SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **05RCP**

Justice

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SAMUEL R. MILLINGTON,

Plaintiff,

- v -

THE CITY OF NEW YORK, HARVEY C. MARX SELF DECL OF LIV TRUST UTD, ROBERT BELSON AS TRUSTEE, ADAMS & COMPANY REAL ESTATE, LLC,

Defendants.

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INDEX NO. 157146/2017

MOTION DATE 11/01/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HARVEY C. MARX SELF DECL OF LIV TRUST UTD, ROBERT BELSON AS TRUSTEE, ADAMS & COMPANY REAL ESTATE, LLC,

Third-Party Plaintiffs,

-against-

44 WEST 37 LLC,

Third-Party Defendant.

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Third-Party
Index No. 595318/2022

The following e-filed documents, listed by NYSCEF document number (Motion 004) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 107, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 128, 129, 130

were read on this motion for DISMISSAL.

Plaintiff brings this action to recover for personal injuries sustained on September 2, 2016, when he tripped and fell exiting his van, after parking it alongside 48 West 37th Street (NYSCEF Doc. No. 1 [Compl. at ¶¶108-113). Plaintiff testified at his General Municipal Law ("GML") §50-h hearing and subsequent examination before trial ("EBT") that he tripped and fell due to a defect in the sidewalk and curb abutting 48 West 37th Street (See NYSCEF Doc. Nos. 87 [GML §50-h Tr. at pp. 19, 36-38]; 88 [GML §50-h marked photos]; and 89 [Millington EBT at pp. 20-21, 24-

26, 28 41]). Plaintiff also testified that there was a "metal plate"—which the parties do not dispute is, in fact, a square-shaped utility cover—embedded in the sidewalk nearby, but that this was not a cause of his trip and fall (NYSCEF Doc. No. 87 [GML §50-h Tr. at p. 38]).

On February 23, 2022, defendant the City of New York (the "City") moved for summary judgment dismissing this action as against it arguing that: (1) it is exempt from liability for injuries caused by any sidewalk defect under Administrative Code §7-210 as it was not the owner of the abutting premises at the time of the plaintiff's accident; (2) it cannot be held liable for any injuries plaintiff sustained due to a defect in the curb because it did not receive prior written notice of this defect required under Administrative Code §7-201; and (3) to the extent plaintiff fell within the twelve-inch perimeter extending from the utility cover, the City may not be liable as it was not the owner of the utility cover. Plaintiff and the City's co-defendants opposed the motion.

In a decision and order date June 12, 2019, this Court (Hon. Verna L. Saunders) denied the motion without prejudice for leave to renew at the close of discovery, writing, in relevant part, that:

> a summary determination is not appropriate at this juncture. Continued discovery … may shed light on the questions regarding whether the City is liable for plaintiff's injuries … Moreover, this court concurs with arguments advanced by plaintiff that the affidavit of City witness Victor Green is deficient, lacking pertinent information necessary to support summary judgment … As well, between the markings on the Big Apple Map and the work permits issued to DEP, issues of fact remain as to whether the City had notice of the alleged defect and/or caused or created it.

(NYSCEF Doc. No. 99 [June 12, 2019 Decision and Order] [emphasis added]).

Plaintiff filed the note of issue on December 30, 2021 (NYSCEF Doc. No. 63 [Note of Issue]). On February 23, 2022, the City again moved for summary judgment, based on the same arguments offered in its prior motion.

In support of its motion, the City submits the affidavit of Davit Atik, an employee of the New York City Department of Finance ("DOF"), attesting to his search of the Real Property Assessment Division database maintained by the DOF which revealed that 48 West 37th Street, is classified as "Building Class 06 (office building)" and was neither a one-, two-, nor three- family solely residential property nor owned by the City (NYSCEF Doc. No. 98 [Atik Aff. at ¶¶4-6]).

