SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 29

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Jan A. Schinkel Roberts, as Administratrix of the Estate of Raymond Schinkel, deceased,

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 156373/2014

The Ford Foundation

Defendant

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Upon the foregoing papers, the Movants' motion for summary judgment dismissing the Plaintiff's action is hereby granted as follows:

Background and Procedural History

Underlying Complaint and Allegations

The underlying action arises from an accident that occurred on April 2, 2014 at the location of 320 E 43rd Street in New York City, NY. The Plaintiffs allege in sum and substance that the Plaintiff Raymond Schinkel, now deceased, was riding a motorized scooter and maneuvering up a driveway cutout on the sidewalk abutting the location of the accident. The Plaintiffs further allege that Mr. Schinkel's scooter tipped over due to the driveway cutout and adjacent abutting street, which Plaintiffs allege were in a defective, hazardous and negligent condition. The Plaintiffs further allege that this caused Mr. Schinkel to sustain injuries when he fell from the scooter and that the Ford Foundation derived a special use and benefit from the driveway cutout and the street immediately in front of the driveway cutout.

Parties Contentions

The Defendant argues in support of the instant motion for summary judgment dismissing the underlying action that it owed no duty of care to the Plaintiff Raymond Schinkel. Specifically, the Defendant argues that Mr. Schinkel's accident occurred on a public street ("roadway"). The Defendant further argues that, as the owner of the property abutting the street, it neither affirmatively created a dangerous condition in the street, negligently made any repairs on the street, caused a dangerous condition to occur through a special use of the street nor violated any statute or ordinance imposing liability upon the Defendant for the maintenance of the street. As such, the Defendant argues that it does not owe any duty of care to the Plaintiffs.

The Defendant further argues that Plaintiffs have failed to establish that the Defendant had actual or constructive notice of any alleged defects, or that the Defendant had a sufficient opportunity within the exercise of reasonable to care to remedy any alleged defects.

In opposition, the Plaintiffs argue that Mr. Schinkel's accident occurred on a driveway that leads to a gated area and loading dock. Specifically, the Plaintiffs argue that Mr. Schinkel attempted to go from the roadway to the sidewalk on the driveway curb cut when the scooter's left rear wheel went into a large hole in the roadway causing the scooter to tip over. The Plaintiffs further argue that said loading dock is for the Defendant's exclusive use and benefit. The Plaintiffs further argue that the Defendant has failed to establish its prima facie entitlement to summary judgment, in that the Defendant has failed to establish that it lacked actual or constructive notice of the defect that caused Mr. Schinkel's accident. Specifically, the Plaintiffs argue that the Defendant has failed to offer any evidence as to the last time that the driveway area in front of the premises was inspected. The Plaintiffs argue that the Defendant has failed to attach with their moving papers an affidavit by someone with personal knowledge as to the condition of the driveway on the date of the loss.

The Plaintiffs further argue that the Defendant failed to establish prima facie that it did not make special use of the area where Mr. Schinkel had his accident and/or that the Defendant did nothing to cause of create the alleged defect. The Plaintiffs argue that the fact that the Defendant did not construct or maintain the area in question is immaterial as the Defendant had a duty maintain the area where Mr. Schinkel's accident occurred so long as the Defendants made a special use of the area.

The Plaintiffs further argue that the Defendant's instant motion is untimely as the Defendant made the instant motion 120 days afer the Plaintiffs filed the note of issue in the underlying action.

In reply, the Defendant argues that the instant motion for summary judgment is timely pursuant to the preliminary conference order dated October 24, 2014, which indicates that the any despositive motions shall be made pursuant to the CPLR. The Defendant argues that CPLR 3212(a) allows for summary judgment motion to be made within 120 days of the filing of the note of issue, and as such the Defendant's instant motion is timely. The Defendant further argues that none of the compliance conference orders issued by this Court subsequent to the preliminary conference order indicated that he Defendant had less than 120 days from the date of the filing of the note of issue to move for summary judgment.[1]

The Defendant further argues that the Plaintiff's accident occurred on the roadway abutting the Defendant's driveway. The Defendant argues that Mr. Sayers testified at his deposition that the subject roadway abutting the driveway had been excavated/dug up multiple times prior to the date of the loss by entities unknown to Mr. Sayers. The Defendant also attaches with the moving papers copies of Department of Transportation work records, which the Defendant argues are sufficient to establish that there were numerous street/roadway openings on the subject location/street.

