the Plaintiff has not proven as a matter of law that the condition alleged constituted a dangerous and defective condition and was not *de minimis*. "The question of whether or not a dangerous or defective condition exists depends on the particular facts and circumstances of each case and is a question of fact for the jury…" *See Guerrieri v. Summa*, 193 AD2d 647, 598 N.Y.S.2d 4 [2d Dept 1993]. Even assuming the depth of the alleged defect, that measurement in itself does not render the condition defective or dangerous as a matter of law. In *Trincere v. County of Suffolk* (90 N.Y.2d 976, 977, 688 N.E.2d 489, 490 [1997]) the Court of Appeals held that "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable." *(Id* at 977). Therefore, granting summary judgment to a defendant "based exclusively on the dimensions of the …defect is unacceptable." *(Id* at 977-978). Additionally, even assuming that the Plaintiffs showed that the condition of the sidewalk was a violation of the Sidewalk Law (Admin Code 7-210) such a violation only constitutes

some evidence of negligence but does not constitute negligence *per se*. See *Aponte v. New York City Hous. Auth.*, 197 AD3d 1283, 153 N.Y.S.3d 582 [2d Dept 2021].

The Plaintiff during her deposition, indicated that she only estimated the size of the hole, constituting the alleged defect, and answered "no" when asked whether she took any measurements of the alleged defect. (Plaintiffs deposition pg 37, lines 16-22, NYSCEF Doc #45) Plaintiff's engineer, Mr. Silberman did not visit the area in question and stated that he received measurements of the hole based upon the Plaintiff's affidavit in support of the motion. Plaintiff states in her affidavit (NYSCEF Doc. #52) that the "…hole diminesions were at least (1) inch deep, approximately 4 inches side to side, and at least one(1) inch front to back." However, she does not state how she determined these measurements and fails to address the fact that she stated that she did not measure the hole during her deposition. The Defendant challenges this and contends that it is a feigned attempt to prevent denial of her motion. The Court agrees. This was "designed to avoid the consequences of her earlier testimony by raising feigned issues." *Zalko v. Sunrise Adult Health Care Ctr.*, 7 A.D.3d 616, 617, 776 N.Y.S.2d 594, 595 [2d Dept 2004]. Moreover, although the photographs provided show the existence of the hole, it is otherwise insufficient for the Court to determine whether it was a defective or dangerous condition. *See Curry v. E. Extension, LLC*, No. 2020-05790, 2022 WL 468381 [2d Dept 2022].

In opposition, Defendant Call Realty fails to rebut the Plaintiff's establishment that Defendant Call Realty had notice of the condition of the sidewalk. The testimony of Mr. Weinstein generally establishes that he believed it was the tenant's duty to repair the condition at issue, not Call Realty's. When asked whether Call Realty had made repairs to the sidewalk in the last ten years, Mr. Weinstein answered "[n]ot that I can recall." When asked when anyone from Defendant Call had made regular inspections of the property, Mr. Weinstein answered "[n]o." (See Plaintiff's Motion, Exhibit F, Pages 13-15). Accordingly, Plaintiff's motion for summary judgment on the issue of liability is denied, however the question of

whether Call Realty had notice of the condition of the sidewalk is answered in the affirmative for purposes of trial.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Plaintiff (motion sequence #3) for partial summary judgment on the issue of liability is denied.

The motion by the Defendants (motion sequence #4) to strike the supplemental Bill of Particulars is denied.

The foregoing constitutes the Decision and Order of the Court.

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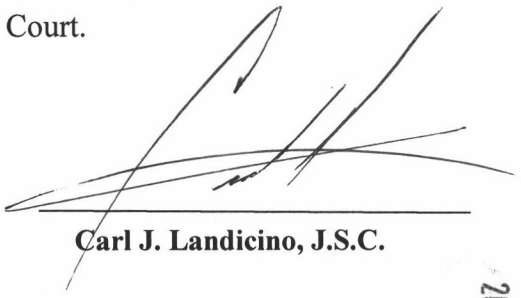

Carl J. Landicino, J.S.C.