Fuentes v 158 Mgt., LLC
2023 NY Slip Op 32860(U)
August 16, 2023
Supreme Court, New York County
Docket Number: Index No. 159122/2017
Judge: J. Machelle Sweeting
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

----------X

MARIANA FUENTES,

Plaintiff,

- v -

158 MANAGEMENT, LLC, WISEMAN MANAGEMENT LLC, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, THE NYC DEPARTMENT OF BUILDINGS,

Defendant(s).

----------X

INDEX NO. 159122/2017

MOTION DATE 02/10/2022

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270

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

In motion sequence number 006, defendants 158 Management LLC ("158 Management") and Wiseman Management, LLC ("Wiseman Management" collectively "non-City defendants") move, pursuant to CPLR 3212, for an order granting summary judgment and dismissing all claims and cross-claims against them. The non-City defendants also move for an order awarding defendants costs and attorneys' fees pursuant to 22 NYCRR § 130-1.1.

Plaintiff Mariana Fuentes ("plaintiff") cross-moves, pursuant to CPLR 3212, for an order granting summary judgment against non-City defendants and for an order awarding plaintiff costs and attorneys' fees, pursuant to 22 NYCRR 13-1.1

Defendants the City of New York, the New York City Department of Transportation and the New York City Department of Buildings (collectively "City") cross-move, pursuant to CPLR

3212, for an order granting summary judgment and dismissing the complaint and any cross-claims against the City.

BACKGROUND

Plaintiff's Complaint

Plaintiff filed a summons and verified complaint against defendants on October 12, 2017. (*See* NYSCEF DOC. NO. 1). Plaintiff subsequently filed an amended summons and amended verified complaint. (*See* NYSCEF DOC. NO. 33). Plaintiff alleges that on August 5, 2017, she was lawfully on a sidewalk in front of 537-539 West 158th Street, New York, New York, when the sidewalk collapsed and she was caused to sustain serious and permanent injuries. (*id.* at ¶ 20). Plaintiff alleges that she was caused "to plummet to the cellar vault below" the sidewalk. (*id.* at ¶ 34).

Plaintiff alleges that 537-539 West 158th Street was owned, managed, controlled and maintained by 158 Management. (*id.* at ¶¶ 14-18). Plaintiff further alleges that 158 Management repaired the aforesaid premises and appurtenances and fixtures, including the sidewalk at the subject location prior to the date of plaintiff's accident. (*id.*).

Plaintiff alleges that Wiseman Management managed, controlled, maintained and repaired the aforesaid premises and appurtenances and fixtures, including the sidewalk at the subject location prior to the date of plaintiff's accident. (*id.* at ¶¶ 19-22).

Plaintiff further alleges that the City of New York owned, managed, controlled, maintained, inspected and repaired the sidewalk at the subject location prior to the date of the accident (*id.* at ¶¶ 23-33).

Plaintiff alleges that all defendants were negligent in their ownership, operation, management, maintenance, repair, inspection and control of the property, cellar vault and sidewalk portions in front of 537-539 West 158th Street. (*id.* at ¶ 35). Plaintiff also alleges a theory of *res*

ipsa loquitur and alleges that all defendants permitted the sidewalk and cellar vault supports to become and remain rotted, posing a hazard to individuals walking on the sidewalk. (*id.* at ¶ 36). Plaintiff alleges that the City had "actual notice" of the defective conditions for at least fifteen days prior to August 5, 2017. (*id.* at ¶37).

Plaintiff alleges that as a result of the aforementioned claims, plaintiff sustained serious physical and psychological injuries. (*id.* at ¶ 39).

PLAINTIFF'S TESTIMONY

Plaintiff testified that her accident occurred on August 5, 2017. (*See* NYSCEF DOC. NO. 250, pg. 31). On the date of her accident, plaintiff testified that she was walking on the sidewalk adjacent to a building located at 537 West 158th Street, New York, New York. (*See* NYSCEF DOC. NO. 249, pg. 10-11). She described the building as an apartment building and testified that several tenants lived there. (*id*. at pg. 11). Plaintiff testified that she was walking to her job as a flower seller. (*id.*). Plaintiff testified that she stopped at the subject location to tie a box of flowers to carry to work. (*id.*). At one point, the sidewalk underneath her collapsed. (*See* NYSCEF DOC. NO. 250, pg. 35, 47).

Prior to the day of her accident, plaintiff had not noticed any cracks or depression at the sidewalk. (*See* NYSCEF DOC. NO. 250, pg. 40). She was specifically asked:

> "Q: Do you recall if, prior to the date of the accident, the sidewalk in that location was level with the rest of the sidewalk in that immediate area?
> A: No.
>
> Q: You don't recall or it wasn't level.
>
> A: It was normal.
>
> Q: And by "normal," do you mean that there weren't any cracks or depressions or do you mean something else?
>
> A: I saw it fine."

(*id*. at pg. 40-41).

Plaintiff testified that as a result of the accident, she sustained psychological and physical injuries to her person. (*id*. at pg. 98-100).

