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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

NASSAU COUNTY

ELAINE KLAU AND MARVIN L. KLAU,

Plaintiffs,

-against-

BELAIR BUILDING, LLC,

Defendant.

MOTION SEQ. NO.: 001
MOTION DATE: 7/27/11

INDEX NO.: 19456/09

BELAIR BUILDING, LLC,

Third-Party Plaintiff,

-against-

NATIONAL GRID and LIPA

Third-Party Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Motion pursuant to **CPLR §3212** by the defendant Belair Building, LLC for an order dismissing the complaint and all cross claims and/or counterclaims insofar as interposed against it is determined as follows.

In August of 2009, the plaintiff Elaine Klau was walking on a public sidewalk abutting 325 Shore Road, in Long Beach, New York, near the Lincoln Apartment complex (E. Klau Dep., 11-12; 18-20, 30; Cmplt., ¶¶ 10-11). As she proceeded eastbound, her right foot struck an allegedly uneven and "upraised" blob of concrete attached to, and located directly on top of, a metal gas valve cover or cap, which had been installed in the concrete sidewalk slab (E. Klau Dep., 11-12; 18-20; 27-28; 85-86; Pictures, Milch Exh., "F;" Sommer Aff., Exh., "H" Stone Dep.,10-12).

After her foot contacted the concrete blob, which was some two to three inches wide and about an inch-and-one half high, the plaintiff lost her balance and fell to the sidewalk, allegedly sustaining personal injuries (E. Klau Dep., 18-21; 27, 32, 54-55).

The property directly adjacent to the sidewalk area where the plaintiff fell – the Lincoln Apartments – is owned by the defendant Belair Building, LLC ["Belair"]. National Grid owns, and is responsible for maintaining, the sidewalk gas box valve on which the plaintiff stumbled (Milch Aff., Exh., "J").

Relevant work records produced during discovery indicate, *inter alia*, that National Grid received notice of a gas leak in the underlying main attached to the subject valve cover, and performed repairs in 2003. As part of the repair process, the concrete sidewalk slab in which the valve was installed was excavated. Thereafter, National Grid retained a private paving contractor to reinstall the sidewalk slab (Stone Dep., 8-9; 17-19, 23; Haberman Dep., 18-20; Marquez Dep., 17-20, 27).

According to Belair's property manager, Brook Haberman he observed utility personnel performing a second repair on the same valve and sidewalk slab, possibly at some point in 2007 or 2008, after which he noticed that the sidewalk had again been replaced (Haberman Aff., ¶¶ 4-6 [Milch Aff., Exh., "8"]; Marquez Aff., ¶¶ 6-7; Klau Dep., 87).

After the repair, and in the exercise of his management duties, Haberman had occasion to walk in the vicinity of the slab, but never noticed any defect in its construction (Haberman Aff., ¶ 5; Marquez Aff., ¶¶ 8-9). After the injured plaintiff's accident occurred, however, Haberman examined the slab more closely and "observed a square metal plate marked 'GAS' and a very small amount of concrete on it" (Haberman Aff., ¶ 5; Marquez Aff., ¶¶ 8-9). Haberman stated that no one from Belair had ever performed any repair or construction work on the involved, sidewalk slab or the gas box valve (Haberman Aff., ¶ 2; Marquez Aff., ¶ 9).

National Grid's current senior administrator, Walter Stone, was deposed and testified, *inter alia*, that as a general practice, National Grid excavates sidewalk slabs surrounding gas box valves when repairs are made. National Grid is thereafter responsible for replacing and/or repairing the excavated sidewalk slab (Stone Dep., 17-19). Stone testified that adjacent landowners are not permitted or authorized to remove gas cap valves (Stone Dep., 31).

By summons and verified complaint dated July, 2010, the injured plaintiff, Elaine

Klau, and her husband, suing derivatively, commenced the within personal injury action as against Belair.

Among other things, the verified complaint references and relies upon, Long Beach City Charter § 256, which provides in relevant part, that *inter alia*, adjoining landowners whose property fronts or abuts "any street, highway, traveled road, public lane, alley or square," must "make, maintain and repair the sidewalk, curbstones and gutters" (Cmplt., ¶ 9). The foregoing Charter section further provides that abutting landowners "shall be liable for any injury or damage by reason of omission, failure or negligence to make, maintain or repair such sidewalk, curbstone and gutter or to remove snow, ice or other obstructions therefrom * * *."

Significantly, the term "sidewalk" is defined in a separate portion of the Charter, as "any portion of a street between the curbline and the adjacent property line, intended for the use of pedestrians, excluding parkways" (Code of Ordinances, Part II, ch. 1, § 1.2 *cf.,* Vehicle & Traffic Law § 144).

