SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 112831/2010
GARDNER, THOMAS D.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 112831/10
MOTION DATE 8/19/10
MOTION SEQ. NO. 002

The following papers, numbered 1 to 18 were read on this motion and cross motions for SJ

Notice of Motion— Affirmation — Exhibits A-F, G [Affirmation], H [Affidavit] Service	No(s). 1-5
DASNY's Notice of Cross Motion— Affirmation — Exhibits A-I —Affidavit of Service	No(s). 6-8
TA's Notice of Cross Motion— Affirmation — Exhibits A-D —Affidavit of Service	No(s). 9-12
Plaintiff's Notice of Cross Motion— Affirmation — Exhibits A-G —Affidavit of Service	No(s). 13-15
Plaintiff's Affirmation in Opposition —Affidavit of Service	No(s). 16-17
Reply Affirmation —Affidavit of Service	No(s). 17-18

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision and order.

FILED
HON. MICHAEL D. STALLMAN
OCT 11 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/6/13
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
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

THOMAS D. GARDNER,
Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY and DORMITORY AUTHORITY OF THE STATE OF NEW YORK,
Defendants,

Index No. 112831/2010
Motion Sequence 002
DECISION & ORDER

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, defendant City of New York (the City) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as against it. Defendants Dormitory Authority of the State of New York (DASNY) and New York City Transit Authority (Transit) individually cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them. Plaintiff Thomas Gardner cross-moves for a declaratory judgment that Transit was responsible for the operation, maintenance and control of the site of his accident.

Background

Plaintiff was injured on December 12, 2009, when he allegedly tripped and fell on the sidewalk at 904 Lexington Avenue, in front of a Hunter College building located between East 67th Street and East 68th Street, New York County. The incident occurred between 5:00 and 5:30 in the evening. Plaintiff was 63 years old at the time.

The instant action commenced on September 30, 2010, with the filing of a complaint asserting negligence as against all defendants: the City as the alleged owner of the sidewalk;

Transit as the alleged owner of a sidewalk grate at the location; and DASNY as the alleged owner or manager of the adjacent building. Marvill affirmation, exhibit B.

Testimony

Plaintiff was deposed on March 27, 2012. Marvill affirmation, exhibit E (Gardner tr). He recalled that the weather was wintery, but dry, without any rain, snow or ice on the ground. *Id.* at 14. He said that he was walking home, when he "tripped on the uneven concrete." *Id.* at 16. Plaintiff testified that he was looking straight ahead as he walked, and did not see the allegedly hazardous condition before he fell. *Id.* at 16-17. He was walking with his companion/business partner. *Id.* at 21. Since, at the time of the incident, he lived on East 65th Street for more than 30 years, and worked on East 61st Street for two to three years, he acknowledged walking by the subject location "[c]ertainly on a monthly basis." *Id.* at 18.

After plaintiff fell, he testified that he "realized that the unevenness of the two slabs of the concrete sidewalk were the cause of why I tripped." *Id.* at 20. He estimated that the difference in height was about one-and-a-half to two inches. *Id.* He had never reported this condition to anyone before the incident. *Id.* at 44. He walked home after the incident, but he summoned an ambulance there shortly after he arrived.

At the deposition, plaintiff was shown 16 color photographs of the general scene of the incident to identify, two to a page on eight pages.[1] He was able to identify specific photographs or portions of photographs as reflecting his recollection of the site. *Id.* at 48-53. He testified that photographs on five of the eight pages depicted the condition that caused his accident. *Id.* at 48-

[1]Black and white copies of these two photographs are found at Marville affirmation, exhibit F; Boydstun affirmation, exhibit A; and, McCrink affirmation, exhibit E. Color copies are found at Markovits affirmation, exhibit A, and appear to be the best representation of the physical setting. According to his transcript at 45-47, plaintiff was shown color photographs.

49. Several of the photographs had circles drawn on them, which plaintiff said he had not drawn. *Id.* at 50-51. He agreed with the questioning attorney that the circles seemed to accurately reflect the accident location. *Id.* at 51. When he was asked if a grate on the sidewalk shown in one photograph "ha[d] any involvement with your accident," he responded "None." *Id.* at 51. The next question asked whether "your accident happened entirely on the sidewalk?" *Id.* "Correct," was his answer. *Id.* Plaintiff's verified bill of particulars states that the "dangerous and defective condition alleged herein was a broken, cracked, uneven and defective sidewalk." Marville affirmation, exhibit D, ¶ 22.

