SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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JOSE DIFO-FERNANDEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, THE METROPOLITAN TRANSPORTATION AUTHORITY, THE NEW YORK CITY TRANSIT DECISION/ORDER AUTHORITY and 4S MANAGEMENT CORP., 3 J S FOOD CORP. and SIG FOOD, CORP.,

Defendants.

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Index No.: 514354-2021
Motion Date: 12-1-25
Mot. Seq. No.:4-5

DECISION/ORDER

The following papers, which are e-filed with NYCEF as items 65-85, 88-93, 95-99, were read on these motions:

Defendants, 4S MANAGEMENT CORP. ("4S") and 3JS FOOD CORP. ("3JS"), move for an order pursuant to CPLR § 3212 granting summary judgment dismissing the complaint and all cross-claims against them. Plaintiff, JOSE DIFO-FERNANDEZ, cross-moves for an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability against defendant 4S.

BACKGROUND

This action arises from a trip and fall accident that occurred on June 22, 2020, on the public sidewalk abutting the property located at 2222 Pitkin Avenue, Brooklyn, New York. The property is owned by defendant 4S and occupied by a commercial tenant, defendant 3JS, which operates a supermarket known as Shop Fair.

The plaintiff testified that he tripped and fell on a raised and broken portion of the sidewalk near the subway entrance for the Van Siclen Avenue station, which is located adjacent

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to the subject property. The plaintiff described the condition as a raised sidewalk flag with a differential of approximately three inches. The defendants, 4S and 3JS, argue that they are not liable for the alleged defect because the area where the plaintiff fell was subject to a "special use" by the New York City Transit Authority ("NYCTA"). Defendants contend that the NYCTA exercised exclusive control over the subway entrance and the immediately surrounding sidewalk, as evidenced by MTA maintenance records indicating snow removal and repairs in the vicinity. Consequently, defendants argue that the NYCTA's special use displaced the abutting property owner's duty to maintain the sidewalk.

The plaintiff opposes the defendants' motion and cross-moves for summary judgment, arguing that 4S, as the abutting property owner, has a non-delegable duty to maintain the sidewalk in a reasonably safe condition pursuant to Administrative Code § 7-210. Plaintiff submits an affidavit from an expert engineer, Scott Silberman, P.E., who opined that the defect was substantial, existed for at least 2.5 years based on Google Street View imagery, and was not within the exclusive control of the NYCTA.

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 eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Administrative Code § 7-210 imposes a non-delegable duty upon owners of real property to maintain the sidewalk abutting their property in a reasonably safe condition (*Sangaray v West River Assoc., LLC*, 26 NY3d 793 [2016]). Defendants argue that this duty was displaced by the NYCTA's special use of the sidewalk as a subway entrance.

The principle of special use imposes an obligation on the part of the user to maintain the area to provide access to the special use structure (*Weiskopf v City of New York*, 5 AD3d 202 [1st Dept 2004]). However, the mere presence of a subway entrance or the fact that pedestrians use

the sidewalk to access the station does not automatically create a special use that absolves the abutting owner of liability (*Arpi v New York City Tr. Auth.*, 42 AD3d 478 [2d Dept 2007]; *Gasis v City of New York*, 35 AD3d 533 [2d Dept 2006]).

Here, the record presents triable issues of fact as to whether the NYCTA's use of the sidewalk was exclusive and whether it completely negated the responsibilities of the abutting property owner. While defendants submitted evidence of NYCTA maintenance activities, this evidence does not conclusively establish that the NYCTA exercised such exclusive control over the specific sidewalk flag in question so as to divest 4S of its statutory duty. The property owner and the Transit Authority may share responsibility depending on the specific factual circumstances of the defect's location and the nature of the use. "Imposition of the duty to repair or maintain a special use is necessarily premised upon the existence of access to and ability to exercise control over the special use structure or installation" (*Kaufman v Silver*, 90 NY2d 204 [1997]).

The conflicting evidence regarding the control and maintenance of the specific area where the plaintiff fell precludes summary judgment. A jury could reasonably find that the use was not exclusive to the NYCTA and that the abutting owner retained its statutory obligations. Accordingly, defendants' motion for summary judgment is denied.

Turning to plaintiff's cross-motion for summary judgment, Plaintiff contends that he is entitled to summary judgment because the defect was dangerous as a matter of law and 4S had constructive notice. To be entitled to partial summary judgment on the issue of liability, a plaintiff must establish that the defendant created the condition or had actual or constructive notice of it (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]). While plaintiff's expert characterizes the defect as substantial, the issue of whether the condition constituted a dangerous trap or a trivial defect is a question of fact that cannot be resolved on this motion.

Based on the foregoing, it is hereby

ORDERED that the motion by defendants 4S MANAGEMENT CORP. and 3JS FOOD CORP. for summary judgment is **DENIED;** and it is further

ORDERED that the cross-motion by plaintiff JOSE DIFO-FERNANDEZ for summary judgment is **DENIED**.

This constitutes the decision and order of the Court.

Dated: December 3, 2025

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020