DAVID HAKAKIAN'S TESTIMONY

At a deposition held on October 27, 2020, David Hakakian appeared on behalf of defendant 158 Management. (*See* NYSCEF DOC. NO. 186). David Hakakian testified that he has been employed by 158 Management as a manager since 2010. (*id.* at pg. 8). He testified that he is the only manager employed by 158 Management. (*id.*). He was hired to manage the properties located at 533 West 158th Street, 537 West 158th Street, and 541 West 158th Street (*id.* at pg. 19). His duties and responsibilities include running day-to-day operations such as ensuring that the boiler works, taking care of tenants and "the things that need to be taken care of in the building." (*id.* at pg. 8).

David Hakakian testified that the building at 537 West 158th Street had six floors with twenty-four apartments. (*id.* at pg. 22). He testified that there is a live-in super named Alex Rodriguez who is provided an apartment in building 537. (*id.* at pg. 26).

David Hakakian testified that prior to the date of plaintiff's accident, he was not aware of any maintenance or repairs performed on the sidewalk in front of 537 West 158th Street. (*id.* at pg. 34). David Hakakian further testified that he was not aware who was responsible for the maintenance and repair of the sidewalk in front of 537 West 158th Street. (*id.*). He had also never given any guidance or direction to Alex Rodriguez, with respect to sidewalk maintenance and repairs for the sidewalk in front of 537 West 158th Street. (*id.* at pg. 37).

David Hakakian testified that he never inspected the sidewalk in front of 537 West 158th Street to assess the need for repair or replacement of any sidewalk in front of the building (*id.* at pg. 39). He also did not employ any contractor to review the condition of the sidewalk in front of 537 West 158th Street prior to August 5, 2017. (*id.* at pg. 40). Specifically, David Hakakian testified "that this is not my job to do" but did not know whose job it was to review the condition of the sidewalk in front of 537 West 158th Street. (*id.* at pg. 40-41).

David Hakakian testified that to his knowledge, prior to August 5, 2017, he did not know if any work was done with respect to the basement at 537 West 158th Street. (*id.* at pg. 45). David Hakakian testified that no records were maintained for any maintenance or repair within the three buildings he managed, including the sidewalk, and he could not articulate a reason as to why records were not kept. (*id.* at pg. 46). David Hakakian also testified that he does not know what a cellar vault is. (*id.* at pg. 49).

David Hakakian testified that prior to August 5, 2017, 537 West 158th Street had received a violation from the Department of Buildings, but he did not recall the details of the violation. (*id.* at pg. 66). However, he testified that both he and Alex Rodriguez were responsible for correcting violations (*id.*). David Hakakian testified that prior to August 5, 2017, he did not observe any cracks or depressions on the sidewalk in-front of building 537. (*id.* at pg. 69-70). He also did not become aware of any issues or conditions in connection with the basement of building 537 prior to the date of accident. (*id.* at pg. 70).

ALEX RODRIGUEZ'S TESTIMONY

At a deposition held on December 23, 2020, Alex Rodriguez appeared on behalf of defendant 158 Management. (*See* NYSCEF DOC. NO. 187). Alex Rodriguez testified that he was employed in 2010 by 158 Management. (*id.* at pg. 13-14). He was hired to fix small things in the apartment building, including painting, but he was not provided with a job title. (*id.* at pg. 14). Specifically, he would receive a list every morning of things that needed to be repaired in each apartment and he would fix it. (*id.* at pg. 16). Alex Rodriguez testified that he was hired to work at the buildings located at 533, 537 and 541 West 158th Street. (*id.* at pg. 17). Alex Rodriguez testified that he lives in the basement of building 537, where he is provided an apartment. (*id.* at pg. 21).

Alex Rodriguez testified that he is the only individual employed in connection to the maintenance and repair of apartments and property at 533, 537 and 541 West 158th Street. (*id.* at pg. 26). He testified that David Hakakian is his boss, but he does not know who Solomon Hakakian is, nr who the owners of 158 Management are. (*id.* at pg. 29-30). Alex Rodriguez testified that he only has contact with David Hakakian and a secretary named Lida. (*id.* at pg. 30). Lida provides him with the weekly schedule for repairs. (*id.*).

Alex Rodriguez testified that 537 West 158th Street is a six floor building with 24 total apartments. (*id.* at pg. 34). He further added that building 537 has a cellar. (*id.* at pg. 35). Alex Rodriguez testified that he knew plaintiff, as she lived in apartment 22 of building 541. (*id.* at pg. 39).

Alex Rodriguez testified that on the day of plaintiff's accident, he was inside of his apartment when the sidewalk collapsed in front of 537 West 158th Street. Alex Rodriguez testified that he learned of the collapse when one of the tenants saw the collapse and called him. (*id.* at pg.

40). He testified that he physically went to the front of the building and was informed that the sidewalk had collapsed. (*id.* at pg. 41-42). He then saw plaintiff in a hole where she fell. (*id.* at pg. 42).

Alex Rodriguez described the hole as being 3 feet by 4 feet. (*id.* at pg. 43). He testified it was right by the entrance next to the building. (*id.*). Alex Rodriguez testified that he saw the hole was around 7 feet deep and he could physically observe plaintiff. (*id.*).

Alex Rodriguez testified that in order for paramedics and fire personnel to gain access to plaintiff, who was at the bottom of the sidewalk collapse, they would need to enter the building through the basement. (*id.* at pg. 45-46). Specifically, Alex Rodriguez was asked:

> Q: So my question is: Once you took the officers from the front door of the basement that leads onto the sidewalk of West 158th Street, describe the route you took in order to get to the location where Ms. Fuentes was, which was located in the front portion of the basement or the cellar of 537 West 158th Street?
>
> A: After you entered through the front door of the basement, the one located on 158th Street, you take the first door. That is the one that takes you to the front of the cellar where Ms. Fuentes was…All I am saying is we took the first door, and that is the one that takes you to the front of the cellar.

(*id.* at pg. 49-50).

Alex Rodriguez testified that he could see plaintiff from both the sidewalk and the basement. Once in the basement, he was "around 6 feet away from her." (*id.* at pg. 52).

Alex Rodriguez testified that in the seven years he was employed prior to the date of the accident, he was not aware of any major improvements to any of the buildings, nor of any maintenance or repair work performed on the sidewalk adjacent to 537. (*id.* at pg. 61).

Alex Rodriguez testified that after the collapse of the sidewalk, he came to learn that a portion of 537 West 158th Street went underneath the sidewalk in front of the building. (*id.* at pg. 107). He specifically testified "when the workers repaired the sidewalk, they did some demolition, and I could see that the basement was underneath it." (*id.*).

AFFIDAVIT OF JUAN TRUJILLO[1]

In support of her motion for summary judgment, plaintiff submits the affidavit of Juan Trujillo dated April 15, 2022. (*See* NYSCEF DOC. NO. 210). The affidavit states that Juan Trujillo resides at 541 West 158th Street, Apartment 22, New York, New York 10032. (*id.* at ¶ 1). He has lived at that address for approximately 26 years. (*id.* at ¶ 2). The affidavit states that he was aware of the condition of the sidewalk in front of 537, 539, 541 and 543 West 158th Street both before and after August 5, 2017. (*id.* at ¶ 3).

Annexed to the affidavit are three photographs, marked plaintiff's "Exhibit 10," "Exhibit 2" and "Exhibit 4." Juan Trujillo states that the attached photographs are a fair and accurate depiction of the sidewalk in front of 541-543 West 158th Street on August 5, 2017. (*id.* at ¶ 4). The photographs also purport to demonstrate what the condition of the sidewalk in front of 537-539 West 158th Street was like prior to August 5, 2017 "in that there were numerous cracks on the sidewalk that resembled the cracks in front of 541-543 West 158th Street." (*id.* at ¶ 5).

[1] Plaintiff testified at her deposition that Juan Trujillo is her husband (*See* NYSCEF DOC. 250 at pg. 12-13).

AFFIDAVIT OF MICHAEL KRAVITZ

In support of her motion for summary judgment, plaintiff submits the affidavit of Michael Kravitz, PE, DFE dated April 20, 2022. (*See* NYSCEF DOC. NO. 211). The affidavit states that he is a professional engineer licensed in the states of New York, New Jersey and New Hampshire.[2] (*id.* at ¶ 2). The affidavit further states that as part of his experience, he has supervised and designed building beams and columns, and has also supervised and designed building columns, beams and girders for major projects. (*id.*).

The affidavit of Michael Kravitz states, in relevant part, that he reviewed several Google Earth photographs of the front of 537 West 158th Street for July of 2011, August of 2013, May of 2014, and May of 2016, which are annexed to the affidavit. (*id.* at ¶ 6). In reviewing the photographs, Michael Kravitz affirms that "the images demonstrate the sidewalk panels adjacent to the building sloped back toward the building as indicated by the residue that formed on the sidewalk surface adjacent to the building." (*id.* at ¶ 13). He adds "proper sidewalk construction slopes toward the curb to prevent storm water infiltration into the building. This is an obvious indication that water was ponding and/or penetrating into the building." (*id.*).

[2] According to the affidavit, Michael Kravitz obtained a Bachelor of Civil Engineering from the City College of New York in 1966 and he completed his graduate studies at City College of New York in structures, soil mechanics and transportation. (*See* NYSCEF DOC. NO. 211 at ¶ 2). The affidavit further states that he is a Certified Diplomate Forensic Engineer, the past President and a Fellow of the National Academy of Forensic Engineers, a Member of the American Society of Civil Engineers, a Member of the Society of Automotive Engineers, a Member of the National Society of Professional Engineers, a past member of the Institute of Transportation Engineers, and a past Associate of the American Academy of Forensic Sciences. (*id.*). The affidavit states that he has worked as a forensic consulting engineer for over 30 years. (*id.*). Prior to that time, he was "employed as a Senior Civil Engineer for Salomon Associates, design and analyzing structures, a Construction Superintendent for Corinno Civetta Construction Company, a Civil Engineer for Marvin M. Spector, P.E., L.S." (*id.*). The affidavit further states that Michael Kravitz has "been qualified in New York Courts as an expert witness in the field of Professional Engineering." (*id.* at ¶ 4).

