#5 C
#6
#7

NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

----------X

CHERY NAZARIO-FELIZ,

Plaintiff,

-against-

BANK OF AMERICA N.A., BANK OF AMERICA N.A. d/b/a BANK OF AMERICA FINANCIAL CENTER, A-1 CAPITAL CORP., ENVISAGE OPTICAL, JCDECAUX NORTH AMERICA INC. and JCDECAUX STREET FURNITURE NEW YORK LLC.,

Defendants.

----------x

J A-1 CAPITAL CORP.,

Third-Party Plaintiff,

-against-

JCDECAUX NORTH AMERICA, INC.

Third-Party Defendant,

----------x

A-1 CAPITAL CORP.,

Second Third-Party Plaintiff,

-against-

JCDECAUX STREET FURNITURE NEW YORK, LLC,

Second Third-Party Defendant.

----------x

Index №. 25783/2020E

Hon. **Elizabeth A. Taylor**,
Justice Supreme Court

The following papers were read on these motions **(NYSCEF Seq. Nos. 5, 6, and 7)**:

	NYSCEF Doc. Nos.
Sequence 5 Notice of Motion – Exhibits and Affidavits Annexed	187-233
Answering Affidavit and Exhibits, Memorandum of Law	249-250
Reply Affidavit	252
Sequence 6 Notice of Motion – Exhibits and Affidavits Annexed	234-243
Answering Affidavit and Exhibits, Memorandum of Law	248 (aff. in support), 257-268
Reply Affidavit	269-274
Sequence 7 Notice of Motion – Exhibits and Affidavits Annexed	275-313
Answering Affidavit and Exhibits, Memorandum of Law	315-327, 328-338

Upon the foregoing papers, the above motions for summary judgment are decided in accordance with the annexed decision and order.

Dated: SEP 09 2024

Hon. _____
Elizabeth A. Taylor, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

----------X

CHERY NAZARIO-FELIZ,

Plaintiff,

-against-

BANK OF AMERICA N.A., BANK OF AMERICA N.A. d/b/a BANK OF AMERICA FINANCIAL CENTER, A-1 CAPITAL CORP., ENVISAGE OPTICAL, JCDECAUX NORTH AMERICA INC. and JCDECAUX STREET FURNITURE NEW YORK LLC.,

Defendants.

DECISION and ORDER
Index No. 25783/2020E

----------X

AND THIRD-PARTY ACTIONS

Elizabeth A. Taylor, J.

In Motion Sequence No. 5, defendant Envisage Optical moves for summary judgment dismissing the complaint and all crossclaims against it pursuant to CPLR 3212.[1]

In Motion Sequence No. 6, defendant A-1 Capital Corp. ("A-1 Capital") moves for summary judgment dismissing the complaint and all crossclaims against it pursuant to CPLR 3212.

In Motion Sequence No. 7, defendants JCDecaux North America, Inc. ("JCDNA") and the second third-party defendant, JCDecaux Street Furniture New York, LLC ("JCDSF") move for summary judgment dismissing the third-party claims against them pursuant to CPLR 3212.

FACTS AND ARGUMENT

This case arises from an alleged trip and fall that occurred on the public sidewalk located at 700 --702 Allerton Avenue in Bronx County. At the time of the accident, defendant A-1 CAPITAL CORP. was the owner of the premises and Envisage Optical was the lessee of the premises. Plaintiff alleges she was on the public sidewalk waiting arrival of a bus. As she approached the bus, she claims to have tripped on fallen over a defective sidewalk. The alleged defect is arguably located

[1] Plaintiff does not oppose Envisage Optical's motion, and in fact, plaintiff signed a stipulation of discontinuance as to Envisage.

in front of Bank of America, owned by A-1 Capital which is located at 700 Allerton Ave. It is also arguably located adjacent to 702 Allerton Ave. (the adjoining building) occupied by tenant Envisage optical store. Both A-1 Capital and Envisage are direct defendants in this action. The action against Bank of America has been discontinued. The bus shelter is operated and maintained by third-Party Defendants JCDECAUX North America, Inc. and JCDECAUX Street Furniture New York, LLC.

