SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

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DEBRA GOLDBERG,

Plaintiff,

-against-

THE CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, HILTON HOTELS CORPORATION, HILTON NEW YORK WALDORF, LLC WALDORF ASTORIA MANAGEMENT, LLC d/b/a THE WALDORF ASTORIA HOTEL,

Defendants.

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DECISION & ORDER

Index No. 151670/14

Mot. Seq. Nos. 001, 002, 003

ALEXANDER M. TISCH, J.

Factual and Procedural Background

This is an action for recovery for personal injuries allegedly sustained by plaintiff Debra Goldberg on April 2, 2013 when she tripped and fell over a raised expansion joint metal strip located on the sidewalk in front of 101-121 East 49th Street as she was walking east between Lexington and Park Avenues in the County, City and State of New York. In Motion Sequence No. 001, defendant Metropolitan Transit Authority ("MTA") moves for summary judgment, pursuant to CPLR 3212, seeking dismissal of plaintiff's complaint on the ground that the MTA cannot be liable for the negligent actions of its subsidiary Metro-North Commuter Railroad ("Metro-North"). In Motion Sequence No. 002, defendants Hilton Hotels Corporation and Waldorf Astoria Management LLC s/h/a Hilton New York Waldorf, LLC, Waldorf Astoria Management, LLC d/b/a The Waldorf Astoria Hotel ("Waldorf") (collectively, "Hilton defendants") moves for summary judgment, pursuant to CPLR 3212, seeking dismissal of the complaint on the ground that Hilton did not own, maintain or repair the subject expansion joint or the area within twelve inches of the expansion joint that allegedly caused plaintiff's injury and

thus did not owe a duty to plaintiff. In Motion Sequence No. 003, defendant The City of New ("City") moves for summary judgment, pursuant to CPLR 3212, seeking dismissal of the complaint on the ground that the City is not liable pursuant to New York City Administrative Code ("Administrative Code") § 7-210. For the reasons set forth herein, the motions for summary judgment are granted as to the MTA, the Hilton defendants, and the City.

Discussion

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Park Hosp.*, 68 N.Y.2d 320, 324 [1986] (citations omitted); *see also Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 852 [1985]. "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact." *Alvarez*, 68 N.Y.2d at 324.

I. MTA Motion Sequence No. 001

In Motion Sequence No. 001, the MTA asserts that, as a public authority, pursuant to New York Public Authorities Law § 1264, its purpose is "the continuance, further development and improvement of public transportation . . . within the metropolitan commuter transportation district." Further, Public Authorities Law § 1264 limits the functions of the MTA, with respect to public transportation, to financing and planning, which excludes operation and maintenance. *Cusick v. Lutheran Med. Ctr.*, 105 A.D.2d 681, 681 [2d Dep't 1984]; *see Noonan v. Long Island R.R.*, 158 A.D.2d 392, 393 [1st Dep't 1990]. Therefore, the MTA cannot be held responsible for

negligence arising out of the operation, maintenance, and control of any of its facilities. *Noonan*, 158 A.D.2d at 393. Moreover, the MTA cannot be held responsible for the negligence of its subsidiaries, including Metro-North, which are "distinct entities and shall be individually subject to suit." *Id.* Liability, as applicable here, is predicated upon ownership, occupancy, control, or a special use of the subject premises. *Balsam v. Delma Eng'g Corp.*, 139 A.D.2d 292, 296 [1st Dep't 1988]. Because the MTA does not own, operate, maintain, or control the sidewalk or the expansion joint upon which plaintiff allegedly tripped and fell, the MTA, unlike its subsidiary Metro-North, owes no duty to plaintiff and is therefore not liable for her injuries.

Plaintiff contends in opposition that Administrative Code § 7-210[1] imposes a non-delegable duty for the maintenance and repair of the public sidewalk on an abutting landowner. An MTA senior real estate manager, Alicia Biggs, who appeared for a deposition on behalf of the MTA, testified that she had no knowledge of the subject expansion joint. *See* NYSCEF Doc. No. 29. However, the Director of Property Operations for the Waldorf, Maher Hanna, testified at a deposition that he was familiar with the subject expansion joint and that he was responsible for

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[1] Administrative Code § 7-210 provides in pertinent part as follows:

a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.

b. Notwithstanding any other provision of the law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant of the corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

b. Notwithstanding any other provision of the law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

the maintenance of the surrounding sidewalk abutting the Waldorf. NYSCEF Doc. No. 30, Tr. 7:10-23. Mr. Hanna also testified that the Waldorf extends one full block between Park and Lexington Avenues on East 49th Street and that the address for the Waldorf is 301 Park Avenue in New York City. *Id.* A New York City Property Statements List indicates that 301 Park Avenue is owned by the MTA and thus the MTA owes a non-delegable duty to plaintiff. However, it is admitted by the Hilton defendants that they owned and managed the property located at 301 Park Avenue at the time of plaintiff's injury. NYSCEF Doc. No. 41, ¶ 3. This is supported by a deed that transferred ownership to the Hilton defendants years before this incident.[2] NYSCEF Doc. No. 100. Accordingly, summary judgment is granted in favor of the MTA and plaintiff's complaint against the MTA is dismissed.