Belair has answered the verified complaint, denied the material allegations therein and interposed various affirmative defenses (Milch Aff., Exh., "B"). Thereafter, Belair instituted a third-party action against National Grid and LIPA.

Discovery has been conducted and Belair now moves for summary judgment dismissing the plaintiffs' complaint insofar as interposed against it. In support of its application, Belair argues, *inter alia*, that the utility-owned gas valve cover (and the concrete affixed to it) were not part of the sidewalk within the meaning of the subject City Charter provision and that the defect was exclusively created by National Grid (*e.g.*, Milch Aff., ¶¶ 34-49, 50). National Grid has not filed papers in connection with the motion.

It is settled that "[a]n adjoining landowner may be liable for injuries caused by a sidewalk defect only where it affirmatively created the dangerous condition, negligently made repairs to the area, caused the dangerous condition to occur through a special use of the area, or violated a statute which expressly imposes liability on the property owner for failure to maintain the abutting sidewalk" (*Holmes v. Town of Oyster Bay*, 82 AD3d 1047, 1048 *see, Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517, 519-520 [2008]; *Hausser v. Giunta*, 88 NY2d 449, 453-454 [1996]; *Harakidas v. City of New York,* 86 AD3d 624; *James v. County of Nassau,* 85 AD3d 971, 972).

However, in construing municipal ordinances and statues and Code provisions

which impose liability upon adjoining landowners, the Court of Appeals has emphasized that "'legislative enactments in derogation of common law, and especially those creating liability where none previously existed,' must be strictly construed" (*Vucetovic v. Epsom Downs, Inc., supra*, 10 NY3d at 521, *quoting from, Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 NY3d 200, 206 [2004]; *Harakidas v. City of New York, supra,* 86 AD3d at 627).

In the leading case of *Vucetovic v. Epsom Downs, Inc., supra,* the injured plaintiff tripped over uneven or defective cobblestones which bordered a dirt tree well containing the stump of a tree removed by the City several months prior to the accident (*Vucetovic v. Epsom Downs, Inc., supra,* at 519, 522, fn 2). The Court's opinion notes that the record was unclear as to who placed the cobblestones and/or who had installed the tree well (*Vucetovic v. Epsom Downs, Inc., supra,* at 522, fn 2). Insofar as relevant § 7-210 of the City Administrative Code provided that: "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." A separate Code provision defined the term "sidewalk" as meaning, "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" (Code § 19-101[d]).

In ruling that the City Code provision was inapplicable to the tree well, the Court observed that neither the Code transfer provision itself, nor the separate definition of sidewalk, mentioned tree wells as covered defects. In light of this statutory omission, and applying the principle of strict construction, the Court declined to apply the Code provision and dismissed the complaint as to the adjoining landowner.

Notably, and upon subsequently interpreting § 7-210, the Second Department has recently held that § 7-210 "does not impose strict liability upon the property owner," and that therefore, "the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable" (*Harakidas v City of New York, supra,* 86 AD3d at 626; *Martinez v Khaimov*, 74 AD3d 1031, 1032-1033).

With these principles in mind, the Court agrees that Belair has established its *prima facie* entitlement to judgment as a matter law. Specifically, Belair has demonstrated that the valve box cover to which the offending cement substance was affixed, does not fall within the scope of the relevant, Charter provisions (*Alexopoulos v City of New York,* 33 AD3d 828, 830 *see generally, Vucetovic v. Epsom Downs, Inc., supra cf., Manning v.*

City of New York, ___Misc.3d___, 2007 WL 2446562, at 2 [Supreme Court, Richmond County 2007]).

Here, there is no common law precedent which would require adjoining landowners to maintain a public utility's gas valve equipment, or to clear potentially sensitive gas service equipment of defects (*Harakidas v City of New York, supra,* 86 AD3d at 626). Accordingly, any transfer of municipal liability is subject to the rule of "strict" or narrow statutory construction (*Vucetovic v. Epsom Downs, Inc., supra*; *Harakidas v City of New York, supra,* 86 AD3d at 626).

At bar, the subject Charter provision, at least to the extent described by the parties, does not particularize the defects for which an adjoining landowner would be responsible, *i.e.*, it contains no language which expressly provides that landowners are to be held accountable for affirmatively created defects which are literally affixed to utility-owned gas main equipment – equipment which only the utility is authorized to service (*see, Vucetovic v. Epsom Downs, Inc., supra*; *Manning v. City of New York, supra*, 2007 WL 2446562, at 2).