Plaintiff testified that she did not see what caused her to fall. She was unconscious immediately upon impact. Plaintiff first remembers waking up in the bus shelter, with a man handing her a handkerchief to staunch her bleeding. She was bleeding from the face and nose. A few days after the accident, plaintiff returned to the scene with a friend, who took photos of the alleged defect. The photos were exchanged by plaintiff's counsel and identified by plaintiff during her depositions.

Plaintiff testified at her deposition that the bus stop was extremely crowded, with the awaiting passengers pushing and shoving "like animals." As she began to walk toward the front door of the second bus, she suddenly found herself on the ground. She had no memory of how she fell or what caused her to fall. She had no recollection of tripping and falling. She did not observe the area after she fell, and did not know what caused her to fall. In particular, plaintiff testified as follows:

> Q. Just before [the bus] stopped at the bus stop did you move away from the window and walk towards the bus stop?
>
> A. I didn't get close to the bus. I moved away a little but I was waiting for the people to get off of the bus and the other people who were waiting to get in were trying to get in like animals.
>
> Q. I'm sorry, like animals?

A. Yes, human beings that want to trample over each other.

* * *

Q. So, your last memory before being injured was waiting to get on the bus, and your first memory after your injury was that you were sitting on the bus stop bench, is that correct?

A. Yes.

Q. And the bench you were sitting on is the bench of the bus shelter?

A. Y es.

* * *

Q. Okay. Do you recall falling?

A. No, I do not recall.

The lease entered into between ENVISAGE OPTICAL and A-1 CAPITAL CORP. (Exhibit "NN") under states in relevant part:

Section 49.01: "Landlord shall be responsible only for structural repairs to the demised premises (the structure shall consist of... the sidewalk immediately adjacent to the demised premises."

Section 4 (entitled "Repairs") "The tenant shall, throughout the term of the lease, take good care of the demised premises (including without limitation, the storefront) and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order."

Plaintiff's expert inspected the site of the accident on July 13, 2020, using the photographs taken by plaintiff's friend shortly after the accident. According to plaintiff's expert, the defect occurred as a result of an improperly made repair to the sidewalk. The sidewalk "patch" measured in total 36 inches by 61 inches. The repair had fragmented leaving exposed an area with an approximate depth of 3/8 inch and at least one inch in horizontal dimension in all directions, measuring approximately 12 inches in length. The expert further opined that the actual depth of the defect at the time of plaintiff's accident was more than 1/2 inch, but that because of debris that had been compressed into the defect at the time of his inspection the depth was 3/8" inch.

ARGUMENT

Sequence No. 5

Defendant Envisage Optical maintains that under the Standard Form of Store Lease Agreement which governs its tenancy, it had no statutory or contractual duty with respect to the structural conditions of the sidewalk. Further, it did not make any special use of the sidewalk, nor did it perform any work to the sidewalk which would render it responsible for the structural condition of the sidewalk. In this regard, plaintiff notes that the lease provides that, "Landlord shall be responsible for structural repairs to the demised premises, which includes sidewalks," and that it was responsible only for nonstructural repairs of the "adjacent" sidewalk.

Defendant A-1 argues in opposition that as defined in the lease as "the structure shall consist of the foundation and exterior walls of the demised premises [and] the sidewalk immediately adjacent to the demised premises..." Based on this contractual language, A-1 argues that the landlord's duty to make "structural repairs" extends only so far as repairs "immediately adjacent" to the property. As the accident appears to have occurred at or near the curb line,

defendant A-1 contends that the accident did not occur "immediately adjacent" to the premises, and therefore as owner under the lease, it is not liable.

In addition, A-1 contends that the photos annexed as exhibits appear to show that a "filler" between the separate sidewalk flags was in disrepair. The sidewalk slab itself appears to be intact It maintains that it is not clear whether the entire sidewalk needed to be replaced (arguably structural repair), or merely resurfacing the area in which the filler has cracked, which arguably would fall under the heading of "taking good care" to make non-structural repairs to keep the area in "good working order."

Sequence No. 6

Defendant A-1 Capital argues that the action must be dismissed in its entirety because, first, the defect which allegedly caused the action is trivial, as it measures at most ½ inch in depth. Secondly, defendant A-1 Capital contends that plaintiff's action is based entirely on surmise, as she did not know what caused her to fall, and she identified the alleged defect only days later. By looking for a defect in the general area in which she fell.