The City also resubmits the affidavit of Victor Green a Department of Transportation ("DOT") employee working in its Highway Inspection and Quality Assurance Unit, attesting that based on his training and experience "the utility cover in question marked 'Water' belongs to the property owner of record" (See NYSCEF Doc. Nos. 40, 95, and 117 [Green Aff.]) as well as an affidavit from Mauro Piccininno, a supervisor of Water and Sewer Operations at the Department of Environmental Protection's Bureau of Sewer and Water Operations, attesting that based on his inspection of photographs of the subject sidewalk and Bureau of Sewer and Water Operations "Water Map," the utility cover on the sidewalk in front of 48 West 37th Street is not part of DEP's water infrastructure (See NYSCEF Doc. No. 96 [Piccinnino Aff. at ¶4]).

Finally, the City submits the affidavit of Henry Williams, another DOT employee, attesting to his search of DOT records for the location of West 37th Street between 5th Avenue and 6th Avenue for the two years up to and including the subject accident, which produced various records including, as pertinent here, four Big Apple Maps (NYSCEF Doc. Nos. 90 [DOT records] and 91 [Williams Aff. at ¶¶3-4]). In its motion, the City acknowledges that one of these Big Apple Maps includes a "symbol on West 37th Street between 5th and 6th [A]venue[s] in front of 48 West 37th Street for a broken, misaligned, or uneven curb" but argues that a Google Maps ismage of the accident location taken in June 2011—of which the City requests that the Court take judicial

notice—establishes that no curb defect was present in 2011, and therefore the defect noted in 2003 could not be the same defect that caused plaintiff's fall in 2016.

Plaintiff and the City's co-defendants oppose the motion, arguing that the Big Apple Map creates a triable of fact as to whether the City had prior written notice under Administrative Code §7-201 and that it is not appropriate for the Court to take judicial notice of this Google Maps image. They further argue that, even if the Court does take judicial notice of this image, it is insufficient to establish any intervening repair of the curb defect between 2003 and 2016. They further argue, alternatively, that issues of fact remain as to whether City caused or created the defective condition. Finally, they argue that the City's motion must be rejected because the City has failed to submit a Statement of Material Facts per Uniform Rule §202.8-g and has submitted papers in excess of the word count set by Uniform Rule §202.8-b.

DISCUSSION

As a threshold matter, the Court rejects the argument that the City's failure to submit a statement of material facts mandates the denial of the motion. A statement of material fact is no longer mandatory under Uniform Rule 202.8-g and, in any event, the City has submitted a somewhat dilatory statement of material fact, with prior permission of the Court. There is no evidence that any delay by the City in doing so has prejudiced plaintiff (See Meserole Hub LLC v Rosenzweig, 71 Misc 3d 1222(A) [Sup Ct, Kings County 2021]; but see Amos Financial LLC v Crapanzano, 145 NYS 3d 366 [Sup Ct, Rockland County 2021]). Similarly, to the extent the City's papers exceed the word limit set out in Uniform Rule 202.8-b, this was done with the permission of the Court. Accordingly, the Court addresses the City's motion on its merits.

"The proponent of a summary judgment motion 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, 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 of the action" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

The City has failed to meet its burden here. Where, as here, it remains unclear whether plaintiff tripped and fell on the sidewalk, curb, or within twelve inches of the utility cover, the City must establish its lack of liability under each of these scenarios, i.e., that it bears no liability under Administrative Code §7-201, Administrative Code §7-210 or 34 Rules of the City of New York ("RCNY") §2-07 (See Concepcion v City of New York, 2019 NY Slip Op. 30964[U], 3-4 [Sup Ct, NY County 2019]). The City has met two of these three requirements.

The City has established through the Atik affidavit that it is not responsible for any defect in the sidewalk under Administrative Code §7-210 (See King v City of New York, 2014 NY Slip Op 31428[U[, *4 [Sup Ct, NY County 2014]; Santos v City of New York, 59 Misc 3d 1211[A] [Sup Ct, Bronx County 2018] citing Vucetovic v Epsom Downs, Inc., 10 NY3d 517, 520 [2008]). The City has also established, through the Piccininno affidavit, that it does not own or control the nearby utility cover and therefore can bear no liability under 34 RCNY §2-07 if plaintiff fell within twelve inches of same[1] (See e.g., Menda v 12-14 E. 37th Dev. Corp., 57 Misc 3d 1219(A) [Sup Ct, NY County 2017]).