Plaintiff's testimony at his March 27, 2012 deposition was essentially identical to his responses at a 50-h hearing on March 11, 2010. *See* McCrink affirmation, exhibit D.

Dmitriy Surkov (Surkov), an employee of the City's Department of Transportation (DOT), was deposed on July 20, 2012. Boydstun affirmation, exhibit E (Surkov tr). He testified in place of a colleague who conducted a search of records for the sidewalk area in front of 904 Lexington Avenue for two years prior to the date of the incident. The records included permits, violations, contracts, complaints, and maintenance and repair records. *Id.* at 8. Surkov said that the search produced one permit and one application. *Id.* at 9. The application was for a work period July 27, 2009 through August 12, 2009. He was unable to explain the purpose of the application. Reading from the DOT records produced, he said that the permit was issued July 10, 2009 to Interboro Sign and Maintenance, Inc. (Interboro), "to occupy the sidewalk in front of 904 Lexington Avenue from East 67th Street to East 68th Street." *Id.* at 16. Surkov had no information about the nature of the work to be performed.

When plaintiff's counsel showed him a copy of what appeared to be a page of the Big

Apple Map[2] with a DOT stamp on it, Surkov did not concede that it came from DOT's records. *Id.* at 9-12.

Edward Wagner (Wagner), a senior project manager with DASNY, was deposed on August 30, 2012. Boydstun affirmation, exhibit F (Wagner tr). He said that he supervises construction firms and contractors at Hunter College and a sister institution in the Bronx, and has been so engaged for 11 years. *Id.* at 11. That position often involves visiting a construction site, sometimes daily, sometimes weekly. *Id.* at 9. At times, his field representative would inspect ongoing work on his behalf. *Id.* at 9-10. Neither made it a practice of inspecting the sidewalk at Hunter. *Id.* at 43. He works out of a DASNY field office at 904 Lexington Avenue daily. *Id.* at 21. Wagner's normal path in and out of the subway does not take him onto the sidewalk in front of the building. *Id.* at 44.

Wagner knew of no DASNY construction projects involving the sidewalk in front of 904 Lexington Avenue at any time. *Id.* at 33, 38. He said that he had no responsibility for sidewalk repairs, and he testified that DASNY did not employ maintenance people at 904 Lexington Avenue. *Id.* at 23-24. In fact, he said that DASNY directly performs no maintenance at that location, and only occasionally contracted for elevator maintenance there. *Id.* at 29. He did not know who removed snow from the sidewalk. *Id.* at 37. As far as Wagner knew, DASNY tradespeople from other locations were never sent to do work at Hunter College. *Id.* at 31. Hunter has its own maintenance staff, and he had no responsibility for it. *Id.* at 34. Wagner had only one recollection of repair work on or about the sidewalk done exclusively by Hunter

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[2]This was a product of the Big Apple Pothole and Sidewalk Protection Committee, an organization created by the New York State Trial Lawyers Association, to map the sidewalks of New York City for defects capable of causing personal injury. Production ceased after 2003, when the City's Administrative Code § 7-210 shifted responsibility for sidewalk defects generally to the owners of abutting property.

personnel, which he could not place in time. *Id.* at 38-40. He stated that Hunter did not have to gain DASNY's permission to make repairs at 904 Lexington Avenue. *Id.* He said that DASNY kept no records of maintenance or repairs to the building. *Id.* at 37-38.

Wagner could not provide any information about the sidewalk grates in front of 904 Lexington Avenue. When he was shown a set of photographs purportedly of the site of the incident, he was unable to recognize some of the scenes, and generally observed that they were "no different from a lot of other New York City sidewalks . . . ." *Id.* at 49.

Carmelite Cadet, a civil engineer employed by Transit, was deposed on April 11, 2013. McCrink affirmation, exhibit F (Cadet tr). She testified that Transit maintained the sidewalk grates in front of 904 Lexington Avenue, but she believed that the City owns them, along with the subway stations beneath. *Id.* at 6. She identified some photographs of the site. *Id.* at 7. When shown some additional photographs, which she recognized as depicting the site of the incident, she stated that one of the grates shown may not have been operated and maintained by Transit. *Id.* at 15-17. Where the photographs seemed to show sections of the sidewalk that had been replaced, she said that Transit did not perform that work, and she did not know who did. *Id.* at 20.