Plaintiff argues that the defect is not trivial, and that its depth in inches is but one factor to be considered in determining whether a defect is trivial. While she could not recall the immediate events that occurred after she fell, at no time during her deposition was plaintiff asked if she saw what caused her to fall on the day of the accident. Plaintiff's testimony regarding her return to the site with her friend reveals that she knew the location of the defect that caused her accident and identified it. Further, at her deposition, plaintiff identified the defect and its location consistent with the photographs taken by her friend.

Sequence No. 7

Defendant JCDNA argues that it did not own or control any portion of the sidewalk at 700-702 Allerton Avenue, Bronx, nor did it own the bus shelter at the bus stop at 700-702 Allerton Avenue. It was not the holder of any franchise issued by the City of New York to allow installation of any bus shelter at 7900-702 Allerton Avenue, and it did not cause any work to be done at the bus shelter or the sidewalk located near the bus shelter. Rather, JCDSF was responsible for the bus shelter pursuant to the Amended and Restated Franchise Agreement dated October 1, 2015, with the City of New York. Pursuant to Section 3.1.5 (c) of that agreement JCDSF only had a duty to maintain the sidewalk at the rear and sides of the bus shelter within an area that extended outward three feet from the rear and sides of the bus shelter.

DISCUSSION

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. To recover damages, a party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury. (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969, 646 NE2d 795, 622 NYS2d 493 [1994].) "To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]).

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor

had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 N.Y.S.2d 573 [1st Dept 2008]). "To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall." (*Mei Xiao Guo v. Quong Big Realty Corp.*, 81 A.D.3d 610, 611, 916 N.Y.S.2d 155 [2d Dept. 2011] [citations omitted]; *Quintana v. TCR, Tennis Club of Riverdale, Inc.*, 118 A.D.3d 455, 987 N.Y.S.2d 68 [1st Dept. 2014] [defendant failed to establish a lack of constructive notice of the wet condition on steps where the moving papers contained no indication of when the area was last inspected prior to the accident]; *Qevani v 1957 Bronxdale Corp.*, 232 AD2d 284, 649 NYS2d 11 [1st Dept. 1996] [issue of fact as to whether existence of condition on steps for 90 minutes constituted constructive notice].)

A defect alleged to have caused injury may be trivial as a matter of law. (*Trincere v County of Suffolk*, 90 NY2d 976 [1997].) Physically small defects may be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards, or difficult to traverse safely on foot. Attention to the specific circumstances is required, and undue or exclusive attention should not be focused on whether a defect is a "trap" or "snare." (*Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 79 [2015].) "[F]actors that may render a physically small defect actionable, [include] a jagged edge; a rough, irregular surface; the presence of other defects in the vicinity; or a location—such as a parking lot, premises entrance/exit, or heavily traveled walkway—where pedestrians are naturally distracted from looking down at their feet." (*Hutchinson v. Sheridan Hill House Corp., supra* at 78 [internal citations omitted]. *See also, Herrera v. City of New York*, 262 AD2d 120 [1st Dept. 1999] [triable issue of fact where photographic record showed the possibility that there was not only an elevation differential of three-quarters to one inch, but also a gap of up to one and a half inches in width].)

There is no dispute here that A-1 as the owner of the property abutting the subject sidewalk had a nondelegable duty to maintain and repair the sidewalk pursuant to NYC Administrative Code §7-210 (*see, Xiang Fu He v. Troon Mgt., Inc.*, 34 NY3d 167 [2019]). "Section 7-210 of the Administrative Code of the City of New York unambiguously imposes a nondelegable duty on certain real property owners to maintain city sidewalks abutting their land in a reasonably safe condition." (*Id.* at 169; *see also*, *Choudhry v. Starbucks Corp.*, 2023 N.Y. App. Div. LEXIS 878 [1st Dept. 2023]).

Plaintiff has raised an issue of fact as to whether the defect was trivial. First, the defect appears to have an edge, which may render a seemingly trivial defect actionable. Secondly, the affidavit of plaintiff's expert witness raises issues of fact as to whether the defect was "flat," as defendant argues, or in fact had the dimensions and size indicated in plaintiff's expert report. Lastly, plaintiff was in an unruly crowd surrounding a bus stop at the time of the accident. "The location of the depression in a heavily traveled pedestrian walkway renders observation of the defect less likely," and raises an issue of fact as to trivial defect. (*Argenio v. Metropolitan Transp. Auth.*, 277 A.D.2d 165, 166, 716 N.Y.S.2d 657 [1st Dept. 2000].)