[1] The underlying action originally appeared before the Honorable Justice Tingling, before it was transferred to this Court upon Justice Tingling exiting the bench.

The Defendant further argues that its use of the roadway constituted no more than a normal use to which the general public is entitled to make of the street. The Defendant argues that private cars, cabs and other cars unrelated to the Defendant are often parked parallel to the subject driveway. The Defendant argues that it has established prima facie that it was not a "special user" of the street in front of the driveway and as such owed no duty of care to the Plaintiff as to said adjacent street.

Oral Argument

On January 3, 2017, the Parties appeared before this Court for oral argument. Defendant's counsel reiterated the argument that Mr. Schinkel's accident occurred on the roadway in front of the driveway. Defense counsel specifically referred to the Plaintiff, Jan Roberts' (Mr. Schinkel's daughter) deposition testimony as to how the accident occurred.

Defense counsel further argued that based upon Ms. Roberts' deposition testimony, the accident occurred on the roadway and not upon the apron of the driveway or the sidewalk in front of the subject location. Specifically, Defense counsel argued that Ms. Roberts testified that Mr. Schinkel's accident occurred due to a depression (an inch or three-quarters-of-an-inch) in the roadway next to the curb in front of the Defendant's building. Defense counsel further argued that the Defendant's witness, Mr. Sayers, testified that the Defendant did not perform any work on the roadway nor was any work performed on the roadway for the Defendant's benefit.

In opposition, Plaintiffs' counsel argued that the accident did not occur on the roadway, but while Mr. Schinkel was mounting the curb on his scooter. Plaintiffs' counsel argued that the curb height (measured from the roadway) constituted the defect that caused Mr. Schinkel's accident. Specifically, Plaintiffs' counsel argued that the "curb cut" was too high compared to any other ramp, and that said curb cut was part of the Defendant's special use of the driveway. Plaintiffs' counsel conceded both that the Defendant was not responsible for the roadway and that a potential depression in the roadway could have been a contributing factor to the accident (Oral Argument pp. 13-14). However, Plaintiffs' counsel argued that the height of the curb itself was also a contributing factor to the accident, for which the

Defendant was responsible. Plaintiffs' counsel argued, without proof, that the curb was approximately two inches high and indicated that he was not aware if said height violated of any rule of the City of New York.[2]

Plaintiffs' counsel further argued that the Defendant has failed to make out its prima facie entitlement to summary judgment. Specifically, Plaintiffs' counsel argued that there is nothing in the Defendant's affidavit in support of the motion for summary judgment to indicate that the curb was in a safe condition. Plaintiffs argue that the affidavit only indicates that the roadway has been repaired numerous times, but does not give any specific locations for said repairs nor refer to any depressions in the roadway. Plaintiffs' counsel argued that the Defendant's affidavit is insufficient to support a motion for summary judgment in that the Defendant has failed to establish prima facie that he curb was in a relatively safe condition.

In reply, the Defendant's attorney argued that the submitted photographs of the subject curb were sufficient to establish that there was nothing defective about the sidewalk/curb on the date of the accident. Defendant's attorney further argues that there have been no violation issued to the Defendant with respect to the sidewalk, and that Ms. Schinkel testified at her deposition that the only "defect" was a depression in the roadway next to the curb. Defendant's attorney argues that given the past work that was preformed on the road (none of which was done by the Defendant or at the Defendant's direction) and the fact that he sidewalk and curb were in good condition, the Defendant did not have to produce an expert to meet their prima facie burden.

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[2] The Court notes that the Plaintiffs do not allege in the pleadings that the Defendant violated any ordinance and/or statute due to the height of the subject curb.

Deposition Testimonies

Raymond Schinkel

On February 11, 2015, the Plaintiff, Raymond Schinkel appeared for deposition and testified that he had problems remembering things (Defendant's Ex. G [Schinkel EBT at 9:5-6]). He testified that he was on his scooter and that we was "coming up on" the Defendant's property when he fell from his scooter (*Id.* at 9:20-25). He further testified that prior to the accident he was going home with his daughter Ms. Roberts (*Id.* at 25:13-15). Mr. Schinkel testified that he was "on the sidewalk" when he fell from his scooter (*Id.* at 26:13-20). However, he later testified that when the accident occurred he was "out in the street" (*Id.* at 29:7-10). Plaintiff testified that his daughter, Ms. Roberts, was next to him and holding his shoulder when his scooter started tipping over (*Id.* at 27:15-25).

