SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 156588/2019

DAVID CHENG, LIZHEN BAO,

Plaintiffs,

MOTION DATE 03/08/2024, 04/09/2024

MOTION SEQ. NO. 005 006

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION BUREAU OF WATER AND SEWER OPERATIONS, 277 PARK AVENUE, LLC

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 144, 145, 146, 147, 155, 157, 159

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 148, 149, 150, 151, 152, 153, 154, 156, 158, 160, 161

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents and oral argument, Defendants the City of New York, New York City Department of Buildings, New York City Department of Transportation, New York City Department of Environmental Protection, New York City Department of Environmental Protection Bureau of Water and Sewer Operations (collectively identified as the "City") and 277 Park Avenue LLC ("277 Park") each move for summary judgment to dismiss Plaintiffs' complaint and all cross claims against them. Plaintiffs David Cheng ("Plaintiff Cheng") and Lizhen Bao oppose both motions, and 277 Park partially opposes the City's motion. For the reasons stated herein the City's motion is granted and 277 Park's motion is granted.

BACKGROUND

On June 28, 2018, Plaintiff Cheng sustained personal injuries when he slipped and fell on a metal curb located at Lexington Avenue between 47th and 48th Street (NYSCEF Doc No. 121, Plaintiff Cheng deposition tr at 27-8). Specifically, Plaintiff Cheng was walking on a portion of the sidewalk that was closed for construction at 277 Park Avenue when his left foot slipped off the

metal curb and caused him to fall (*id*. at 31-4, 38).[1] It was raining heavily at the time and Plaintiff Cheng stepped up onto the closed sidewalk because of a puddle in the pedestrian walkway (*id*. at 20, 31, 38). Plaintiff Cheng observed this specific sidewalk closure and utilized the street detour weekly for approximately six months before the accident (id. at 30, 31, 35, 65).

On July 3, 2019, Plaintiffs commenced this action to recover for the personal injuries Plaintiff Cheng sustained (NYSCEF Doc No. 1).[2] The City and 277 Park joined issue by service of their answers on September 13, 2019 (NYSCEF Doc No. 10; NYSCEF Doc No. 115). The parties exchanged discovery and Plaintiff Cheng appeared for an examination before trial on October 24, 2022 (NYSCEF Doc No. 121). On November 18, 2022, Alison Boles testified on behalf of the City (NYSCEF Doc No. 125). On October 16, 2023, Paul Greene testified on behalf of 277 Park (NYSCEF Doc No. 141). Plaintiffs filed their note of issue on December 15, 2023 (NYSCEF Doc No. 107). On March 8, 2024, the City timely filed its motion for summary judgment (NYSCEF Doc No. 108). On April 9, 2024, 277 Park timely filed its motion for summary judgment (NYSCEF Doc No. 127). All parties were present for oral argument before the court on July 23, 2024.

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 [c]ourt 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]). 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]). 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]). "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]).

I. The City's Motion Seq. 005

The City moves for summary judgment to dismiss Plaintiffs' complaint and all cross-claims against it on the grounds that a wet condition is not a defect, the City did not receive prior written notice, and the City did not cause or create the subject condition (NYSCEF Doc No. 109, Lynch affirmation ¶¶ 20, 28, 41, 54). In support of its motion the City submits uncontroverted evidence consisting of pleadings, testimony, photographs, and records to demonstrate that Plaintiff

[1] The back of 277 Park Avenue faces Lexington Avenue and is also known as 500 Lexington Avenue (NYSCEF Doc No. 141, Paul Greene deposition tr at 35).
[2] Before commencing the instant action, Plaintiffs served the City with a notice of claim and appeared for a hearing pursuant to General Municipal Law § 50-h (NYSCEF Doc No. 113; NYSCEF Doc No. 119).

Cheng slipped on a wet sidewalk curb during heavy rain, the City did not have prior written notice of the allegedly defective condition and did not cause or create the condition.

Plaintiffs oppose the City's motion on the grounds that "any puddling of water" would have forced pedestrians to step up onto the curb, the City had a duty to keep the roadway safe and failed to do so, it was foreseeable that Plaintiff Cheng would have to use the sidewalk if the walkway was flooded or overcrowded, and the sidewalk Plaintiff Cheng did use was too small and narrow (NYSCEF Doc No. 148, Schwartz affirmation ¶ 15). Plaintiffs also argue that the City had notice of a defective condition at the subject location and that there are questions of fact regarding the subject curb (*id.* ¶¶ 29, 34). 277 Park partially opposes the City's motion because the City is responsible for maintaining curbs, and to the extent that a wet curb is actionable, the City is liable (NYSCEF Doc No. 145, Cornell affirmation ¶¶ 9, 12).

