| **Vullo v Hillman Hous. Corp.** |
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| 2018 NY Slip Op 31637(U) |
| March 6, 2018 |
| Supreme Court, New York County |
| Docket Number: 160997/14 |
| Judge: Alexander M. Tisch |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 52
-----------------------------------------------------------X
URANIA VULLO,

Plaintiff, Index No. 160997/14

-against- DECISION & ORDER

HILLMAN HOUSING CORPORATION,
MANHATTAN AUTOCARE and PARK
IT MANAGEMENT CORP, and THE CITY
OF NEW YORK,

Defendants.
-----------------------------------------------------------X

ALEXANDER M. TISCH, J.:

Motion sequence Nos. 001, 002 and 003 are consolidated for disposition. In motion sequence No. 001, defendant Manhattan Autocare (MA) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all claims asserted against it, and, pursuant to 22 NYCRR 130-1.1, for sanctions against plaintiff and her counsel. In motion sequence No. 002 and 003, defendants Park It Management Corp (Park) and Hillman Housing Corporation (Hillman) move, respectively, for similar relief.

This is an action for personal injuries allegedly sustained by plaintiff Urania Vullo on October 19, 2014, when she tripped and fell over the metal stump of a "No Parking" sign in the sidewalk in front of 275 Delancey Street, in the County, City and State of New York (the Subject Premises). Plaintiff commenced this action by filing a summons and complaint against defendants MA, Park and Hillman in November 2014. She filed a supplemental summons and amended complaint (Supplemental Complaint) adding the City of New York as a defendant in March 2015. A second supplemental summons and complaint dated April 6, 2015 (Second

Supplemental Complaint) was served on all defendants. The defendants joined issue by serving answers to the Second Supplemental Complaint.

Depositions have been held of the parties in this action. According to the deposition of the plaintiff, she was walking on Columbia Street towards Delancey Street, when her right foot hit something hard and rough that caused her to fall (plaintiff's deposition tr at 23-24, 26-27); that, after her fall, she observed the object that caused her fall (*id.* at 35); and that she identified the object as a "big piece of metal, like a square shape, big and it looked rusted" (*id.* at 36). Her supplemental verified bill of particulars states that "a raised and protruding piece of metal from a broken street sign caused the accident" (Park's moving papers, exhibit B, supplemental verified bill of particulars, ¶ 6 [B]).

Shulie Wollman, the vice-president and general manager of Hillman, testified that Hillman is a cooperative corporation that owns several properties, including the Subject Premises (Wollman's deposition tr at 8-9); that, at the time of the subject accident, Park, the tenant at the time, operated a parking garage business at the Subject Premises (*id.* at 11); and that Park subleased parts of the Subject Premises to MA (*id.* at 12 -13). He also acknowledged that Hillman received a violation from DOT issued on July 22, 2014, which related to the condition of the sidewalk adjacent to the Subject Premises (*id.* at 20-21). He stated that an outside contractor was hired to perform cement work on the sidewalk adjacent to the Subject Premises (*id.* at 25), and that the cement work was performed "probably in August, September, October" (*id.* at 27). When shown photographs identified as plaintiff's exhibit 2 and respondents' exhibit B [photographs depicting the location of plaintiff's alleged accident], he confirmed that they depicted the condition of the sidewalk prior to and after the work had been done (*id.* at 29); and that respondents' exhibit B reflected that new cement had been laid (*id.* at 30).

David Saperstein, Park's operation manager, testified, inter alia, that after Park received a letter regarding plaintiff's alleged accident, he inspected the area in front of the Subject Premises and noticed that the sidewalk had been repaired (Saperstein's deposition tr at 33); that he identified a photograph, plaintiff s exhibit 2, as depicting the sidewalk prior to the repair (*id.* at 49); and that neither Park, nor any entity on its behalf, performed any type of repair work to the subject sidewalk (*id.* at 50, 54-55).

Richard Rubino, MA's owner, testified, inter alia, that MA's subtenant agreement with Park did not include any responsibility for repairing the sidewalk (Rubino's deposition tr at 22-23); and that the sidewalk had been repaired (*id.* at 28). When shown respondent's exhibit B, he identified the area of the sidewalk that had been repaired (*id.* at 35-36).

Joseph Farina, Department of Transportation's (DOT) Manhattan Deputy Borough Engineer, testified, inter alia, that there were two "no Parking Anytime" street signs on Columbia Street between Broome and Delancey Street., which were supported by U-shaped drive rails, and maintained by the DOT (Farina's deposition tr at 19, 21-22). When shown a photograph identified as respondents' exhibit D, he testified that it depicted "remnants of a drive-rail stump sticking out of the ground, a drive rail, a support" (*id.* at 29-30).