Jan Roberts

The Plaintiff Jan Roberts appeared as a nonparty witness for deposition on April 6, 2015, which was continued on February 23, 2016. Ms. Roberts testified that she was voluntarily appearing as a non-party witness in the underlying action due to Mr. Schinkel's memory issues at his deposition (Defendant's Ex. H [Roberts EBT at 7:9-14]).[3] Ms. Roberts testified that on the date of the accident, her father Mr. Schinkel was living with her (*Id.* at 10:20-25).

Ms. Roberts testified that on the date of the accident she and Mr. Schinkel left her apartment at approximately 5:00 p.m. (*Id.* at 50:19-22). She further testified that the building she and her father live in abuts the Defendant's building (*Id.* at 53:10-12). Ms. Roberts testified that she and Mr. Schinkel transversed the entire sidewalk in front of the Defendant's building, and that Mr. Schinkel did not make any compaints as to any difficulty in maneuvering or operating his scooter on said sidewalk (*Id.* at 64:6-24). She furher testified that there were no obstructions on the sidewalk abutting the Defendant's building on the date of the accident (*Id.* at 69:25 - 70:6).

[3] Mr. Schinkel has since passed away and Ms. Roberts now appears in the instant action as the Administratrix of Mr. Schinkel's estate.

Ms. Roberts testified that the accident occurred as she and Mr .Schinkel were returning to the apartment. Ms. Roberts further testified that she and Mr. Schinkel took the same route back to the apartment as they took leaving the apartment (*Id.* at 91:4-7). She further testified that entire street around the Defendant's building "had problems" and was "not level" (*Id.* at 96:25). She further testified that the roadway abutting the subject driveway was uneven and "patched up" in certain areas (*Id.* at 100:8-17). Ms. Roberts testified that the height between the edge of the subject driveway and the roadway was approximately one inch (*Id.* at 114:3-4).

Ms. Roberts testified that during the time period immediately before the accident, she was walking side-by-side with Mr. Schinkel, who was riding his scooter (*Id.* at 123:18-22). She further testified that she observed that the front wheel of Mr. Schinkel's scooter had crossed the curb and was on the driveway itself (*Id.* at 125:17-24; 131-137; 138: 11-16). Ms. Roberts testified that Mr. Schinkel indicated to her that he was stuck (*Id.* at 127:5-11). She further testified that Mr. Schinkel tipped to the left side and fell to the ground (*Id.* at 127:12 - 128:2). She clarified that the scooter toppled over to the left (*Id.* at 133:3-7).

Ms. Roberts testified that after the accident, she could see that the left rear wheel of Mr. Schinkel's scooter was in a hole and had been stuck in said hole (*Id.* at 133:22 - 134:2). She further testified that when Mr. Schinkel told her he was stuck, she realized that he was stuck in a "hole" (*Id.* at 135:2-8). Ms. Roberts further testified that said "hole" was in the roadway (*Id.* at 135:9-12). She further testified that at the time of the accident, half of Mr. Schinkel's scooter was on the driveway and that the hole was very close to the lip of the driveway (*Id.* at 135:22 - 136:9). Ms. Roberts testified that the first time she saw the hole was during the course of Mr. Schinkel's accident as they were returning to the apartment and that she had not seen the hole at any point prior to the accident (*Id.* at 137:5-15). Ms. Roberts testified that she determined that Mr. Schinkel's scooter fell due to one of its wheels being stuck in a hole in the road (*Id.* at 150:16 - 151:6). Ms. Roberts was shown photos of the area where the accident occurred and confirmed that the bottom of Mr. Schinkel's scooter was touching the driveway,

with one of the rear wheels stuck in a hole in the roadway (*Id.* at 156:11-17).

