# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

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

*Justice*

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MARIA RIVERA,

Plaintiff,

- v -

1325 FIFTH AVENUE LLC, TAHL-PROPP EQUITIES LLC, FIFTH AVENUE SADC INC., CITY OF NEW YORK,

Defendants.

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**INDEX NO.** 162292/2019

**MOTION DATE** 12/06/2022

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 72, 73, 74, 75, 76, 77, 78, 79, 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, 105, 106, 107

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion by defendant the City of New York (the "City") for summary judgment dismissing this action as against it is granted for the reasons set forth below.

Plaintiff alleges that on December 4, 2018, she tripped and fell over a raised portion of the sidewalk flag abutting 1325 Fifth Avenue, New York, New York (the "Building"), sustaining injuries (NYSCEF Doc. Nos. 77 [Compl. at ¶¶2, 19-22] and 80 [GML §50-h at pp. 16-17]). Plaintiff asserts negligence claims against: (i) the Building's owner, 1325 Fifth Avenue, LLC ("1325 Fifth"); (ii) the Building's managing agent, Tahl-Propp Equities LLC (collectively with 1325 Fifth, the "1325 Fifth Defendants"); (iii) the Building's lessee, Fifth Avenue SADC Inc.; and (iv) the City, alleging that these defendants created the defect that precipitated her fall and failed to repair same (NYSCEF Doc. No. 77 [Compl. at ¶¶22]).

The City now moves, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's complaint and all crossclaims against it on the grounds that it is exempt from liability

under Administrative Code §7-210. In support of its motion, the City submits: (i) the affirmation of David Atik, an employee for the New York City Department of Finance ("DOF"), attesting that DOF's Property Tax System database indicates that the Building was not owned by the City on the date of plaintiff's accident and that the Building is classified as a Building Class D7 (elevator apartments with stores) and not a one-, two-, or three-family residential property (NYSCEF Doc. No. 84 [Atik Affirm. at ¶¶4-6]); (ii) the affidavit of Tatiana Pavlova, an employee for the New York City Department of Transportation ("DOT"), detailing the results of her search of DOT records for the sidewalk of Fifth Avenue, between East 111th Street and East 112th Street, for the two-year period prior to and including the date of the subject accident (NYSCEF Doc. No. 83 [Pavlova Aff. at ¶¶3-4]); and (iii) the records produced by Pavlova's search (NYSCEF Doc. No. 82 [DOT Records]).

In opposition, plaintiff argues that an issue of fact exists as to whether the City created the subject defect. In support of this theory, plaintiff relies upon the deposition testimony of Anthony Ranire—a witness for defendant Manhattan North in a prior action entitled Alexandra Aviles v 1325 Fifth Avenue LLC, Manhattan North Management Company, Inc., Tahl-Propp Equities LLC, H&R Block, and the City of New York, Index Number 158733/2013 (Sup Ct., NY Cty) (the "Aviles Action"). In the Aviles Action, plaintiff therein tripped and fell on March 6, 2013 on a defective flag "several sidewalk panels north" of where the accident occurred in this action. Mr. Ranire, the director of construction for the Building's construction agent at that time, Manhattan North, testified that he was in charge of addressing any violations issued by New York City for damaged sidewalks (NYSCEF Doc. No. 95 [Ranire EBT at pp. 6-9]). At his deposition he was shown a record of a complaint to the City related to a "broken" sidewalk in front of the Building, which record noted that the Department of Transportation had issued a violation to the property

owner as a result of the complaint (Id. at pp. 55-58; see also NYSCEF Doc. No. 96 [Ranire EBT Exhibits at p. 31]). Ranire testified that he was unaware of any such violation being issued and, accordingly, had not performed any repair work in response to the violation (NYSCEF Doc. No. 95 [Ranire EBT at pp. 58-59]). He went on to suggest that, since no sidewalk repairs were made under his direction, to the extent there were any such repairs they may have been performed by the City (Id. at pp. 58-59). He subsequently testified, however, that he would have been informed if the City was performing repairs to the sidewalk in front of the Building but had never been told of such repairs being performed (Id. at pp. 72-73).

Plaintiff also submits Google Maps images from May 2013 and May 2016, respectively, which purportedly document that a sidewalk flag adjacent to the one at issue in this action changed colors between 2013 and 2016 (NYSCEF Doc. Nos. 97 and 98). Plaintiff contends that these photos suggests that "some company or entity … performed sidewalk work in the exact area of [plaintiff's] accident at some point" in this three-year period and argues that the City or a company hired by the City performed said work (NYSCEF Doc. No. 87 [Ashe Affirm. in Opp. at ¶48]).