Defendants MA, Park and Hillman now move for summary judgment to dismiss the complaint and all cross-claims asserted against them. The proponent of a summary judgment motion 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 (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible

form establishing that an issue of fact exists, warranting a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Defendants Park and MA argue that the evidence establishes that they did not owe a duty to the plaintiff, and they did not create or cause the alleged hazardous condition, which has been identified as the remnants of a "No Parking" sign.

"To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). The question of whether a duty of care exists is one for the court to decide (*Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347 [2001]).

Further, as noted by the movants, pursuant to section 7-210 of the Administrative Code of the City of New York (Admin Code), the owner of real property abutting a sidewalk, and not the City, has the duty to maintain the sidewalk in a reasonably safe condition and is liable for injuries arising from his or her failure to do so (*see Vucetovic v Epsom, Downs, Inc.*, 10 NY3d 517, 520 [2008]). While signs and signposts are not considered part of the sidewalk for purposes of Admin Code §7-210, abutting real property owners may, nonetheless, be liable if they caused or created the sign-related condition (*Smith v 125th St. Gateway Ventures, LLC*, 75 AD3d 425, 425 [1st Dept 2010]).

It is undisputed that, at the time of the alleged accident, Park was the tenant of the Subject Premises, and MA was the subtenant. As the tenant and subtenant, these movants have no statutory obligation, under Admin Code §7-210, to maintain the public sidewalk adjacent to the Subject Premises (*O'Brien v Prestige Bay Plaza Dev. Corp.*, 103 AD3d 428, 429 [1st Dept 2013]). Further, the evidence establishes that, under their respective lease agreements, they did

not have any duty to maintain and/or repair the sidewalk (*id.*; *see* Saperstein's aff dated 3/7/17; Rubino's deposition tr at 22-23). Additionally, a tenant may not "be held liable to a third party in tort absent a showing that (a) it affirmatively caused or created the defect that caused plaintiff to trip, or (b) put the subject sidewalk to a 'special use' for its own benefit, thus assuming a responsibility to maintain the part used in reasonably safe condition" (*Kellogg v All Sts Hous. Dev. Fund Co., Inc.*, 146 AD3d 615, 617 [1st Dept 2017]). The deposition testimonies of the witnesses who testified on behalf of Park and MA establish that they did not create or cause the alleged defective condition in the subject sidewalk or make special use of it. In view of the foregoing, Park and MA make a prima facie showing of entitlement to summary judgment.

The record reflects that neither plaintiff nor the remaining defendants oppose the applications of Park and MA. Therefore, their respective requests for summary judgment dismissing the complaint and all cross claims asserted against them are granted.

In support of its motion for summary judgment to dismiss the complaint, Hillman argues that it was not its responsibility, but that of the DOT, to maintain the remnant of the traffic sign that caused plaintiff's accident. It also maintains that, even assuming that it was responsible for the alleged defect, it was trivial in nature and not actionable. Additionally, it avers that the alleged defect was not created by it, and that it did not have actual or constructive notice of the alleged defect.

Plaintiff does not dispute that the DOT is responsible for maintaining its signs and sign posts (*see* New York City Charter § 2903 [a] [2]). However, she argues that there is a material issue of fact as to whether Hillman caused the alleged hazardous condition when it paved the subject sidewalk. She claims that the paving work done by Hillman, in response to the violation issued by the DOT, resulted in the negligent placement of cement in the area where the remnant

of the metal stump was located, which made the defect more difficult to see. She also disagrees with Hillman's argument that the alleged defect is trivial in nature. She contends that the photographs, that are part of the record, demonstrate that the metal remnant is multiple inches in width and more than an inch above the subject sidewalk.

