Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Jane Rankin,

Plaintiff,

- against -

The City of New York, Jose Nunez and Copan Deli Corporation,

Defendant.

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Index Number: 26358/10

Motion Date: 10/9/12

Motion Cal. Number: 9

Motion Seq. No.: 2

The following papers numbered 1 to 12 read on this motion by defendants, Jose Nunez and Copan Deli Corporation, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5-6
Affirmation in Opposition(Pltf)-Exhibits.....	7-9
Affirmation in Opposition(City)-Exhibits.....	10-12
Reply.....	13-14

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Nunez and Copan for summary judgment dismissing the complaint and all cross-claims against them is granted.

In order to obtain summary judgment, movants must make a prima facie showing that they are entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Nunez and Copan have met their burden.

Plaintiff allegedly sustained injuries when her right foot went into what she describes in her deposition as a "hole" behind the catch basin curb cover on the north side of 109th Avenue east of the intersection of 157th Street in Queens County on October 31, 2009. This location is adjacent to the premises 108-55 157th Street,

a commercial premises owned by Nunez and leased by Copan. In her bill of particulars, plaintiff states that this defect is "on the concrete slab/sidewalk adjacent to the sewer" and that she "was caused to fall when her foot collapsed into the broken, uneven, unsafe, sunken and trap like condition existing thereat" "while exiting a vehicle parked next to the above described slab of concrete/old sidewalk". Annexed to the moving papers as Exhibit "E" are photocopies of photographs of the area where plaintiff alleges she fell, marked as defendants' Exhibits "C" and "E" at her deposition. Plaintiff circled and initialed in pen on the photographs the defect which she says caused her injury. That spot is the rectangular concrete area directly behind the metal catch basin curb piece. This concrete slab is mottled and uneven, and riddled with graffiti written obviously when the cement was still wet.

Kevin McCarroll, a Department of Environmental Protection (DEP) supervisor of water supply and waste water collection whose duties involve repair and inspection of the City's water and sewer system, testified in his deposition that the rectangular concrete area behind that catch basin curb piece depicted in the photographs is the catch basin's "back plate area". He explained, "Back plate area is an area that is open where the unit goes beyond the curb, the brickwork. The foundation of the unit is brickwork or block or precast". He further explained the process as follows. "After the basin is installed, we will set a curb piece, if possible. And then we will work and place angle irons over the open area to the back of the basin. And then we will form it out and mix cement to sidewalk grade for the area that involves the catch basin and the back wall." He explained that the placement of angle irons behind the catch basin and then filling in the area with cement is to give the unit "some sort of strengthening." Therefore, the back plate area of the catch basin is integral to the catch basin and part of its structure.

McCarroll also testified that the DEP installed this cement area as part of its replacement of the sewer catch basin on October 20, 2000. He reviewed a DEP work order for the catch basin in question and testified that according to the work order, "The supervisor and crew arrived and broke out the defective unit, removed the old casting, rebuilt the walls with block and brick and set a new single highway unit and angle irons for the back plate and curb. They backfilled, blacktop, cemented a new curb and sidewalk and they completed the job on that date." When asked if the DEP refers to the back plate area as a sidewalk, McCarroll replied, "No. We refer to it as the back plate area because we only, we take care of just the back of the basin. We wouldn't go and do the whole sidewalk." When further questioned as to whether

he would refer to this area as the sidewalk area, he replied, "I refer to it as a back plate area." However, he did state that the work order refers to the area as "sidewalk" instead of back plate area and when asked whether the back plate area is an area exclusively maintained by the DEP, he responded, "It is part of the sidewalk area and sometimes it isn't even distinguished it just blends in with the sidewalk."

Also annexed to the moving papers as Exhibit "G" are two color photographs of the area of plaintiff's accident, marked as plaintiff's Exhibit "7" for identification at her deposition. These photographs show that the subject concrete back plate is within a long dirt rectangular lawn strip area, where most of the grass was gone, between the curb and the sidewalk.

A property owner or lessee is not liable for repairing and maintaining abutting public property unless it actually created the defective condition or caused it through some special use, or unless an ordinance or statute charges it with the responsibility to repair and maintain the public property and specifically imposes liability upon it for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

The New York City Administrative Code §19-152 places the duty to repair sidewalks upon the abutting property owners and lessees, and §7-210 specifically imposes liability upon abutting property owners and lessees for any injuries resulting from their breach of that duty.