II. Hilton Motion Sequence No. 002

In Motion Sequence No. 002, the Hilton defendants contend, in support of their motion for summary judgment, that they did not own, maintain, or repair the subject expansion joint or the area within twelve inches of the expansion joint and, as such, they cannot be liable for plaintiff's injuries. Hilton relies on the deposition testimony of Maher Hanna, the Director of Property Operations at the Waldorf, which is owned by Hilton. His duties include the repair and maintenance of the building site at 301 Park Avenue. *See* NYSCEF Doc. No. 58, Tr. 7:4-10. Hanna testified that the subject expansion joint extends the width of the sidewalk on East 49th Street and extends into the roadway to the opposite side of 49th Street. *See id.*, Tr. 13:8-10, 30:2-9. Hanna testified that the Waldorf did not perform maintenance or repairs to the subject expansion joint because it is not their "area." *See id.*, Tr. 7: 24-25, 8:2-3, 8:18-22, 9:6-14, 21:6-11. Hanna further testified that the Waldorf would not be responsible for the maintenance or

[2] Penn Central, predecessor in interest to the MTA, retained ownership of the subterranean portions of 301 Park Avenue, but this does not include the sidewalk or expansion joints. NYSCEF Doc. No. 100.

repair of the subject expansion joint or the area within twelve inches surrounding it because it belongs to another entity, which he believes is Metro-North. *Id.*, Tr. 25:20-25, 26: 2-25, 27: 2-9. Hanna also testified that a repair was made to the subject expansion joint by Metro-North and that he observed Metro-North personnel inspecting expansion joints on the block at issue. *Id.*, Tr. 30:16-25, 31: 2-9, 32:5-15.

The Hilton defendants further contend that despite Administrative Code § 7-210 shifting liability for maintenance of the sidewalk to the abutting property owner, Title 34 of the Rules of the City of New York ("RCNY") § 2-07(b) relieves them from liability. 34 RCNY § 2-07(b), which details the maintenance requirements for underground street access covers, transformer vault covers, and gratings, provides that:

> (1) The owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending 12 inches outward from the perimeter of the hardware.
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> (2) The owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending 12 inches outward from the perimeter of the cover of the grating.

34 RCNY § 2-01 has defined "street" to also include sidewalks. The Hilton defendants maintain that they did not own the subject expansion joint, and that Metro-North, a non-party to this action, owned the expansion joint. The Hilton defendants argue that while they may be responsible for the condition and maintenance of the sidewalk abutting the Waldorf, they are not responsible for the condition of the subject expansion joint as they did not own, maintain, or repair said joint or the area within twelve inches of the joint at issue. As such, they contend that they are not liable for plaintiff's injuries.

Plaintiff contends in opposition that the Hilton defendants admit in their papers that the Waldorf was responsible for the maintenance and repair of the sidewalk where the incident took

place. Further, plaintiff contends that the Hilton defendants' reliance on 34 RCNY § 2-07(b) is misplaced because it deals with covers or gratings on the street, which does not include the subject expansion joint. Rather, the expansion joint is a piece of metal embedded in the sidewalk to structurally strengthen the sidewalk. Moreover, plaintiff asserts that there was sidewalk scaffolding above the location where the incident occurred abutting the Waldorf and that, pursuant to the special use doctrine, the Hilton defendants owed a duty to provide a safe walkway under the scaffolding. *See McKenzie v. Columbus Centre, LLC*, 40 A.D.3d 312 [1st Dep't 2007].

With respect to ownership of the subject expansion joint, the Hilton defendants submit evidence annexed to their reply papers that a permit was issued to Metro-North for the purpose of replacing surface expansion joints on February 8, 1989. NYSCEF Doc. No. 95, ¶ 3.[3] Accordingly, any issue of fact with respect to ownership or maintenance of the subject expansion joint lies between the MTA, through its subsidiary Metro-North, and the City. Therefore, the Hilton defendants are not liable for plaintiff's alleged injuries under this theory. With respect to plaintiff's theory of liability under the special use doctrine, this theory also fails. In Motion Sequence No. 001, plaintiff essentially conceded that the MTA enjoyed a special use of the subject expansion joint because it stabilizes the structure underneath the portion of sidewalk at issue, which is owned by the MTA. Moreover, plaintiff's attempt to argue that the inadequate lighting of the portion of sidewalk on which she tripped due to the scaffolding fails because there is no indication in her pleadings that plaintiff ever made a claim for inadequate lighting. In any case, the scaffolding is unrelated to the expansion joint. Additionally, plaintiff failed to raise any genuine issue of material fact that would defeat the Hilton defendants' entitlement to summary

[3] Though submitted as an exhibit in reply, this Court is permitted to consider such evidence as it directly responds to plaintiff's argument in opposition. *See Whale Telecom Ltd. v. Qualcomm Inc.*, 41 A.D.3d 348, 348 [1st Dep't 2007].

judgment. Based upon the foregoing, the co-defendants' cross-claims for common law indemnification must also be dismissed as there is no evidence of negligence on behalf of the Hilton defendants or that the Hilton defendants were responsible for the maintenance and repair of the subject expansion joint and the surrounding twelve inch area.