Specifically, while the governing charter provision is relatively broad, its language only generally refers, *inter alia*, to the repair and maintenance of "sidewalks, curbstones and gutters" (*Manning v. City of New York, supra*). The charter provision itself does not contain language defining the meaning of "sidewalk" for the specific purpose of applying its repair and maintenance obligations (*see generally, Vucetovic v. Epsom Downs, Inc., supra,* at 521). Similarly, although the Charter's separately codified definitional section does define the term "sidewalk," there is no language in that provision which expressly states that a utility-owned, metal gas box valve constitutes part of a sidewalk for purposes of imposing liability on adjoining landowners (*see, Alexopoulos v City of New York, supra see, Vucetovic v. Epsom Downs, Inc., supra,* at 521 *cf., Smith v. 125th Street Gateway Ventures, LLC*, 75 AD3d 425).

It bears noting that to the extent discernable from the record, the allegedly hazardous cement "blob" was literally fused to the valve box cap itself, and was not, therefore, situated on the surrounding slab portion of the sidewalk. Nor was Belair an entity even possessing the authority to correct conditions affecting utility-owned gas equipment (*cf., Calise v. Millennium Partners*, ____Misc.3d ____, 2010 WL 521123 [Supreme Court, New York County 2010]; *King v. Alltom Properties, Inc.*, ___Misc.3d___, 2007 WL 2333086, at 2 [Supreme Court, Kings County 2007]). National

Grid's witness testified in this respect that only utility personnel were authorized to service or maintain the valve (Stone Dep., 30-31).

While the plaintiffs further contend, *inter alia*, that the definition of the term "sidewalk" under the Long Beach Code includes the surface area where the valve was located, this assertion is not determinative. In the *Vucetovic* case, the governing City Code definition of the term "sidewalk," was also arguably broad enough to literally encompass the specific geographic and/or physical location where the offending cobblestones and tree well were located, *i.e.*, within the "physical boundaries" of what one would consider the sidewalk (*see, Vucetovic v. Epsom Downs, Inc.*, 45 AD3d 28, 30-31 [Gonzalez, J., dissenting], *aff'd, Vucetovic v. Epsom Downs, Inc., supra see also*, New York City Administrative Code, §§ 7-710; 19-101[d]; 19-152). Despite this, the Court of Appeal's written opinion does not rely on the theory that the involved tree well area was not a location "for the use of pedestrians" (*see*, Code § 19-101[d]), but instead, rejected liability because the transfer (and related) Code provisions contained no reference to "tree wells" as specific features of a sidewalk to which the statutory duty would apply (*cf., Vucetovic v. Epsom Downs, Inc.*, 45 AD3d 28, 29 *aff'd, Vucetovic v. Epsom Downs, Inc., supra*).

The plaintiffs' additional suggestion that Belair was duty-bound to notify the appropriate repair authority (Sommer Aff., ¶ 28), is lacking in merit, since the relevant Charter provisions "nowhere impose a duty to notify [third parties] * * * of dangerous conditions" (*King v. Alltom Properties, Inc.*, ___Misc.3d___, 2007 WL 2333086, at 3 [Supreme Court, Kings County 2007]).

Alternatively, and even assuming that the involved defect falls within the reach of the Charter (*cf., Harakidas v City of New York, supra,* (86 AD3d at 626-628), Belair has *prima facie* demonstrated that the plaintiff's injuries were exclusively attributable to the affirmative acts and omissions of National Grid.

In *Harakidas v City of New York, supra,* (86 AD3d at 626), the Second Department recently applied the requisite, "strict construction" principle to the analogous, City sidewalk ordinance, and concluded that although the ordinance "expressly shifts tort liability to the abutting property owner for injuries proximately caused by the owner's failure to maintain the sidewalk in a reasonably safe condition * * * [nevertheless] it does not shift tort liability for injuries proximately caused by the City's affirmative acts of negligence" (*Harakidas v City of New York, supra,* 86 AD3d at 626).

Here, the record indicates that any defect which existed – the raised cement lump affixed to the gas box cap – was created by National Grid. The available evidence in this respect establishes, *inter alia*, that National Grid was the only entity which performed work at the site; and that after National Grid repaired the gas leak, it then reinstalled the valve cap and repaired the sidewalk flag.

In opposition, the plaintiffs have not disputed that the inference to be drawn from the deposition testimony and other evidentiary materials, is that the alleged defect was created exclusively by National Grid's affirmative conduct in performing the repair (*cf., Harakidas v City of New York, supra,* 86 AD3d at 626)(Sommer Aff., ¶ 28).

The Court has considered the plaintiffs' remaining contentions and concludes that they are insufficient to defeat Belair's motion.

Accordingly, it is,

ORDERED, that the motion pursuant to **CPLR §3212** by the defendant Belair Building, LLC, for an order dismissing the complaint and all cross claims and/or counterclaims insofar as interposed against it, is **granted**.

This constitutes the Order of the Court.

Dated: 10/12 2011

J.S.C.

ENTERED
NOV 15 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE