SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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GLENNA DAVIDSON, JOHN DAVIDSON

Plaintiff,

- v -

THE SHUBERT ORGANIZATION, INC., and 267-269 WEST 45THSTREET, LLC

Defendants.

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INDEX NO. 151080/2021

MOTION DATE 12/19/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

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

BACKGROUND

Glenna Davidson (Plaintiff) commenced this action seeking damages for personal injuries allegedly incurred on October 10, 2018, when she fell on a sidewalk ramp adjacent to a building owned by 267-269 West 45th Street, LLC (Defendant).

PENDING MOTION

On November 17, 2022, Plaintiff moved for partial summary judgment on the issue of liability against Defendant, for violation of §§7-210 and 19-152 of the New York City Administrative Code and §§2-09(f)(1) and 2-09(f)(5) of the New York City Department of Transportation Highway Rules and Regulations.

The motion was fully briefed and marked submitted on December 19, 2022, and the court reserved decision.

For the reasons stated below, the motion is denied.

ALLEGED FACTS

On October 10, 2018, Plaintiff, a resident of Metairie, Louisiana, was visiting New York City on vacation with John Davidson (Davidson) her husband. They stayed at Hotel Edison, located at 228 West 47th Street, New York, NY. After eating lunch that day, Plaintiff and Davidson went to the Al Hirschfeld Theatre, located at 302 West 45thStreet, New York, NY, to purchase tickets for a show. After purchasing tickets, they began walking back to their hotel. Their route back to the hotel took them north on the east side of Eighth Avenue. Plaintiff was walking on the right side of Davidson. Plaintiff was wearing tennis shoes and was carrying a small handbag. The sidewalk was crowded with pedestrians, and Plaintiff was looking straight ahead to navigate other pedestrians.

As they were walking in front of 724 Eighth Avenue, Davidson, was looking to his right, towards Plaintiff, when he alleges, he saw her left foot strike and get caught on the middle of a ramp on the sidewalk that caused her to trip and be propelled forward to the ground. Plaintiff struck her face and head on the sidewalk. Plaintiff did not see what caused her to fall.

An ambulance was called to the scene of the accident and Plaintiff was taken to Bellevue Hospital Center for treatment. At the hospital Plaintiff reported having two recent falls before her fall in this case, both as a result of her tripping over something (NYSCEF Doc #61). At her deposition, Plaintiff testified to a subsequent trip and fall in a park in 2021.

Annexed to the Affidavit of Davidson are nine (9) photos that depict the area of the sidewalk and ramp at issue.

Each party submits the affidavit of an expert in support of their positions. Plaintiff submits the affidavit of Stanley Fein. Mr. Fein states that the ramp Plaintiff fell on rises six inches above the surrounding sidewalk and further states:

> Clearly, the concrete was poured in such a manner so as to create a ramp from the sidewalk into the property. The resulting concrete hump shows evidence of significant wear and tear as the edges are unevenly worn away and the raised concrete is the same color and has the same wear and staining pattern as the surrounding sidewalk. Therefore, not only was this condition intentionally caused and created, but it was also present for several years before the date of Mrs. Davidson's accident.

Mr. Fein goes on to state that based on a review of Google Earth images the hump was present since July 2011. Mr. Fein does not identify a defect in the way the ramp was created or maintained which he alleges caused the fall of plaintiff, instead he concludes that the owner's failure to maintain the sidewalk caused plaintiff's fall.

Defendant submits the expert affidavit of Daniel Hogan. Mr. Hogan states that the building that had been immediately adjacent to the sidewalk location has since been demolished but was a 4-story mixed use building built in 1920 on a corner lot. The building had first floor retail spaces, which were, at times, covered by construction fencing which featured signage advertising for Telecharge.

Mr. Hogan opines that the subject ramp, which has since been removed, was a pedestrian wheelchair access ramp from the subject sidewalk to the retail store, and that the codes relied upon by plaintiff in seeking summary judgment are not applicable to the ramp. Mr. Hogan further opines that the concrete wheelchair access pedestrian ramp was appropriately constructed with an appropriate slope and flared sides. Finally, Mr. Hogan opines that such a ramp was required by the Americans with Disabilities Act due to the height difference between the sidewalk and the entrance to the store, and that the ramp contained no defects.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of*

New York, 49 N.Y.2d 557 (1980). Absent such *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

Questions of Fact Preclude an Award of Summary Judgment

The only witness alleging he what caused the fall is Davidson. Davidson does not specifically mention seeing a pedestrian ramp or any particular alleged defect in the ramp.

