Hood v 288 St. Nick LLC
2013 NY Slip Op 30468(U)
March 1, 2013
Supreme Court, New York County
Docket Number: 112489/07
Judge: Michael D. Stallman
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[* 1]

SCANNED ON 3/8/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 112489/2007
HOOD, SANDRA
vs.
288 ST. NICK LLC
SEQUENCE NUMBER : 007
DISMISS

INDEX NO. 112489/07

MOTION DATE 11/29/12

MOTION SEQ. NO. 007

The following papers, numbered 1 to 22 were read on this motion and cross motions for summary judgment

Notice of Motion— Affirmation — Exhibits A-K--Affirmation of Service	No(s). 1-2; 3
Notice of Cross Motion —Affidavit of Service; Affirmation — Exhibits A-K	No(s). 4-5; 6
Notice of Cross Motion— Affirmation — Exhibits A-I—Affirmation of Service	No(s). 7-9
Affirmation in Opposition and Reply; Affirmation in Opposition to Plaintiff's Cross Motion and Reply	No(s). 10-11; 12-13
Supplemental Affirmation in Further Support of Cross Motion and In Opposition to Motion–Exhibits A, B [Supplemental Affidavit]—Affidavit of Service; Affirmation in Opposition to Plaintiff's Cross Motion and in Further Support of Defendants'/Third-Party Plaintiffs' Cross Motion –Affidavit of Service	No(s). 14-16; 16-18
Reply Affirmation and in Further Support of Cross Motion	No(s). 19-20
Reply Affirmation	No(s). 21-22

Upon the foregoing papers, it is ordered that the third-party defendant's motion for summary judgment, the defendants' cross motion for summary judgment, and the plaintiff's cross motion for summary judgment are decided in accordance with the annexed memorandum decision and order.

FILED

MAR 08 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/1/13
New York, New York

_______________, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. Check one: .... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:.................... MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check if appropriate:.................... ☐ SETTLE ORDER ☐ SUBMIT ORDER
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[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

---X

SANDRA HOOD,

Plaintiff,

Index No. 112489/2007

- against -

288 ST. NICK LLC, ABECO MANAGEMENT CORP. and REVA HOLDING CORPORATION,

Decision and Order

Defendants.

---X

288 ST. NICK LLC, ABECO MANAGEMENT CORP. and REVA HOLDING CORPORATION,

Third-Party Plaintiffs,

- against -

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NEW YORK CITY TRANSIT AUTHORITY,

Third-Party Defendant.

---X

HON. MICHAEL D. STALLMAN, J.:

In this trip and fall action, third-party defendant New York City Transit Authority (NYCTA) moves for summary judgment dismissing plaintiff's complaint and all cross claims against it. Defendants cross-move for summary judgment dismissing the complaint, and plaintiff cross-moves for summary judgment in her favor as to liability against defendants and NYCTA.

BACKGROUND

Plaintiff alleges that, on March 15, 2007, she tripped and fell due to a broken,

uneven, sunken, depressed, and hazardous condition on the sidewalk of St. Nicholas Avenue, abutting the premises located at 288 St. Nicholas Avenue, in Manhattan. The allegedly dangerous sidewalk condition was in front of the entrance to a subway station at the southeast corner of West 125th Street and St. Nicholas Avenue.

Plaintiff testified,

> "A couple that was in front of me, they stopped abruptly at the stairs and I saw them begin to kiss. There were, behind them, lots of people coming up that same stairway. So I stopped short.
>
> Q. And what happened next?
>
> A. So I tried – it's almost like I had to stop myself in motion, so – because if I hadn't, the couple – as – I would have fallen into them and I would have knocked them down the stairs. So it's like my foot got wedged into this sort of pit and the lip of it, like – like, because I was – like, it hugged the corner of my shoe and I – it just happened so quickly. I turned this way to avoid the couple. Otherwise, I would have pushed them down the stairs."

(Coffey Affirm., Ex H [Hood EBT], at 28-29.)

At her deposition, plaintiff circled an area on Defendant's Exhibit 3a as the place where she allegedly fell. (Hood EBT, at 21; *see also* Coffey Affirm., Ex F [photographs]; Lewis Affirm., Ex I [photographs].) Defendants' Exhibit 3a was a photocopy of one of three photographs which plaintiff testified were taken by her son (*id.* at 17), "within two days or so of the accident." (*Id.* at 19.)

Pete Lombardo, a Mason Supervisor employed by NYCTA, testified at his

deposition that NYCTA made repairs at the entrance to the subway station located on the southeast corner of the intersection of 125th Street and St. Nicholas Avenue.

Lombardo testified as follows:

> "Q. Have you ever performed any repairs at that station?
> A. Yes.
> Q. And have you supervised any repairs at that station?
> A. Yes.
> Q. Were those repairs made at the entrance to that station?
> A. At the entrance, yes.
> Q. What repairs were made?
> A. We repaired the landings and staircases.
> Q. What did you do to the landings and staircases?
> A. What we repaired was broken concrete on the landings and broken steps.
> Q. When did you make those repairs?
> A. I don't recall."

(Coffey Affirm., Ex K [Lombardo EBT], at 9-10.) Lombardo further testified:

> "Q. So did you repair the landing that is at the southeast corner of the 125th Street Station?
> A. Yes.
> Q. Did you build that landing?
> A. Yes.
>
> * * *
>
> Q. When you installed this, when you and your men installed this landing, had there been a landing there prior to the installation of the landing that is shown in Defendant's Exhibit C?
> A. No.

(*Id.* at 19, 45; *see also* Lewis Affirm., Ex K [photograph marked as Defendant's Exhibit C].)

Lombardo's deposition testimony indicates the repairs were made at sometime in 2009, over two years after the accident at issue. Lombardo was shown a production report dated June 16, 2009, which was marked at his deposition as Defendant's Exhibit A. (*Id.* at 12.) Lombardo was asked, "Is that the date on which repairs were made to the stairs at the subway station entrance?" He answered, "I don't know, it looks like it from the production report. If I could just say, this particular day I was off. Another supervisor had filled in for me, but yes. It looks like repairs were made to a stairway riser and a landing outside of staircase S-2." (*Id.* at 12-13.)

Lombardo also testified during his deposition,

> "We would not do sidewalk repairs unless it fell within Transit Property.
> Q. Is that a rule or something –
> MS. MULVENNA: Objection.
> Q. – that you guys go by, that you wouldn't do sidewalk repairs?
> MS. MULVENNA: You can answer, go ahead.
> A. I am trying to word this right. Our jurisdiction is just top landings.
> Q. I understand.
> A. Anything past the top landing, we would not repair."

(*Id.* at 38-39.) Lombardo stated, "If there is an existing landing, I would repair it to what was there before. In this case here, I just wanted to make is [*sic*] safe, bigger landing, concrete was broken on the top and we just made it a little bigger than normal." (*Id.* at 44.)

At his deposition, Vincent Moschello, a Structure Maintainer employed by

NYCTA, testified as follows:

> "Q. What would you describe as the top landing; is that the top stair or the area before that stair?
>
> A. From my knowledge that I know it's the three feet right in front of the top step, that's it. Right at the very top step and then there is a landing area and that's what we maintain."

(Coffey Affirm., Ex J [Moschello EBT], at 28.) Moschello was shown Defendant's Exhibit 3a. (*Id.* at 28.) He was then asked, "This is the area where the plaintiff circled when asked to show the location of the accident. The area that's circled, would that be beyond the scope of the Authority's maintenance?" Moschello answered,

> "A. Yes.
> Q. Is that because it's more than three feet from the top of the stairs?
> A. Yes, I believe so.
> Q. Would we have any records for anything past the area that you described as three feet?
> A. The top landing as I call it.
> Q. What's the other word that you call it.
> A. The coping.
> Q. Is the area that's circled beyond the coping?
> A. Yes."

(*Id.* at 28-29.)

DISCUSSION

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed]

> sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

Plaintiff argues that summary judgment should be granted in her favor against defendants because, under Administrative Code of the City of New York § 7-210, defendants had a duty to maintain the abutting sidewalk in a reasonably safe condition. Defendants contend that they had no duty to maintain the area where plaintiff allegedly fell because that NYCTA made a special use of the subject area. NYCTA denies that it made special use of the area where plaintiff allegedly fell and argues that it has no duty to maintain public sidewalks.

I.

> "On September 14, 2003, with the passage of § 7–210 of the Administrative Code of the City of New York, 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 owners, whose property abuts the sidewalk. Accordingly, owners of nonexempted properties must now keep the sidewalks abutting their properties in a reasonably safe condition, much in the same way they are obligated to maintain their respective premises."

(*Early v Hilton Hotels Corp.*, 73 AD3d 559, 560 [1st Dept 2010].)

Abe Betosh, the owner of defendant Abeco Management, testified at his deposition that Abeco Management manages the property for 288 St. Nick, LLC, and that it managed the property on March 15, 2007, the date of plaintiff's alleged accident. (Adeyemi Affirm. Ex E [Betosh EBT], at 8-9.) Betosh was asked, "When did 288 LLC start owning the property at 288 St. Nicholas Avenue." He answered, "I'm not sure, but at least five years – at least four years." (*Id.* at 9.) Plaintiff indicates that, because Betosh was deposed on April 15, 2010, one can conclude from his testimony that 288 St. Nick LLC was therefore the abutting property owner on March 15, 2007.

Defendants argue that they have no responsibility to maintain the area where plaintiff allegedly fell because NYCTA made special use of that area. Defendants appear to argue that the duty imposed under Administrative Code § 7-210 would not apply to areas of special use.

A.

The "special use" doctrine applies when, among other things,

> "a structure erected on public land has the effect of causing an adjoining private property to derive a special benefit from that land. In such case, 'the person obtaining the benefit is 'required to maintain' the used property in a reasonably safe condition to avoid injury to others.' The private landowner thus bears a 'duty to repair and maintain the special

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> structure or instrumentality' creating the benefit, provided that the landowner has 'express or implied access to, and control of' the instrumentality giving rise to the duty. This is so regardless of whether the private landowner installed the structure."

(*Petty v Dumont,* 77 AD3d 466, 468 [1st Dept 2010].) Defendants rely on Lombardo's testimony that NYCTA built a raised landing at the entrance to the subway station, which defendants maintain now covers the area where plaintiff allegedly fell, based on measurements and a comparison of photographs before and after the landing was built. (Lewis Opp. Affirm. to Plaintiff's Cross Motion ¶ 6.)

To the extent that the raised landing is a structure that NYCTA erected on the public sidewalk, it would therefore constitute a special use. However, it is undisputed that the raised landing was built after the date of plaintiff's alleged accident. Plaintiff testified that photographs of sidewalk area where she allegedly fell were taken "within two days or so of the accident." (Hood EBT, at 19.) Defendants' Exhibit 3a, which is a copy of one of those photographs, does not depict a raised landing. (*Compare* Lewis Affirm., Ex I *with* Lewis Affirm., Ex K.) Plaintiff did not trip and fall on the raised landing.

The public sidewalk around the entrance or exit of a subway station is not, without more, an area of special use by NYCTA. (*See e.g. Ruffino v New York City Tr. Auth.*, 55 AD3d 817 [2d Dept 2008]["[t]he use by [Sterling's] customer[s] of [a]

public [boardwalk] is not a special benefit giving rise to a special use"]; *Arpi v New York City Tr. Auth.*, 42 AD3d 478 [2d Dept 2007] [no evidence that NYCTA benefitted from that portion of the sidewalk in a manner different from that of the general populace so as to impute liability upon it based upon a theory of special use].)

Weisskopf v City of New York (5 AD3d 202 [1st Dept 2004]), which defendants cite, does not hold otherwise. In *Weisskopf*, the plaintiff tripped and fell upon a defective portion of a public sidewalk adjacent to an entry railing of a subway station located at the corner of Prince Street and Broadway in Manhattan. NYCTA moved for summary judgment on the ground that it owed no duty to plaintiff because the accident occurred on a public sidewalk. In opposition, the plaintiff offered an affidavit from a construction expert, who opined that the sidewalk defect "was the result of the manner in which the metal subway entry substructure was embedded into the subject sidewalk." (*Id.* at 202.)[1]

The Appellate Division, First Department found "that the installation of the subway entrance substructure constituted a special use by NYCTA." (*Id.* at 203.)

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[1] According to the construction expert on behalf of the plaintiff in *Weisskopf*, whose affidavit was reproduced in the record on appeal, "under the broken concrete sidewalk, is the end of a metal plate which is part of the subway entrance railing substructure. . . .That this metal portion of the substructure expands and contracts depending upon the outside temperature. Over time, this expansion and contraction caused the concrete around it to crumble." (Record on Appeal in *Weisskopf v City of New York*, 5 AD3d 202, at 72.)

Weisskopf is distinguishable from this action because the plaintiff in *Weisskopf* introduced evidence that something had been installed into the public sidewalk at the location where the plaintiff allegedly fell. NYCTA derived a special benefit from it because it was part of the subway entrance substructure.

Defendants' reliance upon *Ivanov v City of New York* (21 Misc 3d 1148 [A], 2008 WL 5381388 [Sup Ct, NY County 2008]) is also misplaced. The court did not hold that the portion of the sidewalk in front of the entrance was an area of special use by NYCTA; the language that defendants quote from *Ivanov* is part of the decision summarizing an argument advanced by the plaintiff.[2] Rather, the court did not grant summary judgment to NYCTA because of "material questions of fact as to precisely where Ivanov fell." (*Id.*)

At the time of the subject accident, the place of the accident was not affected by a special use. Construction of a special use over that area after the accident does not retroactively make the area subject to the special use doctrine at the time of the

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[2] The language that defendants purportedly attribute to the court's holding in *Ivanov* (*see* Lewis Affirm. ¶ 19) appears as follows in its entirety:

> "Ivanov argues that because his accident occurred on a portion of the sidewalk which was being specially used by the MTA/TA for its entrance to the A-train, the MTA/TA was under a stringent duty to maintain it in a safe condition, and that its failure to do so either caused or contributed to his accident and resulting injuries."

(*Ivanov*, 2008 WL 5381388, at *3.)

accident.

B.

As discussed above, under Administrative Code § 7-210 "owners of nonexempted properties must now keep the sidewalks abutting their properties in a reasonably safe condition." (*Early,* 73 AD3d at 560.) "Section 7-210 does not define the term 'sidewalk'"(*Vucetovic v Epsom Downs,* 10 NY3d 517, 521 [2008]), and a body of case law has developed as to what is considered part of the sidewalk for the purpose of determining the abutting property owner's duty under Administrative Code § 7-210. However, the issue in those cases is whether the duty that previously rested with the municipality at common-law shifted to the abutting property by virtue of Administrative Code § 7-210. Administrative Code § 7-210 did not purport to address the common-law duty that any third-parties might have arising out of their special use of the public sidewalk.

Defendants essentially argue that a third-party who has made special use of a public sidewalk has a duty to repair and maintain that area of special use, to the exclusion of all others who otherwise have a duty to repair the public sidewalk, either under common-law or by statute. Defendants cite no authority for such a proposition. The Court need not reach this issue, because the Court rejects defendants' contention that a public sidewalk around the entrance or an exit to a subway station is, without

more, an area of special use by NYCTA.

C.

As defendants indicate, "[e]vidence of subsequent repairs may be admissible if an issue of control and maintenance exists." (*Klatz v Armor Elevator Co., Inc.*, 93 AD2d 633, 637 [2d Dept 1983].) However, defendants have not met their prima facie burden of demonstrating, as a matter of law, that NYCTA controlled the area where plaintiff allegedly fell on the date of her alleged accident. "Subsequent repairs might indicate control but not as a matter of law." (*Hogan v National Sellers*, 256 App Div 951 [2d Dept 1939].)

II.

Plaintiff's cross motion for summary judgment in her favor as to liability is denied. The duty that plaintiff asserts that defendants breached is based on Administrative Code § 7-210, which applies only to abutting property owners. Plaintiff submitted no evidence that defendants Abeco Management Corp. and Reva Holding Corporation owned the abutting property.

"[S]ection 7–210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable." (*Khaimova v City of New York*, 95 AD3d 1280, 1281-1282 [2d Dept 2012].) "Therefore, pursuant to § 7–210, liability for an accident

on a sidewalk abutting real property will arise when it is established that the owner of said property created the condition alleged or had prior notice." (*Early*, 73 AD3d at 561.) Here, plaintiff did not meet her prima facie burden of demonstrating that the abutting property owner had created the alleged condition or had prior notice of it.