It is well settled that abutting real property owners are not liable for injuries caused by signs and signposts unless they caused or created the sign-related condition (*see Smith v 125th St. Gateway Ventures, LLC*, 75 AD3d at 425). Further, they have a duty to maintain the sidewalk around the signpost stump (*Bronfman v East Midtown Plaza Hous. Co., Inc.*, 151 AD3d 639, 640 [1st Dept 2017]). I8Here, the record, consisting of Wollman' deposition and invoices from Boshudha US, LLC, the contractor retained by Hillman to repair the sidewalk, demonstrate that the subject sidewalk was paved within two months prior to the plaintiff's accident (Wollman's deposition tr at 20-21; *see* also plaintiff's opposing papers, exhibit C, invoices dated August 21, 2014 through September 11, 2014). Further, in their depositions, the parties identified photographs reflecting the subject sidewalk prior to and subsequent to the cement work (see, e.g. Wollman's deposition tr at 29-30; Saperstein deposition's tr at 49; Rubino's deposition tr at 35-36). Photographs in the record also depict that cement work was performed in the area of the alleged defect, and that cement surrounded the metal remnant that allegedly caused plaintiff's accident (see e.g. plaintiff's opposing papers, exhibit D, photographs identified as respondent's exhibits C, D; defendant's exhibits B, G). The foregoing sufficiently raises a question of fact as to whether the cement work performed on behalf of Hillman caused or created the alleged hazardous condition.

Further, "[a] defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances,

physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). "Only then does the burden shift to the plaintiff to establish an issue of fact" (*id.*).

In determining whether a defect is trivial as a matter of law, the court must examine the facts presented, "including the width, depth, elevation, irregularity and appearance of the condition, along with the 'time, place and circumstance' of the injury" (*Trincere v County of Suffolk*, 90 NY2d 976, 978 [1997] [citation omitted]). There is "no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*id.* at 977; *see also Boxer v Metropolitan Transp. Auth.*, 52 AD3d 447, 448 [2d Dept 2008]).

Here, Hillman fails to make a prima facie showing that, as a matter of law, the alleged defective condition was merely a non-actionable trivial defect. It does not provide an expert report or any other evidence setting forth the dimensions of the alleged defect, or stating the basis for its alleged insignificance. Further, Hillman fails to demonstrate that the defect shown in the photographs marked by plaintiff was, under the circumstances, physically insignificant or that its characteristics or the surrounding circumstances did not increase the risk it posed (*Latif v Eugene Smilovic Hous. Dev. Fund Co., Inc.*, 147 AD3d 507, 508 [1st Dept 2017]).

Additionally, Hillman fails to establish that it did not have actual or constructive notice of the alleged defect. "In order to establish lack of constructive notice, [a defendant is] required to show that the condition was neither visible nor apparent or that it did not exist for a sufficient period of time for defendant to discover and correct it" (*Kowalczyk v Time Warner Entertainment Co., L.P.*, 121 AD3d 630, 630-631 [1st Dept 2014]). Here, the alleged defect was not transient, temporary or moveable in nature, such that Hillman may claim that it did not have

constructive notice thereof; additionally, the photographs of the alleged defect, marked by plaintiff within a short time of her accident sufficiently raise an issue of fact regarding constructive notice (*see Latif v Eugene Smilovic Hous. Development Fund Co., Inc*, 147 AD3d at 508).

In view of the foregoing, Hillman's motion for summary judgment dismissing the complaint and all cross claims against it is denied.

Defendant MA also moves, pursuant to 22 NYCRR 130-1.1 (a), for an order imposing sanctions on plaintiff and/or her counsel. The Rules of the Chief Administrator of the Courts Part 130, as set forth in 22 NYCRR 130-1.1, authorize the court, in its discretion, to impose financial sanctions "upon any party or attorney in a civil action or proceeding who engages in frivolous conduct" (*Watson v City of New York*, 178 AD2d 126, 127 [1st Dept 1991]). MA fails to demonstrate that plaintiff's action in commencing and continuing the instant action against MA rises to the level of frivolous conduct necessary to warrant the imposition of sanctions (*see Bank of Am., N.A., v Angel*, 144 AD3d 612, 612 [1st Dept 2016]). Thus, MA's application is denied.

Accordingly, it is

ORDERED that the branch of the motion by Manhattan Autocare for summary judgment dismissing the complaint and all cross claims against it (motion sequence no. 001) is granted; and it is further

ORDERED that the branch of the motion by Manhattan Autocare, pursuant to 22 NYCRR 130-1.1, for sanctions against plaintiff and her counsel (motion sequence no. 001) is denied, and it is further

ORDERED that the motion by Park It Management Corp. for summary judgment dismissing the complaint and all cross claims against it (motion sequence No. 002) is granted; and it is further

ORDERED that the motion by Hillman Housing Corporation for summary judgment dismissing the complaint and all cross claims against it (motion sequence no. 003) is denied.

Dated: March 6, 2018

ALEXANDER M. TISCH A.J.S.C.

HON. ALEXANDER M. TISCH