To maintain a cause of action in negligence, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Lab'y Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). 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 [1st Dept 2002]). The Administrative Code of the City of New York § 7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk (Administrative Code of City of NY § 7-210; *Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011]). 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 (Administrative Code of City of NY § 7-210). The City is responsible for maintaining sidewalk curbs, even where the abutting premises is privately owned (Administrative Code of City of NY § 19-101; *Fernandez v 2265 E. Tremont Realty, LLC*, 188 AD3d 529, 529 [1st Dept 2020]; *Ascencio v New York City Hous. Auth.*, 77 AD3d 592, 593 [1st Dept 2010]).

Under the Administrative Code of the City of New York § 7-201(c)(2), no action may be maintained against the City for an allegedly defective condition on a roadway unless the City had prior written notice of the condition and failed to correct it with fifteen (15) days of receiving such notice (Administrative Code of City of NY § 7-201[c][2]; *Correa v Mana Constr. Grp. Ltd.*, 192 AD3d 555 [1st Dept 2021]). The only recognized exceptions to the prior written notice requirement involve situations where the municipality caused or created the defect through an affirmative act of negligence or a special use confers a special benefit upon the municipality (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Because prior written notice is a condition precedent, courts have consistently granted summary judgment where the municipality did not have notice of the defect that caused the plaintiff's injury (*see Katz v City of New York*, 87 NY2d 241 [1995]; *see e.g. Gray v City of New Yor*k, 195 AD3d 538, 538 [1st Dept 2021] ["the City established prima facie entitlement to judgment as a matter of law by demonstrating that it did not receive prior written notice of the alleged dangerous condition as required by (the Administrative Code)"]; *Correa v Mana Constr. Grp. Ltd.*, 192 AD3d 555, 555 [1st Dept 2021] ["The City established its prima facie entitlement to summary judgment by establishing that it lacked prior written notice of

the alleged defective condition of the manhole cover, which is a condition precedent to liability for personal injuries sustained as a result of alleged roadway defects"]).

In New York, "mere wetness on a walking surface due to rain does not constitute a dangerous condition" (*Greco v Pisaniello*, 139 AD3d 617, 618 [1st Dept 2016]). Further, "the duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress and does not commence until a reasonable time after the storm has ended" (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]; *see also Friberg v City of New York*, 193 AD3d 451, 451 [1st Dept 2021] ["the City was not required to submit evidence demonstrating when it last inspected or cleaned the staircase, as plaintiff's accident occurred during a rainstorm in progress"]).

In this instance, the City met its *prima facie* burden of establishing entitlement to judgment as a matter of law. A wet sidewalk curb is not an actionable defect, and Plaintiffs failed to articulate any other defect with the subject curb. Plaintiff Cheng testified that it was raining "heavily" at the time, that he was aware of wet conditions because it was raining "pretty hard," and that he slipped and fell because of a wet sidewalk curb (NYSCEF Doc No. 121, Plaintiff Cheng deposition tr at 20, 33, 38, 69). Aside from the wet condition caused by the rain, the metal curb was not defective (*id*. at 47). Accordingly, Plaintiffs cannot maintain a cause of action based upon the wet sidewalk curb during an active rainstorm. Next, to the extent that Plaintiffs argue that the puddle in the roadway or the barriers effectuating the pedestrian walkway created a dangerous condition, the City did not have prior written notice of these conditions. Moreover, whatever duty the City might have had to ameliorate the puddle in the roadway, such duty was suspended until a reasonable time after the rain subsided and upon prior written notice. Lastly, Plaintiffs' arguments that it was foreseeable that Plaintiff Cheng would step up onto the narrow portion of the sidewalk, and that the sidewalk was too narrow are equally unavailing. The City is not liable for the sidewalk because it abuts a privately owned building, and the City did not erect the construction shed. Accordingly, the City met its *prima facie* burden of establishing entitlement to judgment as a matter of law and Plaintiffs failed to create a material issue of fact in opposition.

II. 277 Park's Motion Seq. 006

277 Park moves for summary judgment to dismiss Plaintiffs' complaint and all cross-claims because a wet curb is not a defective condition, 277 Park had no duty to maintain the curb, and 277 Park had no notice of a defective condition with the pedestrian walkaway or the sidewalk (NYSCEF Doc No. 130, memorandum of law at 5-6, 7-10). In support of its motion, 277 Park submits uncontroverted evidence consisting of pleadings and testimony to demonstrate that Plaintiff Cheng slipped on a wet curb during an active rainstorm and 277 Park did not receive any complaints about flooding in the pedestrian walkway before Plaintiff Cheng's accident.