Plaintiff submits no evidence or testimony that the abutting property owner had actual notice of the condition. To the extent that plaintiff relies upon the photographs purportedly taken days after the alleged trip and fall, "Photographs may be used to prove constructive notice if they were taken close in time to the subject accident and if there is testimony that the conditions depicted in the photographs are substantially the same as those that existed on the day of the accident." (*Gennaro v Cord Meyer Dev. Co. & LLC*, 57 AD3d 725, 726 [2d Dept 2008].) However, "[i]t is not to be taken that proof of the condition at the scene of an accident such as this (thus permitting an inference as to the duration of the condition) may always be made by the use of photographs." (*Batton v Elghanayan*, 43 NY2d 898, 900 [1978].) In the absence of testimony or other evidence of how long before the accident the sidewalk condition depicted in the photograph (Adeyemi Affirm., Ex G) existed, the issue of constructive notice is one for the fact-finder, and not one that the Court can make as a matter on law on this motion.

Therefore, summary judgment in plaintiff's favor against defendants on the

issue of liability is denied.

Summary judgment in plaintiff's favor on the issue of liability against NYCTA is denied. NYCTA correctly points out that plaintiff has asserted no claim directly against NYCTA; only defendants sued NYCTA, as a third-party defendant.

III.

On its face, NYCTA's motion for summary judgment sought dismissal of plaintiff's complaint on the ground that NYCTA had no duty to maintain the area where plaintiff allegedly fell. CPLR 1008 permits NYCTA, as the third-party defendant, "to raise any defense that defendant[s] might have against plaintiff's main claim." (*Jeanson v Middlegrove Estates*, 222 AD2d 782, 783 [3d Dept 1995].)

However, NYCTA's argument that it owed no duty to maintain the area where plaintiff allegedly fell would not be a defense to plaintiff's claims against defendants. As discussed above, plaintiff's cause of action against defendants is based on Administrative Code § 7-210, and "pursuant to § 7–210, liability for an accident on a sidewalk abutting real property will arise when it is established that the owner of said property created the condition alleged or had prior notice." (*Early*, 73 AD3d at 561.)

NYCTA's motion for summary judgment also seeks dismissal of third party claims (referred in its notice of motion as cross claims). NYCTA contends, "Where

a party would not be liable under any theory to plaintiff in the first instance, that party cannot be held liable for apportionment under the *Dole* [*Dole v Dow Chemical Co.*, 30 NY2d 143 (1972)] doctrine." (Coffey Affirm. ¶ 17.)

Defendants are not entitled to common-law indemnification against NYCTA.

> "[Tthe key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor.' The duty that forms the basis for the liability arises from the principle that 'every one is responsible for the consequences of his own negligence, and if another person has been compelled * * * to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him.'"

(*Raquet v Braun*, 90 NY2d 177, 183 [1997].) Here, plaintiff's theory of liability against defendants is based on a violation of duties that defendants themselves owed to plaintiff. Defendants' third-party claim for common-law indemnification is not based on a theory that NYCTA owed defendants a duty, but rather that NYCTA owed a duty to plaintiff, i.e., that NYCTA was responsible for maintaining the area of the sidewalk where plaintiff allegedly fell. (*See* Lewis Affirm., Ex E [Third-Party Complaint] ¶ "Eighth"].) "Generally, apportionment among tort-feasors, rather than a shifting of the entire loss through indemnification, is the proper rule when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe[ ] to the injured person." (*Guzman v Haven Plaza Hous. Dev. Fund*

Co., Inc., 69 NY2d 559, 568 [1987][internal citations and quotation marks omitted].) Therefore, so much of the third-party complaint that seeks common-law indemnification against NYCTA is dismissed.

Turning to defendants' third-party claim against NYCTA for contribution,[3] the Court already discussed the issue of whether NYCTA owed a duty to plaintiff to maintain the area where plaintiff allegedly fell, in the context of defendants' cross motion for summary judgment. As discussed above, the Court rejects defendants' argument that NYCTA owed a duty to maintain the sidewalk area where plaintiff allegedly fell on the date of plaintiff's accident because of a special use (i.e., the installation of a raised landing) that occurred subsequent to plaintiff's accident.