Richard Sayers

On February 23, 2016, Richard Sayers appeared for deposition on behalf of the Defendant. Mr. Sayers testified that he is a Director of Facilities Management for the Defendant, the Ford Foundation, which located at 320 East 43rd Street (Defendant's Ex. J [Sayers EBT at 6:10-19; 23:15-18]). He further testified that there is public sidewalk in front of the Defendant's building at said location (*Id.* at 10:10-13). Mr. Sayers was shown a photograph of the subject driveway and described it as "a driveway leading to our loading dock" (*Id.* at 18:18-21).

Mr. Sayers testified that the subject sidewalks was replaced approximately 10 years prior to 2014 (*Id.* at 20:18-23). He further testified that the "curbs" were not changed by the Defendant (*Id.* at 21:8-10). Mr. Sayers testified that the street in front of the Defendant's building is very busy and there have been multiple instances of Con Ed or other contractors, not affiliated with the Defendant, performing road work on said street (*Id.* at 26:14-20).

Mr. Sayers testified that the Defendant's loading dock is behind a security gate and that in order for trucks to make deliveries they would have had to drive over the subject driveway (*Id.* at 27:7-21). Mr. Sayers testified in sum and substance that said truck deliveries were made for the Defendant's benefit.

Analysis

The Defendant's instant motion for summary judgment is timely based upon the preliminary conference order of the Honorable Justice Tingling and the Court will determine the underlying motion on the merits.

As previously stated the underlying action originally appeared before the Honorable Justice Tingling and was transferred to this Court upon Justice Tingling exiting the bench. In the preliminary conference order dated October 24, 2014, Justice Tingling indicated that the despositive motions were to be made pursuant to the CPLR, which allows for summary judgment motions to be made with 120 days of the filing of the note of issue in the absence of specific date being set by the Court (CPLR 3212[a]).

This Court's rules do require that all substantive motion be made within 60 days of the filing of a note of issue, however, at no point prior to the instant motion did this Court specifically order the Parties to make their substantive motions within said 60 day time period, nor did this court issue a written order indicating as such.

Further, even assuming arguendo that the Defendant's instant summary judgment motion was untimely, the Court has wide latitude in determining whether to consider an untimely summary judgment motion (*See Chambers v. Maury Povich Show*, 285 A.D.2d 440 [2nd Dept 2001]). Given that the Plaintiffs were able to both fully submit papers in opposition to the Defendant's instant motion for summary judgment and participate in oral argument in opposition to the motion, the Court finds that the Plaintiffs were in no way prejudiced by the timing of the Defendant's instant summary judgment motion.

As such, the Court will determine the Defendant's instant summary judgment motion on the merits.

Summary Judgment Standard

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" *(Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [NY 2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [NY 2012] [internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 NY 1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). "Where different

conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [NY 1992]).

The Defendant has established prima facie that Mr. Schinkel's accident occurred due to a condition on the roadway abutting the curb outside of the Defendant's building and that his action was not caused in connection with any "special use" of the subject driveway by the Defendant

"Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk or street is placed on the municipality, and not on the owner or lessee of abutting property, unless the landowner or lessee has either affirmatively created the dangerous condition, voluntarily but negligently made repairs, caused the condition to occur through a special use, or violated a statute or ordinance expressly imposing liability on the landowner or lessee for a failure to maintain the abutting street" (*Ankin v Spitz*, 129 A.D.3d 1001, 1002 [2nd Dept 2015] *citing Farrell v City of New York*, 67 A.D.3d 859 [2nd Dept 2009]; *Smirnova v. City of New York*, 64 A.D.3d 641 [2nd Dept 2009]; *Hyland v. City of New York*, 32 A.D.3d 822 [2nd Dept 2006]; *see also Weiskopf v. City of New York*, 5 A.D.3d 202 [1st Dept 2004]; *but see also* NYC Administrative Code 7-210).