Plaintiffs oppose 277 Park's motion by arguing that because 277 Park erected the barriers and created the pedestrian footpath, it was foreseeable that Plaintiff Cheng would step onto the narrow portion of the sidewalk, and 277 Park failed to establish when they last inspected the sidewalk or the roadway(NYSCEF Doc No. 148, Schwartz affirmation ¶¶ 12, 13, 15, 29). Additionally, Plaintiffs aver that 277 Park was on notice of a defect with the curb because the

Department of Transportation received a complaint about a broken curb at 500 Lexington Avenue (*id.* ¶ 29).

Under the Administrative Code of the City of New York § 7-210, abutting owners of real property are responsible for maintaining the sidewalk in a reasonably safe condition (Administrative Code of City of NY § 7-210). The curb is not part of the sidewalk as defined by § 19-101 of the Administrative Code of the City of New York, and "abutting [private] owners are not obligated to maintain the curb" (*Fernandez*, 188 AD3d at 529). A defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 42 [1st Dept 2011]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015]).

In New York, "mere wetness on a walking surface due to rain does not constitute a dangerous condition" and a landowner's "duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended" (*Greco*, 139 AD3d at 618; *Pippo*, 43 AD3d at 304; *see also Aberger v Camp Loyaltown, Inc.*, 193 AD3d 195, 198 [1st Dept 2021] [defendant "also established that it lacked constructive notice because the fact that a sidewalk becomes more slippery when wet does not constitute an actionable defect"].

In this case, 277 Park made out a *prima facie* case of entitlement to judgment as a matter of law. 277 Park had no duty to maintain the curb where Plaintiff Cheng fell. To the extent that Plaintiffs argue that 277 Park created the defect because it erected the barriers, 277 Park demonstrated that it did not have actual or constructive notice of the puddle, that the footpath was defective, or that the closed sidewalk was too narrow.[3] Any duty that 277 Park would have had to remedy the puddle was suspended until a reasonable time after the rain subsided. Plaintiffs fail to create an issue of fact in opposition. 277 Park was not required to submit evidence of when it last inspected the roadway because the accident occurred during an active rainstorm (*Friberg*, 193 AD3d at 451). Additionally, the Department of Transportation record that Plaintiffs rely on to demonstrate notice pertains to a broken piece of concrete at the corner of Lexington and 47th Street. Plaintiff Cheng did not fall because of broken concrete nor did he fall on the corner of Lexington and 47th Street.

Accordingly, it is hereby

ORDERED that Defendants the City of New York, New York City Department of Buildings, New York City Department of Transportation, New York City Department of

[3] Plaintiffs argue that "the area provided for the public to walk on was too small and too narrow and forced the plaintiff to fall" (NYSCEF Doc No. 148, Schwartz affirmation ¶ 15). However, the area that was provided for the public to walk was in the roadway, and by Plaintiff Cheng's own testimony was wide enough for two to three lanes of pedestrian traffic (NYSCEF Doc No. 121, Plaintiff Cheng deposition tr at 36). The portion of the sidewalk where Plaintiff Cheng fell was closed for construction and was not provided for the public to walk on. There was also signage posted that the sidewalk was closed (*id.* at 35).

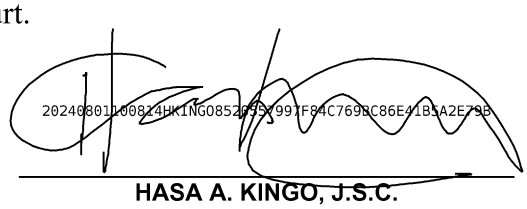
Environmental Protection, New York City Department of Environmental Protection Bureau of Water and Sewer Operations' motion for summary judgment (Motion Seq. 005) is granted and the complaint and all cross-claims are dismissed with costs and disbursements to Defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the City of New York, New York City Department of Buildings, New York City Department of Transportation, New York City Department of Environmental Protection, New York City Department of Environmental Protection Bureau of Water and Sewer Operations 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 Defendant 277 Park Avenue LLC's motion for summary judgment (Motion Seq. 006) is granted and the complaint and all cross-claims are dismissed with costs and disbursements to Defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of 277 Park Avenue LLC 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.

This constitutes the decision and order of the court.



8/1/2024
DATE

HASA A. KINGO, J.S.C.

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