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 3rd day of March 2023.

PRESENT: CARL J. LANDICINO, J.S.C.

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CHANA FRIEDMAN, Index No. 511857/2020

Plaintiff,

DECISION AND ORDER

-against-

VAYEICHI YOSEF LLC, Motions Sequence #1, #2

Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	21-35, 37-45, 51-63, 87
Opposing Affidavits (Affirmations)	64-72, 77-78, 88,
Reply Affidavits (Affirmations)	75, 81, 82

After a review of the papers and oral argument the Court finds as follows:

Defendant, Vayeichi Yosef, LLC (hereinafter the "Defendant") moves (motion sequence #1) for summary judgment pursuant to CPLR 3212 and an Order dismissing the complaint. Plaintiff, Chana Friedman (hereinafter the "Plaintiff") cross-moves for summary judgment pursuant to CPLR 3212 on the issue of liability. This action concerns injuries purportedly sustained by the Plaintiff on August 29, 2019, as a result of a trip and fall allegedly caused by a defective and dangerous sidewalk condition abutting the property known as 664 Bedford Avenue, Brooklyn, New York (the "Premises"). The Defendant apparently owns the Premises.

The Defendant's primary contention is that based upon the nature of the sidewalk condition, the Plaintiff is unable to "demonstrate any actionable, non-trivial defect as the location

where she claims to have fallen is an expansion joint and does not constitute a trap-like or nuisance condition." The Defendant also argues that the Plaintiff has failed to establish that the Defendant had actual or constructive notice of the condition.

The Plaintiff contends that, based upon the nature of the condition and images of the area some time prior to the accident, the Defendant had constructive notice of the alleged defective sidewalk fronting its property. The Plaintiff also argues that the Court has sufficient evidence that the subject condition constituted a dangerous and defective condition to make a determination of the Plaintiff's entitlement to summary judgment on the issue of liability.

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, 787 N.Y.S2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [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, 538 N.Y.S.2d 837 [2d 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 AD3d 518, 520, 824

N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 610 N.Y.S.2d 50 [2d 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.
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> 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.

Defendant in support of its motion proffers, *inter alia*, the Plaintiff's deposition, the Defendant's deposition, photographs of the area in question and the report of Rudy O. Sherbansky, P.E., F. NSPE ("Sherbansky"). Plaintiff appeared for depsotion on May 26, 2021. The Plaintiff confirmed that the accident occurred on August 29, 2019 "between 1:00 and 2:00 p.m." (Page 19). The Plaintiff described the accident as follows: "[h]appened too quick. My foot got stuck. I lost balance and I plunged to the floor on my left side." (Pages 24-25). She indicates that she walks the

area approximately once a week, based upon the establishments she visits. (Pages 26-27) She identified the subject area and alleged defect on photographs provided to her during the deposition. (Page 34).

Sherbansky explained his experience in his field of engineering. He stated that he reviewed a number of documents. He stated that he visited the scene on December 3, 2021. He determined that the "purported gap or height differential in the sidewalk… is located at an expansion joint between sidewalk flags in front of the corner building at 664 Bedford Avenue…" He acknowledged that on the date of his visit, "the height differential between sidewalk flags was partially patched with asphalt." He stated that notwithstanding the repair, he was able to measure the height differential. He found "the height differential along the 4 feet length of expansion joint between sidewalk flags at the place of occurrence varies between 0" inches and ¾" of an inch." He concluded that "[t]here was no substantial structural condition that caused the accident and if there was, it was too trivial or minor to require any repairs or action." He also concluded that the condition did not constitute a trap and he believed that the condition did not violate Administrative Codes §19-152 (a-1)(5) which "requires the owner to repair any sidewalk flag with a vertical grade differential between adjacent sidewalk flags greater than or equal to one half inch." He concluded that it would be speculative to find that the specific area where the Plaintiff claimed caused her fall violated the Code. Sherbanksy then began to ponder and calculate the statistical probabilities the Plaintiff fell in an area where the Code violation existed.

The Court finds that the Defendant has failed to make a *prima facie* showing that the Defendant is free from liability. The Plaintiff's testimony indicates that she tripped or "foot got stuck" causing her to fall. The Court will not engage in a discussion of the difference between tripping or getting your foot stuck on a raised flag or gap because it is not material in this matter. The Plaintiff stated that her walking was impeded by the condition of the sidewalk. Her

identification of the area is sufficient. Sherbansky does not indicate with any specificity whether the subsequent repair interfered with his ability to take a measurement. He references the repair and conclusorily states he was able to take his measurements, with no further explanation given. In any event, based upon his own experience, knowledge and the application of relevant code provisions, Sherbansky found a height differential of as high as ¾" along the length of the expansion joint. He acknowledged that a differential of ½ inch is violative of Administrative Code §19-152. Sherbansky's discussion as to the probability of the Plaintiff tripping in a specific area is speculative, and certainly does not serve to support a finding that the Defendant was free from negligence. Even assuming that Defendant was, the Plaintiff has sufficiently raised an issue of fact relating to the defective and dangerous nature of the condition which will be addressed in relation to the Plaintiff's motion. Accordingly, the Defendant's motion is denied.

The Plaintiff, in support of her motion, proffers, *inter alia*, her deposition, her affidavit, the affidavit of Elise Dann (CLA) and the affidavit of Vincent Pici, P.E. ("Pici"). Pici in his affidavit details his experience and education. Mr. Pici states that he has reviewed the pleadings, photographs of the subject defect, depositions and the reports of both Mr. Sherbansky and Elise Dann, R.A. Mr. Pici states that, "[t]he accident location as described by Ms. Friedman and illustrated in the photographs marked as Defendant's Exhibits 'A' and 'B' consists of a vertical displacement between adjoining concrete sidewalk slabs." Mr Pici further states that, "[t]he defect is located in the center section of the sidewalk adjacent to building known as 664 Bedford Avenue, Brooklyn, New York and extends along the entire width of the sidewalk slab shown in the photographs authenticated by Ms. Friedman and Ms. Dann." Mr, Pici stated that, "[t]he photographs also illustrate the irregular, chipped and broken exposed vertical edge of the higher flag, on which Ms. Friedman tripped." Mr. Pici opined that, "the condition resulting from the vertical displacement between the two adjoining sidewalk flags at issue in this case clearly does

not comply with these recognized requirements and resulted in the hazardous condition on which Ms. Friedman tripped." Mr. Pici also stated that "Mr. Sherbansky's conclusion, stated in paragraph 14(b), that the variation in height differential of 3/4 inch, which he observed between the adjacent sidewalk flag surfaces, is a trivial or an insignificant physical condition for a public sidewalk, and is not a tripping hazard ignores the requirements of Section 19-152(a)(4) and 2-09(0(5)(iv), which both state a substantial defect and a trip hazard, exists where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch." Mr. Pici concludes that "[t]he sidewalk at this location was improperly maintained, was unsafe for its intended use, and that the conditions created were the result of a failure to replace the uneven sidewalk flags (7-210(a) and 19-152 (a))." (See Plaintiff's Motion, Exhibit "9", NYSCEF Doc. 63).

In her affidavit, Elise Dann, R.A., C.L.A. details her experience and education. Ms. Dann states in her report that "[t]he subject sidewalk contained a substantial defect and trip hazard as defined by the New York City Administrative Code." Ms. Dann also states in her report that "[t]he 3/4-inch to 7/8-inch vertical grade differential between the subject adjacent sidewalk flags, which is 50 to 75 percent greater than 1/2 inch, meets the criteria for a substantial defect, as defined by the New York City Administrative Code." Ms. Dann opines that "[t]he differential in height between the subject sidewalk flags occurred over an extended period and created a hazardous trip condition. An effective inspection and maintenance program would have identified and eliminated the defect." Ms. Dann further opined that, "[t]he subject hazard includes the defective and hazardous trip condition and the inaction of the Owner/Operator and their agents in eliminating the hazard." Ms Dann opined that, "[t]he failure of the Owner/Operator and their agents to maintain the subject sidewalk free from substantial defects and hazardous conditions, as required by Sections 19- 152(a)(4) and 19-152(a-1)(5) of the New York City Administrative Code, allowed a

hazardous condition to persist within Ms. Friedman's path of travel, which was a cause of her trip, loss of balance, fall, and injuries." (See Plaintiff's Motion, Exhibit "6", NYSCEF Doc. 60).

The Plaintiff's reference to *Lopez v. 1675 Realty*, 209 AD3d 407, 408, 176 N.Y.S.3d 225, 226 [1st Dept 2022] and *Tropper v. Henry St. Settlement*, 190 A.D.3d 623, 141 N.Y.S.3d 33, 34 [1st Dept 2021] is misplaced. Those cases make findings as a matter of law that the conditions alleged constituted unsafe conditions [*Lopez*, ¾ of an inch deep to 1 inch deep together with a 2 ½ to 4 ½ inch wide condition] [*Topper*, displacement of approximately 3 inches]. The dimensions described in *Lopez* and *Tropper* were significantly greater than those here. The holdings in those cases did not establish that a violation of Administrative Code §19-152[a][4] constitutes anything more than some evidence of negligence. The facts here, even as represented by the Plaintiff, do not constitute, as a matter of law, that the condition was a trap or dangerous condition. "Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the facts of each case and is a question of fact for the jury." *Butera v. Brookhaven Mem'l Hosp. Med. Ctr., Inc.*, 210 AD3d 1048, 1049, 177 N.Y.S.3d 497, 498 [2d Dept 2022], quoting *Dingman v. Linchris Hotel Corp.*, 201 AD3d 704, 704, 156 N.Y.S.3d 865, 866 [2d Dept 2022], see *Curry v. Eastern Extension,* 202 AD3d 907, 159 N.Y.S.3d 684 [2d Dept 2022]. Accordingly, the Plaintiff's motion is denied.

Based upon the foregoing, it is hereby ORDERED as follows:

The Defendant's motion (motion sequence #1) for summary judgment is denied.
The Plaintiff's motion (motion sequence #2) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
2023 MAR 10 PM 2:00

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