Plaintiff's argument that NYCTA owed a duty of care under *Bingham v New York City Transit Authority* (8 NY3d 176 [2007]) is unavailing. In *Bingham*, the Court of Appeals held,

> "Courts have long recognized that the duty of care imposed on a common carrier with respect to its passengers requires not only that it keep the transportation vehicle safe, but also that it maintain a safe means of ingress and egress for the use of its passengers. This duty has been applied to those areas owned and maintained by others if 'constantly and notoriously' used by passengers as means of approach.
>
> * * *

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[3] "[A] defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a procedural bar or because of a substantive legal rule." (*Raquet*, 90 NY2d at 182.)

> Where . . . a stairwell or approach is primarily used as a means of access to and egress from the common carrier, that carrier has a duty to exercise reasonable care to see that such means of approach remain in a safe condition or, where appropriate, to take such precautions or give such warnings as would protect those using such area against unforeseen danger. Whether those means of ingress or egress are used primarily for that purpose would generally be a question of fact."

(*Bingham*, 8 NY3d at 180-181.)

Where a public sidewalk surrounds the entrance to a subway station, one must walk on that sidewalk in order to enter the subway station. If the duty under *Bingham* were held to apply to a public sidewalk, where would the duty to maintain the public sidewalk end? Would NYCTA, as the common carrier, be required to maintain a continuous path directly to the subway entrance along an entire street block? To extend the duty under *Bingham* to a public sidewalk would make NYCTA an insurer of the safety of sidewalks on all blocks where subway entrances are located.

The Court of Appeals noted in *Bingham* that "this duty of care imposed on a carrier to keep approaches and platforms safe has not been extended to common areas in a multi-carrier facility." (*Id.* at 128 n.) Here, the public sidewalk is akin to a common area to which a duty under *Bingham* should not extend. (*See Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 821 [2d Dept 2008] [duty under *Bingham* did not extend to a boardwalk located between a Long Island Rail Road station and a

NYCTA subway station].) The fact that the public sidewalk abuts an entrance to a subway station therefore does not, without more, constitute an approach under *Bingham*.

Notwithstanding all of the above, the evidence that NYCTA subsequently constructed a raised landing on the sidewalk area some two years after the accident, might be argued to be a "subsequent repair" and thus some evidence as to the issue of whether NYCTA had control and maintenance of the area at the time of plaintiff's alleged accident. (*Klatz,* 93 AD2d at 637.) Lombardo testified at his deposition that he built the landing (Lombardo EBT, at 19), and that "We would not do sidewalk repairs unless it fell within Transit Property." (*Id.* at 38-39.) Moschello testified at his deposition that NYCTA maintains the "landing area," which is "three feet right in front of the top step." (Moschello EBT, at 28.) However, defendants assert that the raised landing that was built after plaintiff's alleged accident was larger than three feet from the top step. (Lewis Opp. Affirm. to Plaintiff's Cross Motion ¶ 6.)

It would seem somewhat peculiar that NYCTA would unilaterally construct a raised landing over an area over which NYCTA had no right or permission to build. No one on this motion has introduced any evidence or document indicating that NYCTA and the City of New York had any agreement, in the nature of a license or otherwise, that would authorize or empower NYCTA to construct the landing upon

the public sidewalk, or upon an area on the public sidewalk beyond three feet from the subway stairs. If NYCTA had a right or permission to build over the subject area, this could refute NYCTA's assertion that it had no right to control, or a duty to maintain, the subject area. Perhaps NYCTA has some evidence or explanation as to why the installation of the raised landing would not be evidence of its control or maintenance at the time of plaintiff's alleged accident. However, no such explanation or evidence was offered here. Of course, at trial, defendants/third-party plaintiffs have the burden of proving that NYCTA had control over the place of the accident, in order to prevail on their claim for contribution.

Therefore, summary judgment dismissing so much of the third-party complaint that seeks contribution against NYCTA is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the third-party defendant New York City Transit Authority's motion for summary judgment is granted only to the extent that so much of the third-party complaint that seeks indemnification is dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendants' cross motion for summary judgment, and plaintiff's cross motion for summary judgment in her favor as to liability against

defendants and the third-party defendant are denied; and it is further

ORDERED that the remainder of this action shall continue.

Dated: March 1, 2013
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

FILED

MAR 08 2013

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