Property owners in the City of New York have a non-delegable duty to repair and maintain at their own expense the public sidewalks abutting their premises, pursuant to §19-152 of the Administrative Code of the City of New York. However, a violation of that section, prior to September 14, 2003, could not form the basis of liability against them for injuries sustained by pedestrians. In the absence of any statute making property owners liable for injuries to pedestrians, liability remained exclusively upon the City.

The Administrative Code was amended in 2003 to add §7-210, which transferred liability from the City to the property owners, except owners of one to three-family homes that are either wholly or partially owner-occupied and used exclusively for residential purposes.

Section 7-210 was enacted to shift tort liability from the City to the property owner who breaches the duty to repair imposed by §19-152. The scope of an adjacent property owner's liability

regarding the repair and maintenance of sidewalks imposed by §7-210 therefore "mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code section[s] 19-152" (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193). Therefore, §7-210 must be read in conjunction with §19-152 which provides that a property owner is required to repair only "those sidewalk flags which contain a substantial defect."

In the instant case, the defective area at issue was clearly not on the sidewalk or a sidewalk flag but was part of the structure of the curbside sewer catch basin. The term "sidewalk" is defined in §19-101(d) of the Administrative Code as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." In harmony with this, §19-152 concerns only "sidewalk flags." Likewise, §2904 of the New York City Charter imposes a duty upon the adjacent owner to repair and maintain at his own cost the "sidewalk flags." The subject back plate concrete slab is clearly not a sidewalk flag and, therefore, is not an area over which the abutting owner would be responsible.

Thus, it is clear that neither §19-152 nor §7-210 imposes upon a property owner a duty to repair and maintain curbs or structural elements of a sewer catch basin not intended for use by pedestrians.

Although the DEP work order referred to the back plate area as "sidewalk" and McCarroll stated that the back plate area was part of the sidewalk area, neither McCarroll nor any DEP worker who prepared the work order for the catch basin purported to hold himself out as being knowledgeable concerning the statutory definition of "sidewalk" according to the intent of the City Council as expressed in the Administrative Code.

Moreover, it is clear from his testimony that McCarroll did not consider this back plate area as a sidewalk in the ordinary sense of the term as a surface intended for pedestrian ambulation, but merely as part of the extended reinforcing structure of the catch basin itself, and that he referred to it as being part of the sidewalk since it was "floated" to "sidewalk grade" and that "sometimes it isn't even distinguished it just blends in with the sidewalk." He clearly did not testify that the subject concrete back plate area was constructed for use as a sidewalk for pedestrian use. In any event, this is not the situation described by him where the back plate area was paved to be level with the sidewalk and blend in with the sidewalk, since it was within a dirt lawn strip area separated from the actual sidewalk and was

demonstrably not an area intended for pedestrian use. Therefore, this concrete back plate was not part of the sidewalk within the meaning of Administrative Code §19-101(d) and not contemplated by the City Council to be included in the area of "sidewalk" for which an adjacent property owner would be responsible under §§19-152 and 7-210 of the Administrative Code. In addition, although when asked if an adjacent property owner would be authorized to alter this concrete back plate area, he replied that he did not know, it is clear from his testimony concerning the purpose of this area as being a reinforcing structure for the sewer catch basin and his description of how angle irons bracing the back of the catch basin are embedded in the concrete, that a private property owner would not be in a position to remove, replace or modify this structure.

Movants' counsel notes in his memorandum of law in support of the motion that the concrete back plate area upon which plaintiff tripped and fell was not on or attached to the sidewalk but was in the dirt/grassy area between the curb and sidewalk. He further argues essentially that this dirt area within which the concrete back plate was located was a curbside tree well area which an adjacent property owner is not responsible to maintain, citing Vucetovic v. Epsom Downs, Inc. (10 NY 3d 517 [2008]). That case states that a property owner may not be held liable pursuant to §7-210 for injuries to a pedestrian who trips in a tree well in front of the premises because a tree well is not part of the sidewalk within the meaning of that section and since a tree well is not intended for the use of pedestrians. This Court concurs with movants' counsel's analysis.