Upon review of the submitted evidence, including the deposition testimonies, and having conducted oral argument, the Court finds that the Defendant has established prima facie entitlement to summary judgment dismissing the underlying action. Ms. Roberts specifically testified that Mr. Schinkel's accident occurred when one of the back wheels of the electric scooter he was riding on became stuck in a hole in the roadway in front of the subject driveway. Further, there was nothing in her EBT testimony nor any of the other witnesses' EBT testimonies to suggest that there were any defects in the driveway/curb itself. Specifically, there was nothing in any of the submitted evidence, including the witnesses' EBT testimonies, to suggest that the height of the driveway/curb measured from the roadway constituted a defect on any kind. Ms. Roberts specifically testified that the road was uneven and patched in certain spots, which was consistent with Mr. Sayer's testimony that the roadway had undergone numerous work by entities unaffiliated with the Defendant. Said evidence is sufficient to establish prima facie both that Mr. Schinkel's accident was caused by a defect in the roadway and that said defect was

not caused or created by the Defendant. In addition, the Defendant has established prima facie that there were no statutes or ordinances expressly imposing liability upon the Defendant to maintain the abutting street.

Further, the Court finds that the Plaintiffs have failed to submit sufficient evidence to create any issue of fact as to whether or not the underlying accident was caused by a defect in the abutting roadway (i.e. the "hole" in the roadway described by Ms. Roberts). At oral argument, the Plaintiffs argued that it was the height differential between the lip of the driveway and the abutting roadway that constituted the defect. However, Ms. Roberts clearly testified that Mr. Schinkel's accident was caused by a hole in the roadway. Ms. Roberts also testified that Mr. Schinkel had gotten the front wheel and at least half of his scooter onto the driveway/curb before the accident. As such, the height differential between the driveway/curb posed no obstacle to Mr. Schinkel getting at least the front half of his scooter onto the driveway. Based upon Ms. Roberts' testimony, it was the hole in the roadway that prevented the scooter from completely going on the driveway (when the left back wheel fo the scooter became stuck in said hole), not the height of the driveway/curb. In addition, the Plaintiffs have failed to submit any evidence sufficient to suggest that the Defendants caused or created the hole in the roadway the caused Mr. Schinkel's accident.

Finally, even assuming arguendo that the Plaintiffs had submitted evidence to suggest that Mr. Schinkel's accident had been caused by the height differential and not a hole in the roadway, the Plaintiffs have failed to submit any proof to suggest that the lip of the driveway was not an appropriate height measured from the abutting roadway.

As such, the Defendants have established prima facie, based in part upon Ms. Roberts' EBT testimony, that the accident occurred due to a hole in the roadway and not any alleged "defect" in the driveway or curb adjacent to the Defendant's building and the Plaintiffs have failed to create any issue of fact on these points.

In addition, upon review of the submitted papers and having conducted oral argument, the Court finds that the Defendant has established prima facie that the Plaintiff's accident did not stem from any "special use" of the abutting roadway. As previously stated, as a general rule, the duty to keep public roadways in reasonably safe condition and to repair any defects falls upon the municipality. An exception to this general rule exists, however, where an owner of land which abuts a public sidewalk/roadway created the defect or uses the sidewalk/roadway for a special purpose. "The special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use, and is therefore required to maintain a portion of that property" (*Poirier v. City of Schenectady*, 85 NY2d 310, 315 [NY 1995]). "The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others." *(Breland v. Bayridge Air Rights*, Inc., 65 A.D.3d 559, 560 [2nd Dept 2009]; *Balsam v. Delma Eng'g Corp.*, 139 A.D.2d 292 [1st Dept 1988]). "A special use has been characterized as involving the installation of some object in the sidewalk or street or some variance in the construction thereof." (*Weiskopf v. City of New York*, 5 A.D.3d 202, 203 [1st Dept 2004][internal citations omitted]).

The Defendant has established prima facie that it did not derive any special benefit from the abutting roadway unrelated to the regular public use of said roadway. Based upon the submitted papers, the Court finds that the Defendant has established prima facie that the subject roadway was regularly and frequently driven upon by automobiles in the course of the public's regular use of the roadway. The automobiles using the roadway included automobiles making deliveries to the Defendant's building. However, this "use" of the roadway fell entirely within the regular public use of the roadway and as such did not constitute a "special use" of the roadway by the Defendant.

Further, the Plaintiffs' submitted papers have failed to create any issue of fact on this point. Specifically, nothing in the Plaintiff's submitted papers support the argument that the Defendant derived any special benefit from the abutting roadway unrelated to the regular public use of said roadway. The fact the roadway abutting the driveway eventually lead to gated private "loading dock" used by the Defendant, does not create an issue of fact as to whether or not the Defendant made "special use" of the roadway itself unrelated to the regular public use of said roadway.