Michael Kravitz opines that a constant flow of water infiltrated the cellar, creating high humidity and thus caused the steel beams that supported the cellar ceiling under the sidewalk to corrode. (*id.* at ¶ 18). Michael Kravitz further opined that "the corroded steel beams which supported the sidewalk above lost material thereby reducing its ability to support the loads and fail as evidenced in the inserted photograph. (*id.*).

Michael Kravitz states that he observed the cellar vault on November 20, 2019, opined that the cellar ceiling beams continued to show signs of severe corrosion. (*id.* at ¶ 19). He added "the cellar vault ceiling beams could no longer support the sidewalk load or the additional live load of pedestrians." (*id.*). The cause of corrosion was water infiltrating the cellar through the sidewalk and south stone walls of the cellar." (*id.*).

AFFIDAVIT OF CHRISTOPHER MENJIVAR

In support of its motion for summary judgment, the City submits the affidavit of Christopher Menjivar dated November 14, 2019. (*See* NYSCEF DOC. NO. 252). Christopher Menjivar states that he is a paralegal working with the Department of Transportation of the City of New York ("DOT"). (*id.* at ¶ 1). As part of his job duties, he personally performs a search for records maintained by DOT. (*id.*).

The affidavit states that Christopher Menjivar personally performed a search for numerous records, including permits, applications for permits, Office of Construction Mitigation and Coordination files ("OCMC"), corrective action request ("CAR"), notices of violation ("NOV"), notifications for immediate corrective action ("NICAs"), inspections, contracts, maintenance and repair orders, complaints, sidewalk violations, resurfacing/milling records and Big Apple Maps. for the sidewalk located at West 158th Street, between Broadway and Amsterdam Avenue (and on

the side of 537 West 158th Street), in the County, City and State of New York for a duration of two years prior to, and including, August 5, 2017. (*id.* at ¶ 3).

Christopher Menjivar affirmed that his search revealed 49 permits, 49 hardcopy permits, 49 applications, 1 OCMC file, 4 CAR, 3 NOV, 0 NICA, 79 inspections, 1 contract, 0 maintenance and repair orders/records, 0 complaints, 0 sidewalk violations, 1 sidewalk inspection, 0 sidewalk re-inspections, 0 copies of sidewalk violations and 0 Office of Special Events Reports.[3] (*id.*). Moreover, the search revealed three Big Apple Maps labeled Volume 11N, pages 70, 72 and 78. (*id.* at ¶ 4).

AFFIRMATION OF DAVID ATIK

In support of its motion for summary judgment, the City submits the affirmation of David C. Atik dated May 11, 2022. (*See* NYSCEF DOC. NO. 254). David Atik is an attorney employed by the City of New York, Department of Finance ("DOF"). His duties and responsibilities include responding to Freedom of Information Law ("FOIL") requests, and complying with and responding to subpoenas and other demands for information regarding DOF's various property records. (*id.* at ¶1). David Atik also searches for records maintained in the Property Tax Assessment ("PTS") database. (*id.* at ¶ 2). David Atik affirms that the information contained in the PTS includes property ownership information and building classification information. (*id.*).

David Atik affirms that he performed a search of the PTS database for records relating to 537-539 West 158th Street, New York, New York. The address is identified by Block 2117 and Lot 57 for the County of New York. (*id.* at ¶ 4). David Atik affirms that the search revealed that the City did not own the aforementioned property. (*id.* at ¶ 5). Moreover, the search revealed that

[3] The results of Christopher Menjivar's records are annexed as NYSCEF DOC. NO. 253 and labeled as "City's Response to CSO – DOT Records."

the property was classified as a Building Class C1 (walk-up over six families) and not a one-, two- or three-family solely residential property. (*id.* at ¶ 6).

AFFIDAVIT OF FRANK COSIMANO

In support of its motion for summary judgment, the City submits the affidavit of Frank Cosimano dated May 4, 2022. (*See* NYSCEF DOC. NO. 255). Frank Cosimano states that he is employed by the New York City Department of Buildings ("DOB") as a supervising inspector of DOB. (*id.* at ¶ 1). His duties include inspecting building locations abutting sidewalks in the City to enforce DOB's rules and regulations regarding building conditions. (*id*. at ¶ 2). His duties require him to be able to identify the entities responsible for building hazards by a visual inspection, in order for NOV and DOB violations to be issued. (*id*. at ¶ 3)

Frank Cosimano states that he personally conducted an inspection on August 5, 2017, pursuant to Complaint No. 1457085 of the sidewalk and sidewalk vault abutting 537-539 West 158th Street in the County, City and State of New York. (*id*. at ¶ 4). He also conducted a subsequent inspection of the vault at the premises after the commencement of the litigation, with opposing parties present. (*id*.).

Frank Cosimano states that in an attempt to identify the entity responsible for the maintenance of this vault, he observed the design, structure and physical appearance of the vault to assess who, if anyone, had conducted maintenance of the fault. (*id*. at ¶ 5). He also examined the entry and exit points to assess the use of the vault. (*id*.).