Plaintiff's counsel, in his affirmation in opposition, argues that since the location of plaintiff's accident was, in fact, between the curb line and adjacent property line, it was a sidewalk pursuant to §19-101(d) over which movants bore statutory liability under §7-210. However, what makes a sidewalk a sidewalk, is not merely that it is between a building line and street curb, but, as heretofore discussed, that it is an area intended for use by pedestrians upon which to walk. Indeed, §19-101(d) explicitly limits the definition of sidewalk as including only those areas "intended for use by pedestrians." The subject back plate concrete slab located wholly within the dirt and grass lawn strip or tree well area was clearly not intended for use by pedestrians. That the DEP worker who penned the work order for the construction of the sewer catch basin referred to this slab as "sidewalk" thus does not raise an issue of fact since it is clear from the testimonial and demonstrative evidence presented on this record that such area is not intended for use by pedestrians, is within a lawn strip or tree well area that likewise is not intended for pedestrian use, that it is not a sidewalk flag and is therefore not a sidewalk, as a matter

of law.

Plaintiff's counsel's attempt to distinguish the Vucetovic case by stating, "It is further undisputed that plaintiff's accident did not occur in...the tree well", is without merit. Movants' counsel explicitly raises this issue in his memorandum of law in support of the motion and annexes the photographs of the subject area which clearly show that the concrete back plate of the sewer catch basin is entirely within a long dirt and grass curbside lawn strip between the street curb and the sidewalk and argues that the area was therefore within such a tree well area spoken of in Vucetovic.

The Court notes that the photographs submitted depict a continuous strip of dirt and weedy grass running parallel to the sidewalk and the curb.

Regardless of whether the area where plaintiff tripped actually had trees in it, the reasoning of the Court of Appeals in its holding in Vucetovic that a tree well is not a sidewalk within the meaning of §7-210 over which the abutting property owner is responsible for maintaining applies equally to lawn strips. (As an aside, it must be noted that the term "lawn strip" is one being used by the Court, and not the parties, to describe this area, since the photographs do not show any trees or tree stumps in this area). Stated the Court of Appeals, "[S]ections 19-152 and 16-123, the provisions whose language section 7-210 tracks, contemplate the installation, maintenance, repair and clearing of sidewalks or sidewalk flags. Significantly, tree wells are not mentioned in sections 19-152, 16-123 or 7-210. Given the statutory silence and the absence of any discussion of tree wells in the legislative history, it seems evident that the City Council did not consider the issue of tree well liability when it drafted section 7-210" (10 NY 3d at 521-522). The term "tree well" may be replaced with "lawn strip" wherever it appears in the Vucetovic opinion without doing violence to its reasoning.

As heretofore noted, §19-152, which mirrors the duties and responsibilities imposed by §7-210, and §2904 of the New York City Charter impose upon property owners the duty to maintain only "sidewalk flags." Moreover, §19-101(d) of the Administrative Code explicitly limits the definition of sidewalk as including only those areas "intended for use by pedestrians." Thus, it is clear from the language of the various statutes that the City Council intended the term sidewalk to have its ordinary implied meaning as a concourse intended for pedestrian ambulation and that a tree well or a lawn strip is not such a concourse. Like a tree well, the subject lawn strip, containing dirt, weeds and grass, was clearly

not intended for use by pedestrians. The fact that plaintiff stepped onto the back plate area of the sewer, and would have had to traverse the dirt strip to get onto the sidewalk does not make movants responsible for its maintenance.

Finally, plaintiff's counsel's argument that movants have not established a prima facie entitlement to summary judgment because they have not proffered evidence that "clearly and unambiguously states that they did not create the defect" is without merit.

In the first instance, movants proffered uncontested evidence in the form of McCarroll's testimony that the DEP created the concrete back plate area. But in any event, since movants had no duty to repair and maintain the lawn strip or the back plate slab contained within it, it was plaintiff's burden to show evidence that movants created the defect or caused it through some special use(see Pratt v. Villa Roma Country Club, Inc., 277 AD 2d 298, 299[1st Dept 2000] ["No ordinance or statute is alleged here. Thus, it was incumbent upon the plaintiffs to raise a triable issue of fact that the defendant either created or caused the defective condition, or derived a special benefit from the abutting property unrelated to public use . . . . Since the plaintiffs failed to come forward with any opposing evidence demonstrating that the defendant created or caused the defective condition, or made a special use . . . the Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint"]). Plaintiff has failed to show any evidence that movants created the condition or caused it through a special use. Indeed, plaintiff has failed to proffer any evidence to rebut the testimony of the City's witness that the DEP created the area where she allegedly tripped and fell.

The City has likewise failed to raise any issue of fact in opposition.

Therefore, movants are entitled to summary judgment as a matter of law.

Accordingly, the motion is granted and the complaint and all cross-claims are dismissed as against Nunez and Copan.

Dated: October 16, 2012

KEVIN J. KERRIGAN, J.S.C.