Finally, plaintiff argues that the City's motion is premature because depositions have yet to be conducted and she has yet to receive a response to her Freedom of Information Law ("FOIL") request seeking: (i) records relating to work performed to the subject sidewalk between May 2013 and May 2016; and (ii) Notices of Claim related to trip and falls between 2004 and 2007 on the subject sidewalk abutting the Building (See NYSCEF Doc. Nos. 99 and 100).

The 1325 Fifth Defendants also oppose the motion, in part, requesting that the City's motion be denied as premature.

In reply, the City notes that Mr. Ranire's testimony as to whether the City performed work was, by his own admission, entirely speculative and, moreover, was offered in an action in which

the City had already been granted summary judgment under Administrative Code §7-210. It argues, further, that plaintiff submits no evidence demonstrating that the City performed any work on the subject sidewalk during the years at issue.

**DISCUSSION**

"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 established that it is exempt from liability under Administrative Code §7-210. That statute shifts tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner, except for sidewalks abutting one-, two- or three-family residential properties that are owner-occupied and used exclusively for residential purposes (See Santos v City of New York, 59 Misc 3d 1211[A] [Sup Ct, Bronx County 2018]; see also Vucetovic v Epsom Downs, Inc., 10 NY3d 517, 520 [2008]). Here, the City's submission of the Atik affirmation establishes that it did not own the Building on the date of plaintiff's accident and that the Building was not a one-, two-, or three-family residential property (See e.g., King v City of New York, 2014 NY Slip Op 31428[U], *4 [Sup Ct, NY County 2014]).

The City has also established, through Pavlova's affidavit and the DOT records attached thereto, that it did not cause or create the defective condition through an affirmative act of

negligence (See Mejia v Sobro Dev. Corp., 2017 NY Slip Op 30440[U], *3 [Sup Ct, NY County 2017]; see also Rizzo v City of New York, 178 AD3d 503, 503-04 [1st Dept 2019]).

Plaintiff's reliance on the Mr. Ranire's testimony that the City may have done work on the sidewalk in front of the Building is misplaced as this testimony was, by his own admission, entirely speculative and, in any event, was entirely undercut by his subsequent testimony that he would have been informed of such work but was never notified of same[1] (See e.g., Ragolia v City of New York, 143 AD3d 596, 597 [1st Dept 2016] ["plaintiff's expert's assumption that the City must have created the roadway defect because no permits had been issued is speculative"]). Accordingly, his testimony does not create any issues of material fact in this case.

Nor has plaintiff or the 1325 Fifth Defendants established "that discovery might lead to relevant evidence or that the facts essential to justify their opposition to the motion [are] exclusively within [City's] knowledge and control" (Bacchus v. Bronx Lebanon Hosp. Ctr., 192 AD3d 553, 554 [1st Dept 2021]). Plaintiff's argument that the City's motion is premature because she has yet to receive a response to her FOIL request "only expresses a mere hope or speculation that discovery might turn up some evidence giving rise to a triable issue of fact," which is insufficient to preclude summary judgment (DaSilva v Haks Engrs., 125 AD3d 480, 482 [1st Dept 2015]). Moreover, to the extent that plaintiff seeks notices of claim from prior actions, these documents are irrelevant where, as here, the City is exempt from liability under Administrative Code § 7-210 (See Khywad v Persaud, 2015 NY Slip Op 50830[U], *2 [Sup Ct, Queens County 2015] citing Adamson v City of New York, 104 AD3d 533 [2d Dept 2013]; see also Barricelli v City of New York, 2020 NY Slip Op 33315[U] [Sup Ct, NY County 2020]).

[1] To the extent the City asserts, in passing, that Mr. Ranire's deposition testimony in the Aviles Action is inadmissible, the Court disagrees. "[E]vidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the court's determination" (In re New York City Asbestos Litig., 7 AD3d 285, 285 [1st Dept 2004]).

Accordingly, it is

**ORDERED** that the City of New York's motion for summary judgment is granted and the complaint and all crossclaims against it are dismissed; and it is further

**ORDERED** that, as the City of New York is no longer a party to this action, the Clerk of the Court is directed to transfer this matter to the inventory of a non-City Part; and it is further

**ORDERED** that within thirty days from entry of this order, counsel for the City of New York shall serve a copy of this decision and order, with notice of entry, on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119), who are directed to enter judgment accordingly; 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 "E-Exiling" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

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9/13/2023
DATE

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

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| | X | GRANTED | | DENIED | | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
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