Frank Cosimano opines that vaults owned and managed by the City typically allow for a public utility, such as a sewer to run through the vault and as such, have exit and entry points to the roadway. (*id*.). He further stated that vaults owned and managed by private entities tend to be fully connected to the abutting property, with no entry or exit points to the street. (*id*.).

Frank Cosimano states that he observed no entryways or exits from the sidewalk vault to the street with respect to the vault at issue. (*id*. at ¶ 6). The only entry and exit to the vault was through the premises. (*id*.). Moreover, Frank Cosimano states that he examined the structure of the vault, and based on his prior experience, observed that efforts had been made to reinforce the vault and "such reinforcement was not the kind conducted by the City of New York." (*id*.).

Frank Cosimano concludes that based on his over twenty years' experience as DOB inspector, the sidewalk vault "is not owned, maintained, managed or controlled by the City of New York and was not owned, maintained, managed or controlled by the City of New York on August 5, 2017." (*id*. at ¶ 7).

AFFIDAVIT OF DAVID SCHLOSS

In support of its motion for summary judgment, the City submits the affidavit of David Schloss dated April 15, 2019. (*See* NYSCEF DOC. NO. 256). David Schloss is a Senior Title Examiner with the New York City Law Department. (*id*. at ¶ 1). His duties include the examination and certification of real estate titles in New York County. (*id*.).

David Schloss conducted a title search for 537-539 West 158th Street, New York, New York being designated on the tax map at Block 2117, Lot 57. (*id*. at ¶ 2). According to David Schloss, record title for New York Block 2117, Lot 57 on August 5, 2017 was in 158 Management, pursuant to a deed recorded June 11, 2009. (*id*. at ¶ 3).

DISCUSSION

It is well settled that "[t]he 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 eliminate any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made a *prima facie* showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]).

The court's function on summary judgment is "issue-finding rather than issue-determination" (*Mayo v Santis*, 74 AD3d 470, 471 [1st Dept 2010]). In deciding the motion, "the court should draw all reasonable inferences in favor of the nonmoving party" and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989] [citations omitted]). "'[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" to defeat a motion for summary judgment (*Siegel v City of New York*, 86 AD3d 452, 455 [1st Dept 2011], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Furthermore, since summary judgment is a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Additionally, Section 7-210 (b) of the New York City Administrative Code states, in relevant part:

> 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.

Movant non-City defendants argue that they are entitled to summary judgment as a matter of law because defendant Wiseman had no duty to maintain the sidewalk adjacent to the subject premises. (*See* NYSCEF DOC. NO. 175). Non-City defendants further argue that they had no notice of any alleged defect in the sidewalk that caused the collapse. (*id.*). Non-City movant maintains that building defendants "were not even aware the subterranean vault existed" and therefore could not have performed any affirmative act within the vault nor could they have observed or repaired any defects. (*id.*).

Plaintiff argues in her cross-motion that she is entitled to summary judgment because non-City defendants had a duty to maintain the sidewalk abutting the subject premises, as well as the subject building and vault. (*See* NYSCEF DOC. NO. 214). Plaintiff further argues that non-City defendants are liable under a theory of *res ipsa loquitur*. (*id.*). Finally, plaintiff further contends that the non-City defendants had notice of both the defective sidewalk abutting the subject premises as well as the severely corroded support beams in the cellar vault. (*id.*). Specifically, plaintiff maintains that the non-City defendants were "on notice of a dangerous condition because of the sidewalk cracks and back-sloping sidewalk that were signs of water damage, in other words ponding water and penetration into the sidewalk and building." (*id.* at ¶ 76)."

The City argues in its cross-motion that the City is not liable for the plaintiff's alleged injuries pursuant to § 7-210 of the New York City Administrative Code. (*See* NYSCEF DOC. NO. 237, at ¶¶ 22-28). In opposition to the City's motion, the non-City defendants argue that the City did not conclusively demonstrate that the subterranean vault is not the property of the City. (*See* NYSCEF DOC. NO. 262). Non-City defendants further argue that § 7-210 of the New York City Administrative Code is inapplicable since there is a question of fact regarding negligence with respect to a subterranean vault underneath the subject sidewalk. (*See* NYSCEF DOC. NO. 237, at ¶ 22).[4]

It is undisputed that plaintiff's accident occurred on the sidewalk abutting 537 West 158th Street, New York. New York. (*See* NYSCEF DOC. NO. 262, ¶ 15). There is also no question that 537 West 158th Street, New York, NY, which is owned by co-defendant 158 Management, is a residential building with apartments on six separate floors. (*See* NYSCEF DOC. NO. 254 at ¶ 6). Therefore, 537 West 158th Street, New York, NY is a non-exempt property under § 7-210.

Pursuant to § 7-210 (b), co-defendant 158 Management as "the owner of real property abutting any sidewalk…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." As 537 West 158th Street, New York, NY is a non-exempt property under § 7-210, the duty shifts to 158 Management to maintain the sidewalk in a reasonably safe condition. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]).