Cadet said that Transit also maintains the "vent borders," the concrete surrounding the grates. *Id.* at 9-10. However, she was unaware of any law or regulation that required Transit (or the owner of any other sidewalk grate) to maintain the sidewalk or roadway for a distance of 12 inches surrounding the grate. *Id.* at 12. Cadet had no knowledge of any repairs to the indicated grates, and she said that she had not searched the Transit's records for such information. *Id.* at 13-14.

The visual evidence of the photographs, particularly those marked as defendants' exhibits

E and G, shows the indicated pavement flag not sitting flat against the pavement flag immediately next to it, on its southern edge, and not meeting the vent border of a nearby grate evenly, on its eastern edge. The pavement flag appears to be sloping down slightly, so that its edge is below the adjacent pavement flag and the adjacent vent border. The difference in height along the two edges of the subject pavement flag is the only visible defect. The photographs do not show any cracks, chips or missing pieces in the pavement flag identified by plaintiff. The vent border, as pictured, is intact, and seemingly level.

Discussion

Legal Standard for Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). 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 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

The City's Summary Judgment Motion

The City's Administrative Code § 7-210 (b) holds the owner of real property abutting any sidewalk liable for any injury "proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." The City submits an affirmation by David C. Atik

(Atik), an employee with the Department of Finance, which maintains the Real Property Assessment Division database of property ownership. Marville affirmation, exhibit G. Atik states that, according to his search of the database, the City did not own the property at 904 Lexington Avenue as of December 12, 2009. *Id.*, ¶ 6. In the absence of any evidence to the contrary, the City is not liable, as it was not the owner of the abutting property. *Locario v State of New York*, 90 AD3d 547, 547 (1st Dept 2011) ("Subject to exceptions that do not apply here, [Administrative Code] section 7-210 shifted tort liability for the negligent failure to maintain sidewalks in a reasonably safe condition from the City to abutting property owners"). Plaintiff does not oppose the City's summary judgment motion dismissing the complaint as against it. Therefore, the motion is granted, and the complaint is dismissed as against the City.

DASNY opposes the City's motion to the extent that the City may seek to impose liability upon DASNY, and cross-moves to dismiss the City's cross claim to that effect. Boydstun affirmation, ¶ 2. The City, in its answer to the complaint, cross-claimed for indemnity by Transit and DASNY "on the basis of a contract between them, actual or implied." *Id.*, exhibit A, ¶ 11. With the dismissal of the complaint as against the City, its cross claims are dismissed as moot, as are any cross claims as against it. DASNY's opposition and its cross motion to dismiss the City's cross claim are also thereby rendered moot, and that part of DASNY's cross motion is denied.

DASNY's Summary Judgment Cross Motion

The main thrust of DASNY's cross motion is for dismissal of the complaint as against it. It reviews the testimony described above, and takes special note of Wagner's denial that DASNY performed any maintenance work at the Hunter College building, 904 Lexington Avenue. DASNY defines itself as a public benefit corporation responsible for the financing of

construction of City University of New York (CUNY) structures, including facilities at Hunter College. It says that it is a landlord-out-of-possession, and that it maintains ownership of the properties only as collateral until the bonds that financed the construction are paid off.

CUNY occupies 904 Lexington Avenue, and other DASNY properties, under an agreement and lease dated as of July 15, 1986, as amended on May 4, 1987, April 6, 1988 and November 29, 1989, and subsequent versions dated January 31, 1990, May 25, 1994, August 16, 2000, and January 22, 2003. Boydstun affirmation, exhibit H. As originally stated in section 6.05, and repeated consistently in each successive version, "City University, at its expense, shall hold, operate, maintain, repair and replace the Project[, the building or facility,] and its equipment in a careful and prudent manner and keep the Project and its equipment in a clean and orderly fashion." Further, Education Law § 6203 provides that the "city university shall have the care, custody, control, and management of the lands, grounds, buildings, facilities and equipment used for the purposes of the educational units of the city university and it shall have the power to protect, preserve and improve the same." DASNY concludes that the "sidewalk adjacent to an (sic) Hunter College certainly and logically falls within the terms lands and grounds used for the purposes of the educational units of City University." Boydstun affirmation, ¶ 16.