[1] To the extent the City also resubmits the affidavit of Victor Green in support of this branch of its motion, Justice Saunders previously determined that Green's affidavit was insufficient to establish the City's lack of liability under 34 RCNY §2-07, and this determination remains the law of the case (See DeJesus by Negron v Parkchester Gen. Hosp., 161 AD2d 465, 467 [1st Dept 1990]).

However, a lack of liability under Administrative Code §7-210 and 34 RCNY 2-07 does not extend to curb defects (See Storper v Kobe Club, 76 AD3d 426, 427 [1st Dept 2010]; see also Rojas v Empire City Subway Co. Ltd., 173 AD3d 626 [1st Dept 2019] [internal citations omitted]) and it remains an open question whether plaintiff fell due to a defect in the curb rather than the sidewalk. The City argues that it has cannot be held liable for any curb defect because it has established a lack of prior written notice of any defective condition in the curb. The Court disagrees. The Big Apple Maps produced by the City creates a question of fact as to this issue which the Google Map image produced by the City fails to resolve.

As a preliminary matter, the Court agrees with the City that it may take judicial notice of this Google Maps photo. Pursuant to CPLR §4532-b[2]

> An image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if such image, map, location, distance, calculation, or other information indicates the date such material was created and subject to a challenge that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove. A party intending to offer such image or information in evidence at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, or later for good cause shown, a party upon whom such notice is served may object to the request to admit into evidence such image or information, stating the grounds for the objection. Unless objection is made pursuant to this subdivision, the court shall take judicial notice and admit into evidence such image, map, location, distance, calculation or other information.

(CPLR §4532-b [emphasis added]).

The Court first notes that it is unclear whether the City complied with the requirements of this statute prior to including this material in its motion. In any event, the Court does not agree

[2] The City relies on CPLR §4511(c) in arguing that the Court must take judicial notice of the Google Maps image in question, but this provision was removed by the Legislature in 2019 and, effectively, replaced by CPLR §4532-b.

with the City that this image establishes conclusively that the curb defect noted in the 2003 Big Apple Map was not present by 2011 (and therefore could not be the same condition that caused plaintiff's fall in 2016). As plaintiff notes, the image "is grainy and of poor quality" and "there are marking all over the curb and sidewalk" which make it "impossible to definitively determine how many cracks are shown and where such cracks appear in this photograph, not only because of the lack of the photo's quality" (NYSCEF Doc. No. 113 [Sfouggatakis Affirm. at ¶19]). Accordingly, "[t]o draw conclusions based upon a comparison to different photographs from distorted and farther removed angles is unfair and inappropriate, especially in consideration of a summary judgment motion, where all inferences are to be found in favor of the non-moving party" (Id. at ¶20). In short, this Google Maps image does not "as a matter of law, establish that the defect depicted on the Big Apple Map was different from the one plaintiff allegedly tripped over; they merely raise factual disputes" (McDaniel v City of New York, 209 AD3d 409, 409-10 [1st Dept 2022]). Accordingly, as issues of fact remain as to whether plaintiff's fall was caused by a defect in the subject curb and whether the City had prior written notice of this defect, the City's motion for summary judgment must be denied.

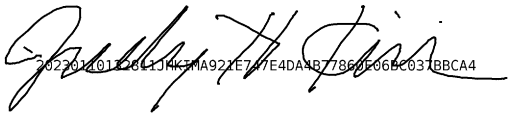
In light of the foregoing, it is

ORDERED that the City of New York's motion for summary judgment dismissing this action is denied; and it is further

ORDERED that within twenty days of the date of this decision and order counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon plaintiff as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "EFiling" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



1/10/2023
DATE

HON. JUDY H. KIM, J.S.C.

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