With regards to plaintiff's argument that *res ipsa loquitur* is applicable, the Court of Appeals has held that *res ipsa loquitur* is warranted when the plaintiff establishes "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence, 2) it

[4] Plaintiff has not raised any opposition to City's cross-motion for summary judgment.

must be caused by an agency or instrumentality within the exclusive control of the defendant, 3) it must not have been due to any voluntary action or contribution on the part of plaintiff" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986][internal quotation marks and citation omitted]). Moreover, the First Department has held that the application of the doctrine of *res ipsa loquitur* is warranted in circumstances surrounding the collapse of a sidewalk (*Williams v Forward Realty Corp*., 198 AD3d 503, 504 [1st Dept 2021]).

Here, plaintiff has demonstrated that the first element of *res ipsa loquitur* has been satisfied. Plaintiff was injured when the sidewalk, which also served as the ceiling for an underground cellar vault collapsed. The entire collapse of a sidewalk, that functions as a ceiling for a vault, does not ordinarily occur in the absence of negligence. As such, the first element has been met.

The evidence also supports the second element of *res ipsa loquitur*. "Exclusive control of the instrumentality of the accident, 'is not an absolute rigid concept, but is subordinate to its general purpose, that of indicating that it was probably the defendant's negligence which caused the accident in question'" (*Pavon v Rudin*, 254 AD2d 143, 145 [1st Dept 1998] quoting *Nesbit v New York City Tr. Auth*, 170 AD2d 92, 98 [1st Dept 1991]). Moreover, exclusivity does not require elimination of all other possible causes of the incident (*Banca Di Roma v Mutual of Am. Life Ins. Co., Inc*., 17 AD3d 119, 121 [1st Dept\ 2005]).

Here, the evidence shows plaintiff fell through the sidewalk adjacent to the building at 537 West 158th Street, which was owned by defendant 158 Management. Additionally, when the sidewalk collapsed, plaintiff ultimately landed in a vault cellar that was accessible only through the aforementioned building owned by 158 Management. Contrary to non-City defendants' position that they lacked knowledge that the vault existed (*See* NYSCEF DOC. NO. 175, ¶ 67),

the super of the building, Alex Rodriguez, certainly testified that he knew how to grant first responders access to plaintiff in the cellar vault. When asked if he physically went with police officers through the door in order to get to the front of the cellar, he testified "yes. I entered with the police officers. I showed them the way. I told them where she was, and they asked me to leave the door open." (*See* NYSCEF DOC. NO. 187, pg. 50).

The evidence presented also demonstrates that non-City defendants had exclusive control of the instrumentality, namely the vault and its ceiling. Specifically, the affidavit of Frank Cosimano states that based upon his experience, "vaults owned and managed by private entities tend to be fully connected to the abutting property, with no entry or exit points to the street." (*See* NYSCEF DOC. NO. 255 at ¶ 5). He observed that the only entry and exit was through the premises of 537-539 West 158th Street. (*id.* ¶ 5). This again is consistent with the testimony of Alex Rodriguez, who testified that there was a door inside the basement "the one located on 158th Street, you take the first door. That is the one that takes you to the front of the cellar where Ms. Fuentes was." (*See* NYSCEF DOC. NO. 223, pg. 50). Accordingly, the second element of *res ipsa loquitur* is also satisfied.

Lastly, the plaintiff has demonstrated that the accident was not due to any voluntary action or contribution by her. Plaintiff herself testified that on the day of her accident, she merely stood on the sidewalk adjacent to 537 West 158th Street, as she had done many times in the past, when it suddenly collapsed underneath her. (*See* NYSCEF DOC. NO. 250, pg. 35, 47). Non-City defendants fail to demonstrate how the sidewalk collapse could have been caused by plaintiff.

In opposition, non-City defendants argue that plaintiff cannot argue that two entirely independent co-defendants are liable under the doctrine of *res ipsa loquitur* as such a claim inherently undermines the "exclusive control" needed for the doctrine to apply. (*See* NYSCEF DOC. NO. 256, pg. 66).

The evidence establishes that on the date of plaintiff's accident, the property of 537 West 158th Street, New York, NY was owned by 158 Management which had a duty, pursuant to § 7-210 of the New York City Administrative Code, to maintain the sidewalk in a reasonably safe condition. Moreover, the evidence establishes that the cellar vault and its internal structure that plaintiff fell into was only accessible through the building, which is sufficient to constitute exclusive control. Lastly, the affidavit provided by the plaintiff's expert, Michael Kravitz, establishes that he observed corroded vault ceiling beams after the accident that resulted in the sidewalk collapsing underneath and thus causing plaintiff's accident. (*See* NYSCEF DOC. NO. 211). Accordingly, the elements of *res ipsa loquitur* are satisfied against 158 Management. Therefore, that branch of plaintiff's motion for summary judgment as against 158 Management is granted.