In addition to the argument that CUNY has assumed liability for the subject sidewalk by contract and law, DASNY claims that Administrative Code § 7-210 does not apply to it in this action. DASNY particularly cites *Green v Dormitory Auth. of State of N. Y.* (173 AD2d 1, 5 [3d Dept 1991]):

> "There is nothing in either the language of the Dormitory Authority Act (Public Authorities Law art 8, tit 4) or its legislative history to suggest that the Legislature intended to impose upon defendant a duty of reasonable care in the operation and maintenance of SUNY dormitories after operation, maintenance and control of the dormitories have been transferred to the State."

Under similar circumstances, the Appellate Division, First Department, recognized that "[t]he lease [between DASNY and Columbia University] is not a standard leasing agreement, but rather a part of an extensive financing arrangement." *Garcia v Dormitory Auth. of State of N. Y.*, 195 AD2d 288, 289 (1st Dept 1993). Consequently, it held that "[t]he rights reserved to defendant [Dormitory] Authority do not constitute sufficient retention of control to subject the Authority to liability for failure to maintain the premises in good repair." *Id.* As in the instant action, the agreement between DASNY and Columbia University required the occupant to repair and maintain the subject premises.

Therefore, following the *Green*, *supra*, and *Garcia*, *supra*, DASNY's cross motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed as against it.

Transit's Cross Motion for Summary Judgment

Transit correctly claims that it "does not own, operate, maintain nor control the sidewalk in front of 904 Lexington Avenue, New York, New York." McCrink affirmation, ¶ 9. There is no factual evidence to the contrary. However, Transit's possible involvement in this action is based on DOT's rule that

> "[t]he 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 twelve inches outward from the perimeter of the cover or grating."

34 RCNY 2-07 (b) (2). "Street" is defined at 34 RCNY 2-01 to include sidewalk.

From the visual evidence of the photographs identified by plaintiff and Cadet, the vent border of the grate next to the allegedly defective pavement flag appears intact. There is no sign of a crack emanating from the vent border that disturbed the surface of the adjacent sidewalk. However, plaintiff submits the affidavit of Stanley H. Fein (Fein), a licensed professional

engineer, who visited the accident site, as well as reviewing deposition testimony, in which Fein states that he measured the vent border as eight-and-a-half inches. Markovits affirmation, exhibit A. The eastern edge of the defective sidewalk flag, therefore, was within 12 inches of the subway grate, covered by 34 RCNY 2-07 (b) (2). Transit, accordingly, has the responsibility for the repair of such a defective condition. *Cruz v New York City TrAuth.*, 19 AD3d 130, 131 (1st Dept 2005) ("As the photographs in the record clearly depict, the defective area is, at least in part, inside the 12-inch area that is within defendant's zone of responsibility"). However, plaintiff allegedly tripped on a difference in height at the southern edge of the sidewalk flag, the edge perpendicular to the grate and the vent border, as he walked north-to-south along the sidewalk in front of 904 Lexington Avenue. It is an issue of fact whether that portion of the sidewalk flag was within Transit's area of responsibility.

Transit offers no reply to plaintiff's argument, or his expert's assertions. Its cross motion for dismissal of the complaint focuses on the sidewalk itself, noting that plaintiff explicitly disclaimed any contact with the metal grate nearby. It does not discuss 34 RCNY 2-07 (b) (1)-(2). Under these circumstances, Transit's cross motion is denied.

Plaintiff's Cross Motion for Declaratory Judgment

The complaint lacks a cause of action for declaratory judgment. Siegel, NY Prac § 438 (5th ed 2011). It contains only a single cause of action for negligence as against all defendants. Therefore, plaintiff's instant cross motion for a declaratory judgment does not request appropriate relief, and is denied. To the extent that the cross motion can be regarded as seeking summary judgment on liability, it is denied. Plaintiff has not met its burden of demonstrating entitlement to judgment as a matter of law for the reasons stated above; there is a factual question presented as to whether Transit is legally responsible for maintaining the accident site.

Accordingly, it is

ORDERED that defendant City of New York's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint and all cross claims as against it is granted, and the complaint and all cross claims are dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Dormitory Authority of the State of New York's cross motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it is granted, and the complaint is dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant New York City Transit Authority's cross motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it is denied; and it is further

ORDERED that the action is severed and continued against defendant New York City Transit Authority; and it is further

ORDERED that plaintiff Thomas D. Gardner's cross motion for a declaratory judgment on the responsibility for the operation, maintenance and control of the site of his accident is denied.

HON. MICHAEL D. STALLMAN

DATED: **October 10, 2013**
New York, NY

ENTER:

J.S.C.