> " … if a key fact at issue is in the exclusive knowledge of the moving party, summary judgment ordinarily will be denied … Especially when the key issue is one on which the movant would have the burden of proof at the trial – although not only in that situation – the opposing party should be entitled to cross-examine the movant in front of the fact-trier. Implementation of that right requires a denial of the motion, leaving the issue to be tried." Siegel, Practice Commentaries, McKinney's Consol. Laws of New York, Book 7B, CPLR 3212:19, pp.28-29).

Generally, proximate cause is a question of fact for a jury. *Hain v Jamison* 28 NY3d 524 (2016); *Monell v City of New York* 84 AD2d 717, 718 (1st Dept., 1981).

The Statutes Relied Upon by Plaintiff in Seeking Summary Judgment Are Not Applicable to The Facts in The Case at Bar as The Fall Was Allegedly Caused By a Wheelchair Access Ramp and Not a Defective Sidewalk Flag

§ 19-152(a) of the New York City Administrative Code of the Department of Transportation provides in relevant part:

The owner of any real property, at his or her own cost and expense, shall (1) install, construct, repave, reconstruct and repair the sidewalk flags in front of or abutting such property …. The commissioner shall direct the owner to install, reinstall, construct, reconstruct, repave or repair only those sidewalk flags which contain a substantial defect. For the purposes of this subdivision, a substantial defect shall include any of the following:

> 4. a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch or where a sidewalk flag contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch or more in depth;

New York City, N.Y., Code § 19-152, New York City, N.Y., Code § 19-152.

§ 2-09(f)(5) of the New York City Rules and Regulations/Department of Transportation/Highway Rules provide in pertinent part:

> (5) "Substantial defects. Any of the following conditions shall be considered a substantial defect… (iv) A trip hazard where the vertical differential between adjacent flags is greater than or equal to ½" or where a flag contains one or more surface defects of one inch or greater in all horizontal directions ½" or more in depth.

By their terms these states address defects in sidewalk flags and not a ramp giving access to a building or retail establishment.

The record does not indicate who created the ramp, although plaintiff's expert alleges the ramp had been in place for a number of years.

Before § 7-210, an abutting landowner had no duty to maintain the public sidewalk and was not liable for an accident occurring thereon unless he/she created the dangerous condition

alleged or derived a special use from the sidewalk [*Weiskopf v City of New York* 5 AD3d 202, 203 (1st Dept 2004)]. Tort liability for an accident involving a defective condition on a public sidewalk was once premised only upon the abutting owner's affirmative acts in making the sidewalk more hazardous, i.e., causing or creating a dangerous condition but, since the enactment of § 7-210, it became well settled that an owner of property abutting a public sidewalk is liable for a dangerous condition upon said sidewalk even in the absence of affirmative acts (*Martinez v. City of New York,* 20 A.D.3d 513, 515 [2d Dept 2005]).

However, despite § 7-210, owners remain liable for injuries caused by defective sidewalks if they caused or created a dangerous condition thereon or derived a special use from the public sidewalk [*Meyer v City of New York,* 114 AD3d 734, 734-735 (2d Dept 2014)].

As is the case with any action sounding in premises liability, an owner of real property abutting a public sidewalk is now liable if it is proven that he or she created the dangerous condition, had prior actual or constructive notice of its existence (*Weinberg v 2345 Ocean Associates, LLC,* 108 AD3d 524, 525 [2d Dept 2013]; *Anastasio v Berry Complex, LLC,* 82 AD3d 808, 809 [2d Dept 2011]), or enjoyed a special use of the public sidewalk (*Terilli v Peluso,* 114 AD3d 523, 523 [1st Dept 2014]; *Rodriguez v City of Yonkers,* 106 AD3d 802, 803 [2d Dept 2013])

Hames v. Manhattan and Bronx Surface Transit Operating Authority, No. 310146/10, 2017 WL 1135829, at *4 (N.Y. Sup. Ct. Feb. 17, 2017).

Therefore, additional questions of fact precluding summary judgment, include whether defendants created the ramp, whether the ramp was defective, and whether any alleged defect in the ramp was the proximate cause of plaintiff's fall.

Based on the foregoing, plaintiff has failed to make out a *prima facie* case for summary judgment and plaintiff's motion for summary judgment is denied.

WHEREFORE it is hereby:

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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 "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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1/24/2023
DATE

SABRINA KRAUS, 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