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 20th day of March 2023.

PRESENT: HON. CARL J. LANDICINO,
Justice.

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LUISA JIMENEZ,

Plaintiff,

-against-

LORDAN MASPETH LLC,

Defendant.

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Index No.: 514293/2019

DECISION AND ORDER

Motion Sequence #1

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	14-25,
Opposing Affidavits (Affirmations)	28-30,
Reply Affidavits (Affirmations)	31-32

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 January 14, 2019. The Plaintiff, Luisa Jimenez (hereinafter "the Plaintiff") allegedly injured herself after tripping on a broken, uneven, cracked, sidewalk flag located adjacent to the property known as 65 Maspeth Avenue, Brooklyn, New York (hereinafter "the Premises"). The Premises are apparently owned by Defendant Lordan Maspeth, LLC (hereinafter the "Defendant").

The Plaintiff now moves (motion sequence #1) for an order pursuant to CPLR 3212, granting her motion for partial summary judgment on the issue of liability as against the Defendant. Specifically, the Plaintiff contends that the Defendant had a duty to repair the sidewalk flag at issue and that the Defendant had notice of the alleged condition prior to the Plaintiff's accident. In support of this position, the Plaintiff relies on her own deposition, the deposition of Ali Bulman, and the affidavit of Scott Silberman, P.E.

The Defendant opposes the motion. The Defendant argues that the Plaintiff has failed to meet their *prima facie* burden in as much as the Plaintiff has failed to show that the defect at issue was actionable. What is more, the Defendant argues that the Plaintiff has not met her burden regarding whether the Defendant had actual or constructive notice of the alleged dangerous condition.

"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.

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 the Defendant had actual or constructive notice 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 Ali Bulman, apparent comptroller and treasurer of the Defendant, the affidavit of Scott Silberman, P.E., and images of the alleged sidewalk defect. The Plaintiff sat for deposition on November 9, 2021. As part of the Plaintiff's deposition, when asked what caused her to trip, the Plaintiff stated, "[i]t was like broken, the crack where I stepped, and so I tripped and I fell." (See Plaintiff's Motion, Exhibit "D", Page 17). The Plaintiff was then shown an image of the defect and asked whether it was the cause of her fall. The Plaintiff stated, "[y]es." (See Plaintiff's Motion, Exhibit "D", Page 18). When asked to describe the defect, the Plaintiff stated, "[n]o, you can see right up, there's like two right there, two cracks." (See Plaintiff's Motion, Exhibit "D", Page 19). When asked to explain how she tripped on the crack, the Plaintiff stated, "I was walking from the left to the right and then my toes-I had sneakers, soft sneakers, so my toes got like inside that. It was big, like big, deep. So I tripped. It went

in and I tripped and I fell, and I fell on my knee and it hurt a lot." (See Plaintiff's Motion, Exhibit "D", Page 22).

Ali Bulman sat for his deposition on January 6, 2022. He appeared on behalf of the Defendant. When asked who he was employed by, Mr. Bulman stated, "[i]t's called Naftali Group." (See Plaintiff's Motion, Exhibit "E", Page 6). When asked what his position was at Naftali Group, Mr. Bulman stated, "I am comptroller and treasurer." (See Plaintiff's Motion, Exhibit "E", Page 6). When asked what type of business Naftali Group is, Mr. Bulman stated, "[w]e are real estate development and investment company." (See Plaintiff's Motion, Exhibit "E", Page 9). When asked if part of the business involves managing properties, Mr. Bulman stated, "[w]e used to manage properties up until 2015, and since then we are using a third-party management company." (See Plaintiff's Motion, Exhibit "E", Page 9). When asked who the third party management company was for the Premises, Mr. Bulman stated, "[f]or this building, it's Douglas Elliman Property Management." (See Plaintiff's Motion, Exhibit "E", Page 9). When asked how many times he was at the property in 2019, Mr. Bulman stated, "[o]ne or two times." When asked the same question in relation to 2018, Mr. Bulman stated, "[s]ame, yeah." (See Plaintiff's Motion, Exhibit "E", Page 18). When asked whether he ever noticed any defective condition of the sidewalk, Mr. Bulman stated, "I did not." (See Plaintiff's Motion, Exhibit "E", Page 19).

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 October 2017, more than a year prior to the Plaintiff's accident. Although the Defendant challenges the contention that such an image can prove notice, he does not object to the image. See CPLR 4532-a. Defendant concedes that the Plaintiff identified the alleged defect using the Google image. The Defendant's reliance on *Roa v City*, 188 AD3d 504, 505, 134 N.Y.S.3d 348 [2d Dept 2020], is mislaid. The Court in that matter indicated that the image was inconclusive and that in any event the opposing party provided evidence raising an issue of fact as to the condition at that time. That is not the case here.

There was no objection and the Defendant proffered nothing to raise an issue of fact regarding the condition of the sidewalk on the date reflected on the image. *See Salvia v. Hauppauge Route 111 Assocs.*, 47 AD3d 791, 792, 849 N.Y.S.2d 630, 631 [2d Dept 2008]; *and Coker v. McMillan*, 177 AD3d 680, 681, 112 N.Y.S.3d 272 [2d Dept 2019]. The Plaintiff has made a *prima facie* showing that Defendant had constructive notice of the alleged defective condition.

However, the Plaintiff has not established 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 Plaintiff 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 and 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]. Additionally, issues of comparative negligence have not been resolved.

In opposition, Defendant fails to rebut the Plaintiff's showing that Defendant had notice of the condition of the sidewalk. The testimony of Mr. Bulman generally establishes that he had no knowledge of the condition of the sidewalk. Accordingly, Plaintiff's motion for summary judgment on the issue of liability is denied, however the question of whether Defendant 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 summary judgment on the issue of liability is denied. However, the Court finds that the Defendant had notice of the condition prior to the time of the accident and had sufficient time to remedy same.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.