SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **05M**

Justice

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ELISABETTA PINTO,

Plaintiff,

- v -

STERLING LANDLORD CORP., STARDUST DINERS, INC.,ELLEN'S STARDUST DINER, THE CITY OF NEW YORK

Defendant.

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INDEX NO. 155178/2020

MOTION DATE 04/18/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

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

Defendant, City of New York ("City") moves for an order pursuant to CPLR § 3212 granting summary judgment and dismissing Plaintiff's complaint and all cross-claims against the City. Plaintiff, Elisabetta Pinto ("Plaintiff"), along with Defendants Sterling Landlord Corp. ("Sterling"), United States Realty & Investment Company ("USRIC"), C&I Broadway LLC ("C&I"), and 1650 Broadway Associates Inc. d/b/a Ellen's Stardust Diner ("Broadway Associates") (collectively, "Co-Defendants") oppose the City's motion.

BACKGROUND

On November 20, 2019, Plaintiff tripped and fell on the sidewalk adjacent to Ellen's Stardust Diner located at 1650 Broadway, between West 50th Street and West 51st Street, because of a raised sidewalk flag (NYSCEF Doc No. 48, Statement of material facts ¶ 1). Sterling, USRIC, and C&I own the subject premises and rent the ground floor, basement, and mezzanine to Broadway Associates (NYSCEF Doc No. 68, Moroknek affirmation ¶ 3).

Plaintiff commenced this action on or about July 9, 2020 (NYSCEF Doc No. 49, Harris affirmation ¶ 3). On September 9, 2020, issue was joined by the City by service of its Answer (*id.* ¶ 3). Thereafter Plaintiff attempted to file a Supplemental Summons and Amended Complaint, which were later returned for correction (*id.*). On September 25, 2020, the City filed an Amended Answer (*id.*). On June 29, 2020, Plaintiff appeared for a hearing pursuant to General Municipal Law § 50-h (*id.* ¶ 5). Plaintiff was then deposed on November 18, 2022, and January 18, 2023 (*id.* ¶ 6). On February 4, 2022, a Case Scheduling Order was issued and pursuant to the Order, the City served copies of Department of Transportation records on October 26, 2022, January 11, 2023, and April 17, 2023 (*id.*).

The City now moves for summary judgment to dismiss the complaint and all cross-claims against it on the grounds that it does not own the abutting building, did not cause or create the allegedly defective condition, and did not have notice of the condition. In support of its motion, the City offers uncontroverted evidence including testimony, pleadings, photographs, public records, and statutory regulations, which demonstrate that it does not own the building located at 1650 Broadway, which abuts the accident location, and the building is not a one-, two-, or three-family residential property (NYSCEF Doc No. 48, Statement of material facts ¶ 2). The City also contends that summary judgment is proper because it did not cause or create the subject condition or have notice of the defect. In support of these arguments, the City proffers evidence that it conducted a two-year Department of Transportation sidewalk search for the segment of Broadway between West 50th Street and West 51st Street (NYSCEF Doc No. 49, Harris affirmation ¶ 12). The permits, corrective action requests, notices of violation, inspections, and complaints adduced by the search do not provide written notice of the subject condition (NYSCEF Doc No. 49, Harris affirmation ¶¶ 13, 31-36). The City argues that it did not cause or create the defective condition because none of the work permits were issued to a City agency or contractor and there was no work conducted by the City in the subject location that would have caused or created the alleged condition (*id*. ¶ 34). Additionally, Plaintiff's testimony established that there was no construction or repair work being performed on the sidewalk at the time of the incident (NYSCEF Doc No. 49, Harris affirmation ¶ 10).

Sterling, USRIC, and C&I oppose the City's motion on the grounds that the City failed to establish that it did not cause or create the condition that caused Plaintiff's accident and is otherwise silent on whether the City designed, constructed, or installed the subject sidewalk (NYSCEF Doc No. 68, Moroknek affirmation ¶¶ 11, 12). Sterling, USRIC, and C&I contend that the City only addresses the subject premises' ownership and not whether the City caused or created the condition (*id*. ¶ 9). Sterling, USRIC, and C&I dispute the City's statement of facts, except with respect to ownership of 1650 Broadway, and take umbrage with the fact that the City performed a records search for two years prior to and including the date of accident (NYSCEF Doc No. 72, Moroknek response to statement of material facts ¶ 2).

Plaintiff opposes the City's motion on the grounds that there are issues of material fact regarding the City's notice of the alleged defect. Plaintiff contends that the City did have prior written notice of the defective sidewalk condition because the Big Apple Pothole and Sidewalk Protection Corporation served a Big Apple Map on the Department of Transportation on October 23, 2003, sixteen (16) years before the accident (NYSCEF Doc No. 73, Breslauer affirmation ¶ 21). Plaintiff contends that "from the syntax of Reid's affidavit, those defects were never remedied or ameliorated" (*id*. ¶ 21). Plaintiff further argues that there is no affirmative statement by any City employee that construction work was not performed in the area (*id*. ¶ 28). Lastly, Plaintiff contends that the City's statement of material facts includes improper statements of law, rather than allegations of a statement of material fact, and generally disputes the City's facts (NYSCEF Doc No. 74, Response to statement of material facts ¶¶ 1-5).