As to causation, plaintiff in fact testified as defendant A-1 argues that she did not recall falling. However, she also testified that she called her son immediately after the accident, as she sat on the bus stop bench, and told him that she tripped on the sidewalk. She also steadfastly testified at her deposition that she was caused to fall by a sidewalk defect. In fact, at her deposition on August 5, 2021, plaintiff testified that she realized what caused her to fall when she slipped on the sidewalk (Exhibit 2, Plaintiff's 8/5/21 EBT, p. 129). Plaintiff was then questioned about her visit to the site a day or two after the accident with her friend. Counsel asked: "but before you went there that day, you really weren't sure what caused your accident; right? Plaintiff responded "I was

sure, because that's where I fell. I tripped on that sidewalk where I was waiting for the bus." (Exhibit 2, Plaintiff's 8/5/21 EBT, p. 132). This testimony raises issues of fact as to causation. To the extent the testimony is inconsistent or confusing, that merely raises issues of fact for trial.

As to the motion of defendant Envisage, the lease in question provides that Envisage, as tenant, is liable for nonstructural sidewalk defects. The uncontroverted evidence is that the fall occurred dud to a "hole" which arose due to an earlier patch or repair, as depicted in the photographs, which deteriorated over time. In *Diop v. Getty Sq. Realty LLC* (199 A.D.3d 410, 410-411, 153 N.Y.S.3d 846 [1st Dept. 2021]), plaintiff fell on an asphalt patch outside of the defendant tenant's restaurant, which had been used to repair a hole in the sidewalk. The First Department, in holding that the tenant was not at fault, stated as follows:

> "The landlord respondents assert that the lease made [tenant] responsible for sidewalk repairs. However, paragraph 4 of the lease made [landlord] responsible for structural repairs to the sidewalk. Patching a hole in the sidewalk was a structural repair for which [landlord] was responsible under the lease." (Citations omitted.)

(*see Negron v Marco Realty Assoc., L.P.*, 187 AD3d 511, 134 NYS3d 18 [1st Dept 2020] [hole in sidewalk was structural repair; tenant not responsible]; *Carson v. JAD Realty LLC*, 214 A.D.3d 588, 187 N.Y.S.3d 183 [1st Dept. 2023] [tenant had a duty to make only nonstructural, minor repairs to the sidewalk under paragraph 4 its lease]; *Errazuri v. E Food Supermarket, Inc.*, 228 A.D.3d 732, 213 N.Y.S.3d 384 [2d Dept. 2024] [tenant responsible only for nonstructural repairs to the sidewalk not responsible for repair of broken sidewalk flag].)

Here, as in these earlier cases, the only reasonable interpretation of the lease was that the tenant was not responsible for structural sidewalk repairs, and the repair of the sidewalk here was clearly structural in nature, as it would require removing and replacing a large missing piece of the existing sidewalk flag, or the replacement of the entire flag. Contrary to defendant A-1's

arguments, the repair was not a nonstructural repair for which the tenant would be liable.

The uncontroverted evidence shows that the accident occurred more than three feet from the bus stop, in an area over which JCDSF (or any affiliated defendant) had a duty to maintain. The arguments that JCDSF may have effectuated repairs to the area in question is based on speculation. To the extent A-1 argues that discovery is not complete, that argument is misplaced, as the note of issue is filed, and there is no pending discovery motion.

Based upon the foregoing, it is hereby

ORDERED that defendant Envisage Optical's motion for summary judgment dismissing the complaint and all crossclaims against it pursuant to CPLR 3212 is granted, and it is further

ORDERED that the motion of defendant A-1 Capital Corp. is denied, and it is further

ORDERED that the motion of defendants JCDecaux North America, Inc. and the second third-party defendant, JCDecaux Street Furniture New York, LLC is granted, and it is further

ORDERED that the Clerk is directed to enter judgment dismissing all claims against defendant Envisage Optical, third-party defendant JCDecaux North America, Inc., and the second third-party defendant JCDecaux Street Furniture New York, LLC.

This constitutes the decision and order of the Court.

Dated: SEP 09 2024

ENTER:

Hon. Elizabeth A. Taylor, J.S.C.