III. City Motion Sequence No. 003

In Motion Sequence No. 003, the City contends that pursuant to Administrative Code § 7-210, liability for plaintiff's injuries is shifted to the abutting landowner, which appears to be 301 Park Avenue. The City submits proof that it does not own 301 Park Avenue or any other property that abuts the sidewalk where plaintiff was allegedly injured and that the landowner of the abutting property is not exempt pursuant to Administrative Code § 7-210(c). *See* NYSCEF Doc. No. 78. The City further contends that it is not responsible for the maintenance or repair of the subject expansion joint pursuant to 34 RCNY § 2-07 because it does not own or maintain said joint. Finally, the City contends that it did not cause or create the allegedly defective condition on the sidewalk. A record search indicates that the City did not perform work on the subject expansion joint for two years prior to and including the date of the incident. *See* NYSCEF Doc. No. 76-77.

In opposition, plaintiff contends that the City is responsible for the sidewalk portion at issue pursuant to Administrative Code § 7-201(c)(2)[4] on the ground that the City had actual prior

[4] Administrative Code § 7-201(c)(2) provides:

> No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereon, being out of repair, unsafe or dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized b y the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe,

written notice of the defect in the sidewalk from Big Apple Sidewalk and Pothole Protection Maps that were filed with the City's Department of Transportation in 2002 and 2003 before Administrative Code § 7-210 took effect. Plaintiff's argument, unsupported by any case law, is essentially that the City should have repaired the defective condition that they were on notice of prior to the enactment of Administrative Code § 7-210.

In reply, the City argues that Administrative Code § 7-210, which became effective on September 14, 2003, is applicable and, accordingly, liability for any injuries sustained on a public sidewalk after that date shifted away from the City to the abutting landowner. The relevant case law supports this conclusion. The City enacted Administrative Code § 7-210 as an effort to transfer tort liability from the City to adjoining property owners. *Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d 517, 521 [2008]. With the passage of Administrative Code § 7-210, the duty to maintain and repair public sidewalks, within the City of New York, and any liability for the failure to do so, was shifted, with certain exceptions, to the owners of property abutting the sidewalk. *Early v. Hilton Hotels Corp.*, 73 A.D.3d 559 [1st Dep't 2010]. The Appellate Division, First Department held that the City would generally be liable for accidents caused by sidewalk defects prior to the September 14, 2003 effective date of Administrative Code § 7-210. *Rodriguez v. City of New York*, 12 A.D.3d 282 [1st Dep't 2004]. Accordingly, plaintiff's argument fails as there is no basis to hold the City liable for an injury that took place on April 2, 2013, ten years after the law took effect, even if it is presumed that the City had notice prior to the enactment of Administrative Code § 7-210. In light of the fact that the incident occurred on a sidewalk abutting property not owned by the City, that such property does not fall within any of

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dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

the exceptions set forth in Administrative Code § 7-210, and that it has not been disputed that the City did not cause or create the subject defect on the sidewalk, the City cannot be liable for plaintiff's injuries as a matter of law. Additionally, as mentioned above, Metro-North was issued a permit to replace surface expansion joints in the area in which plaintiff was allegedly injured. As such, any potential liability for plaintiff's injuries falls on Metro-North for failing to maintain the subject expansion joint in a reasonably safe condition. Accordingly, summary judgment is granted in favor of the City and plaintiff's complaint against the City is dismissed.

Any requested relief not expressly addressed herein has been considered by the Court and is hereby denied.

Conclusion

In light of the foregoing, it is hereby:

ORDERED that the MTA's motion for summary judgment (Mot. Seq. No. 001) is granted; and it is further,

ORDERED that the Hilton defendants' motion for summary judgment (Mot. Seq. No. 002) is granted; and it is further,

ORDERED that the City's motion for summary judgment (Mot. Seq. No. 003) is granted; and it is further,

ORDERED that the Clerk is directed to enter judgment in favor of all defendants against plaintiff, dismissing the complaint against them; and it is further

ORDERED that this constitutes the decision and order of this Court.

Dated: June 30, 2017

Hon. Alexander M. Tisch, J.S.C.

HON. ALEXANDER M. TISCH