However, plaintiff has failed to meet her burden to demonstrate that Wiseman Management may be held negligent. Plaintiff's own moving papers state that no discovery has been provided by Wiseman Management, nor has Wiseman Management appeared for a deposition. Plaintiff's papers state "plaintiff initially sued Defendant [Wiseman Management] because Defendant's own insurance carrier identified Defendant [Wiseman Management] as an involved party in the herein incident." (*See* NYSCEF DOC. NO. 269, ¶ 33). At this juncture, it is still unclear what, if any, role Wiseman Management played with respect to the subject premises or incident. Accordingly, plaintiff's motion for summary judgment insofar as it concerns defendant Wiseman is denied.

As the elements of *res ipsa loquitur* are herein satisfied, the non-City defendants' motion for summary judgment is denied. Non-City defendants' contention that they lacked actual or constructive notice is unavailing, as "notice of a defect is inferred when the doctrine" of *res ipsa loquitur* applies. (*Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 163 [1st Dept 2015]). The Court has reviewed the numerous affidavits and affirmations submitted with respect to notice and, while informative, the Court need not proceed with any further discussion as to notice as it is inferred.

"Where a plaintiff's '*prima facie* proof is so convincing that the inference of negligence arising therefrom is inescapable and unrebutted, summary judgment on liability is proper.'" (*Thomas v New York Univ. Med. Ctr.*, 283 AD2d 316, 317 [1st Dept 2001], quoting *Salter v Deaconess Family Medicine Ctr.*, 267 AD2d 976, 977 [4th Dept 1999]). Here, the non-City defendants' contend that plaintiff cannot establish that they had exclusive control over the "section of sidewalk that collapsed, since such was open to the public." (*See* NYSCEF DOC. NO. 175, ¶ 65). Non-City defendants further argue that "it is undisputed" that the building defendants were entirely unaware of the existence of the subterranean vault prior to the subject accident. (*id*, ¶ 65).

Both of the non-City defendants' arguments are unavailing. Section 7-210(b) of the New York City Administrative Code shifts the duty to maintain the sidewalk in a reasonably safe condition from the City to the property owner, in this instance 158 Management. Thus, 158 Management bears any liability for the condition of the sidewalk adjacent to 537 West 158th Street. Moreover, the testimony of the building's own super, demonstrates that he knew how to access the cellar vault that plaintiff fell in, through a door located within the building. As the cellar vault was only accessible through the building, the non-City defendants' argument that it did not know the vault existed is wholly disingenuous. The non-City defendants have failed to submit any

evidentiary proof to rebut the permissible inference of negligence (*O'Connor v 72 St. E. Corp.*, 224 AD2d 246, 247 [1st Dept 1996] *citing Dillenberger v 74 Fifth Ave. Owners Corp.*, 155 AD2d 327, 327 [1st Dept. 1989]). Accordingly, the non-City defendants' motion is denied.

With respect to the City's cross-motion for summary judgment, it is clear that pursuant to New York City Administrative Code § 7-210(b), co-defendant 158 Management, LLC as "the owner of real property abutting any sidewalk…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." As 537-539 West 158th Street, New York, NY is a non-exempt property under § 7-210, the duty shifts to 158 Management to maintain the sidewalk in a reasonably safe condition.

In opposition to the City's motion, the non-City defendants argue that the City did not conclusively demonstrate that the subterranean vault is not the property of the City (*See* NYSCEF DOC. NO. 262). Non-City defendants further argue that § 7-210 of the New York City Administrative Code is inapplicable since there is a question of negligence with respect to a subterranean vault underneath the subject sidewalk. (*id.* at ¶ 22).[5]

Non-City defendants' objection to the applicability of § 7-210 of the New York City Administrative Code is misguided. As discussed above, 537-539 West 158th Street is a non-exempt property under § 7-210. It is undisputed that the sidewalk plaintiff was walking on collapsed, causing her to fall into a cellar vault.

Here, the evidence supports, and the City has established, that it did not own the cellar vault that ultimately collapsed underneath the sidewalk. Courts have routinely held that "imposition of liability for a dangerous condition on property must be predicated upon occupancy,

[5] Plaintiff has not raised any opposition to City's cross-motion for summary judgment.

ownership, control, or special use of the premises." (*Gould v Lex Shakos, LLC*, Sup Ct, NY County, March 15, 2023, Kraus, J., Index No. 154540/2019, *quoting Velez v Captain Luna's Mar.*, 74 AD3d 1191, 1192 [2d Dept. 2010]. *See also LaGuarina v Metropolitan Tr. Auth*, 109 AD3d 793, 795 [2d Dept 2013]). Therefore, "'where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property.'" (*Turrisi v Pondesora, Inc.*, 179 AD2d 956, 957 [3d 1992]).

The affidavit of Frank Cosimano states that based on his experience, "vaults owned and managed by private entities tend to be fully connected to the abutting property, with no entry or exit points to the street." (*See* NYSCEF DOC. NO. 255 at ¶ 5). He observed that the only entry and exit was through the premises of 537-539 West 158th Street. (*id.* ¶ 5). This is consistent with the testimony of Alex Rodriguez, who testified that there was a door inside the basement "the one located on 158th Street, you take the first door. That is the one that takes you to the front of the cellar where Ms. Fuentes was." (*See* NYSCEF DOC. NO. 223, pg. 50).