The Court notes that had Mr. Schinkel's accident been caused by a defective curb cut, a defect in the driveway area and/or a defect in the sidewalk apron, the Court would have considered whether or not the special use doctrine was applicable to the Defendant's use of the driveway (*See Trent-Clark v. City of New York*, 114 A.D.3d 558 [1st Dept 2014]). However, as previously stated, in the instant case the submitted evidence clearly establishes that Mr. Schinkel's accident was caused by a defect in the roadway and not any defect in the driveway, curb or sidewalk adjacent to the Defendant's building.

Even assuming arguendo that the driveway did constitute a "special use" by the Defendant, the Court would still find that the Defendant was entitled to summary judgment dismissing the underlying action. The submitted photos showed a non-defective driveway/sidewalk, and Ms. Roberts did not testify that she observed any defects in the driveway. As such, there is nothing to show that the Defendant's alleged "special use" of the driveway (i.e. delivery trucks using the driveway to get to the Defendant's gated delivery area.) caused the hole in the roadway that the Plaintiffs allege caused Mr. Schinkel's accident (*See Trent-Clark v. City of New York*, 114 A.D.3d 558 [1st Dept 2014]; *Torres v. Cent. Parking Sys.*, 3 AD3d 529 (2nd Dept 2004); *Achkhanian v. Town of Oyster Bay*, 262 A.D.2d 510 (2nd Dept 1999)).

Further, although the Plaintiffs argue that the height from the roadway to the lip of the curb/driveway was too high, they have submitted no evidence to link the Defendant's alleged "special use" of the drive way (i.e. to facilitate deliveries) with the height of the lip of the curb/driveway. The Plaintiffs have presented no argument nor submitted any proof to create an issue of fact as to how the Defendant's alleged "special use " of the drive way to facilitate deliveries effected the height of the driveway/curb.

The Defendant has also established prima facie that it did not directly cause or create the hole in the roadway. Mr. Sayers specifically testified that no work was done on the subject roadway by the Defendant nor on the Defendant's behalf. The Defendant also submitted an affidavit by Mr. Sayers to this same effect. Further, there is nothing to suggest that the Defendant in anyway adjusted and/or changed the condition of the abutting roadway (*See Tanzer v. City of New York*, 41 A.D.3d 582, 583 [2nd Dept 2007][the responsibility for the maintenance, repair, and creation of roadway surfaces lies with the municipality and allegations based upon the regular use of a roadway by vehicles is insufficient to create an issue of fact as to whether or not a Defendant created an alleged defect in the roadway]).

In opposition, the Plaintiffs have failed to submit any evidence sufficient to create an issue of fact as to whether or not the Defendant was directly responsible for the hole in the roadway. Specifically, the Plaintiffs have failed to introduce any evidence in its submitted papers to suggest that the Defendant caused or created the hole in the roadway that the caused Mr. Schinkel's accident.

It is clear from the submitted papers, including Ms. Roberts EBT testimony, that Mr. Schinkel's accident was caused by a defect in the roadway and not any defect in the driveway, curb or sidewalk adjacent to the Defendant's building. It is equally clear that the Defendant neither created said hole in the roadway nor derived any "special use" of said roadway outside of the regular public use of the roadway for vehicles to drive upon. Further, there is nothing to indicate that the Defendant had any statutory duty to maintain roadway abutting the sidewalk adjacent to the Defendant's building.

As such, there is no basis to hold the Defendant liable for the Mr. Schinkel's accident, which occurred as a result of a defect in the roadway.

Conclusion

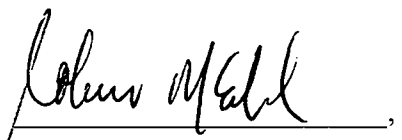
Accordingly and for the reasons so stated in the instant decision, it is hereby

ORDERED that the Defendant's motion for summary judgment is hereby granted and the Plaintiff's action is hereby dismissed in its entirety.

The Clerk of the Court is hereby DIRECTED to enter JUDGEMENT for the Defendant the Ford Foundation, dismissing the complaint.

The foregoing constitutes the Judgment and decision of the Court.

Dated: February 21, 2017



, JSC

HON. ROBERT D. KALISH
J.S.C.