Broadway Associates adopts the arguments advanced by Sterling, USRIC, C&I, and Plaintiff (NYSCEF Doc No. 76, Healy affirmation ¶ 3). Like Plaintiff, Broadway Associates contends that the City's statement of material facts includes improper statements of law, rather

than allegations of a statement of material fact, and generally disputes the City's facts (NYSCEF Doc No. 77, Response to statement of material facts ¶¶ 1-5).

In reply, the City argues that Plaintiff and Co-Defendants fail to produce evidence sufficient to overcome the City's *prima facie* showing of entitlement to summary judgment. The City contends that ownership and lease of the subject property is not in dispute, and Co-Defendants concede same (NYSCEF Doc No. 78, Harris affirmation ¶ 4; NYSCEF Doc No. 72, Moroknek Response to Statement of Material Facts ¶ 2). Further, Plaintiff and Co-Defendants do not advance any facts that the City caused or created the height differential between the sidewalk flags and the City's evidence establishes that there were no permits, repair orders, violations, or contracts indicating that the City or its contractors did any work to the subject sidewalk (NYSCEF Doc No. 78, Harris affirmation ¶¶ 9-10, 16). The City contends that Co-Defendants' presumption that at some point in time the City installed the subject sidewalk is speculative and insufficient to establish that the City caused or created the subject defect (NYSCEF Doc No. 81, Harris affirmation ¶ 6). Lastly, to the extent Co-Defendants argue negligent design of the sidewalk, the cause of action was not asserted in the Notice of Claim, Complaint, or cross-claims, and may not now be raised for the first time in opposition to the City's motion (NYSCEF Doc No. 81, Harris affirmation ¶ 6).

DISCUSSION

Pursuant to CPLR § 3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party" (CPLR § 3212[b]). "The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Upon proffer of evidence establishing a prima facie case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To be a "material issue of fact" it "must be genuine, bona fide and substantial to require a trial" (Leumi Financial Corp. v Richter, 24 AD2d 855 [1st Dept 1965]). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citation omitted]).

It is well established that owners of real property have a duty to maintain their property in a reasonably safe condition (*Mejia v New York City Transit Auth.*, 291 AD2d 225, 225–26 [2002]). Additionally, Administrative Code § 7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk (NYC Admin. Code § 7-210[b]; *Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011]). Administrative Code § 7-210 provides, in relevant part, the following:

> [T]he 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. 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[.]

(*id*.).

Where the City owns real property that abuts a sidewalk, or the property is a one-, two-, or three-family residential property that is owner occupied and used exclusively for residential purposes, the City is liable for injuries or death caused by the failure to maintain the sidewalk (NYC Admin. Code § 7-210[c]). Accordingly, a threshold determination regarding liability for injuries that arise from a defective sidewalk condition is ownership of the property abutting the subject sidewalk (*Rodriguez v City of New York*, 70 AD3d 450, 450 [1st Dept 2010]). Absent evidence of ownership, occupancy, control, or a one-, two-, or three-family residential property, liability cannot be imposed on the City (NYC Admin. Code § 7-210[b]; *Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009]).

In support of its motion, the City submits Plaintiff's notice of claim, testimony, and photographs to establish that Plaintiff fell on the sidewalk located at 1650 Broadway. The consistency of Plaintiff's pleadings, testimony, and photographic evidence are sufficient to establish that Plaintiff fell on the sidewalk abutting 1650 Broadway. As such, there is no material issue of fact regarding the location of the incident. The City also presents sufficient evidence to demonstrate that it did not own the building located at 1650 Broadway and the building is a commercial building not used for residential purposes. Co-Defendants also admit that on the date of the accident, Sterling, USRIC, C&I owned the building and leased the ground floor, basement, and mezzanine to Broadway Associates. Thus, the City has made a *prima facie* showing that it is entitled to summary judgment by demonstrating that it did not own the building abutting the subject sidewalk at the time of the incident, and the building is not a one-, two-, or three-family residential property used for residential purposes.

The City has also made a *prima facie* showing that it did not cause or create the subject condition. The records proffered by the City are sufficient to establish that it was not doing work in the subject location and therefore did not cause or create the defect. The arguments in opposition do not advance any facts that contradict this evidence or otherwise suggest that the City caused or created the subject condition. As such, there is no issue of material fact that the City caused or created the subject condition. Finally, the arguments that the City negligently installed the sidewalk condition at some unknown point in time or knew about the defective condition sixteen (16) years before the accident are similarly unavailing and do not create an issue of material fact. Accordingly, as the City has established that it did not own the building abutting the sidewalk where Plaintiff fell, and it did not cause or create the subject defect which caused Plaintiff to fall, summary judgment dismissal of Plaintiff's complaint and all cross-claims is warranted.

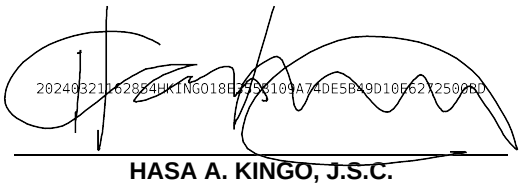
Accordingly it is

ORDERED that the motion for summary judgment is granted and the complaint and cross-claims are dismissed against the City; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant the City of New York and dismissing the claims and cross-claims made against the City in this action; and it is further

ORDERED that the Clerk of the Court is further directed to transfer this matter to the inventory of a non-City part.

This constitutes the decision and order of the court.



3/21/2024
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	X	**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**