As such, the City has established, *prima facie*, that it did not own, occupy, control or have any special use of the cellar vault in question. In opposition, non-City defendants attempt to create a feigned question of fact without providing "evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). Non-City defendants argue that the affidavit of Frank Cosimano "states simply that the vault <u>*probably*</u> (emphasis added by non-City defendants) is not owned by the CITY DEFENDANTS, and therefore his findings are speculative." (*See* NYSCEF DOC. 262 at ¶ 20).

Non-City defendants do not proffer any evidence, other than mere speculation in an affidavit, to raise a triable question of fact. In contrast, the City has made a *prima facie* showing that it did not own the cellar vault, based upon the fact that it did not have access to the vault and that the vault had no entry or exit points along the sidewalk. The only way the cellar vault could be accessed was through the non-City defendants' property.

Additionally, that branch of the City's cross-motion that it did not cause or create the subject condition that caused plaintiff's accident is unopposed by co-Defendants. Therefore, the City has established that it is entitled to summary judgment pursuant to § 7-210(b) of the New York City Administrative Code. The City has also made a *prima facie* showing that it did not own the subject cellar vault that collapsed, and non-City defendants have failed to establish that material issues of fact exist. Accordingly, the City's cross-motion is granted.

Lastly, both plaintiff and non-City defendants request sanctions. Specifically, non-City defendants seek costs and sanctions predicated upon plaintiff's failure to discontinue the action against Wiseman. Plaintiff, in turn, seeks costs and sanctions based upon the non-City defendants' request that costs and sanctions be awarded.

Pursuant to 22 NYCRR § 130-1.1 Rules of the Chief Administrator of the Courts, the court may award reasonable attorney's fees or costs in the form of reimbursement for actual expenses reasonably incurred or impose financial sanctions on any party or attorney who engages in frivolous conduct. Conduct for the purposes of this rule is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false

(22 NYCRR § 130-1.1[c][1], [2], [3]).

To determine whether conduct is frivolous, the court considers, "among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal factual basis was apparent or should have been apparent, or was brought to the attention of counsel or the party" (22 NYCR §130-1.1[c]).

Here, it remains unclear what, if any, role Wiseman had with respect to the subject property or incident. As discovery is incomplete with respect to defendant Wiseman, it cannot be determined at this time if any of the aforementioned conduct is frivolous. The court has considered the above, and in its discretion, denies both plaintiff's and non-City defendants' request for sanctions.

In conclusion, the non-City defendants' motion for summary judgment on the issue of liability is denied. Furthermore, that branch of the non-City defendants' motion seeking costs and sanctions against plaintiff is also denied.

The plaintiff's cross-motion for summary judgment on liability, pursuant to a theory of *res ipsa loquitur*, is granted only with respect to defendant 158 Management. Plaintiff's motion against Wiseman is denied. Plaintiff's motion seeking costs and sanctions against non-City defendants is also denied.

The City's motion seeking summary judgment on the issue of liability, pursuant to Section 7-210 of the New York City Administrative code, is granted.

CONCLUSION

In accordance with all of the aforesaid reasons set forth herein, it is hereby:

ORDERED that defendants 158 MANAGEMENT LLC and WISEMAN MANAGEMENT, LLC's motion for summary judgment seeking dismissal against plaintiff MARIANA FUENTES is **DENIED**; and it is further

ORDERED that the branch of defendants 158 MANAGEMENT LLC and WISEMAN MANAGEMENT, LLC's motion for costs is **DENIED**; and it is further

ORDERED that the branch of plaintiff MARIANA FUENTES' cross-motion for summary judgment regarding liability against defendant 158 MANAGEMENT is **GRANTED**; and it is further

ORDERED that the branch of plaintiff MARIANA FUENTES' motion for summary judgment regarding liability against defendant WISEMAN MANAGEMENT, LLC is **DENIED**; and it is further

ORDERED that the part of plaintiff MARIANA FUENTES' motion for costs is **DENIED**; and it is further

ORDERED that the defendants the CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION and the NYC DEPARTMENT OF BUILDINGS'S motion for summary judgment is **GRANTED**; and it is further

ORDERED that all claims and cross-claims against CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION and the NYC DEPARTMENT OF BUILDINGS by plaintiff MARIANA FUENTES and defendants 158 MANAGEMENT, LLC and WISEMAN MANAGEMENT, LLC, are dismissed; and it is

further

ORDERED that the Clerk of the Court shall enter judgment in favor of CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION and the NYC DEPARTMENT OF BUILDINGS, dismissing the claims and cross-claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the caption in this case shall be amended to remove the City of New York, The New York City Department of Transportation and the New York City Department of Buildings as named defendants, as they are no longer parties in this action; and it is further

ORDERED that this matter and any further motions or proceedings are transferred to a General IAS part, as none of the remaining parties in this action are represented by the New York City Law Department, Office of the Corporation Counsel; and it is further

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

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

ORDERED that the balance of this action is severed and continued.

8/16/2023							
DATE				J. MACHELLE SWEETING, J.S.C.			
CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:	X	INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE