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

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KENTON ROJAS,

Plaintiff,

-against- Index No. 150691/2013

THE CITY OF NEW YORK, RESTANI CONSTRUCTION CORPORATION, VALES CONSTRUCTION CORP., EMPIRE CITY SUBWAY COMPANY LTD., AND CONSOLIDATED EDISON CO. OF NEW YORK, INC.

DECISION/ORDER

Defendants,

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HON. ALEXANDER M. TISCH, J.:

Motion sequence numbers 006 and 008 are consolidated for disposition.

In this trip and fall action, plaintiff Kenton W. Rojas (Rojas) alleges that, on November 11, 2011, he was traversing the curb of the pedestrian median at the intersection of Amsterdam Avenue and St Nicholas Avenue between West 162nd and West 163rd Streets, New York, New York and was caused to fall and sustain injuries to his right ankle and foot and left shoulder due to the defective curb condition. Rojas contends that the hazardous condition was caused by defendants' negligence.

Defendant The City of New York (the City) and co-defendant Empire City Subway Company Ltd. (Empire) separately move, pursuant to CPLR 3212, for summary judgment to dismiss the complaint.

For the reasons stated below, the City's motion for summary judgment (motion sequence number 006 or City's motion) is granted and Empire's motion for summary judgment (motion sequence number 008 or Empire's motion) is also granted.

I. Background

A. Trip and Fall Injuries

At his General Municipal Law § 50-h hearing on June 22, 2012, Rojas testified that he was carrying a grocery bag in each hand and engaged in a conversation with his daughter at the time of the accident (City's motion, exhibit E). Rojas related that he was looking straight ahead as he stepped with the heel of his right foot on the defect, lost his balance and fell backwards on his buttocks (*id.*). He attributed the cause of the accident to the hole in the ground, which caused an imbalance as the ground was not level (*id.*). Following the accident, Rojas stated that he experienced immediate pain in his back and, two weeks later, swelling in his heel and that he was dragging his foot (*id.*). He underwent X-rays and was diagnosed with Achilles tendinitis (*id.*). He was prescribed anti-inflammatory and prescription pain medication, and a boot and arch support for his shoes (*id.*).

At his examination before trial (EBT), on January 22, 2016, Rojas gave testimony that he was also prescribed a cane, which he used; that he underwent physical therapy and had an MRI of his foot (City's motion, exhibit F). An orthopedic surgeon operated on his foot in July 2012 and then Rojas had additional physical therapy (*id.*). Rojas also saw a doctor for his left shoulder and arm for injuries resulting from the fall (*id.*). He had both X-rays and MRIs done. He also took anti-inflammatory medication and underwent physical therapy (*id.*). A surgeon performed an operation on his left shoulder in February 2013 and then Rojas continued with more physical therapy (*id.*).

Plaintiff's Bill of Particulars (BOP), dated October 21, 2013, essentially echoes the foregoing and specifies that his surgeries included, but were not limited to, a right Achilles debridement, a right Haglund resection, and a right Achilles tendon repair as well as an

arthroscopic subacromial decompression and an arthroscopic rotator cuff repair of the left shoulder (City's motion, exhibit D). The BOP further details that, as a result of the aforementioned injuries, Rojas experiences a limited range of motion of his left shoulder and arm, and limited utilization of his right ankle and foot, left arm and shoulder, which affect his normal and customary daily activities (*id.*).

B. Procedural History

It is undisputed that the alleged accident occurred on November 11, 2011 at about 6:30 in the evening and that Rojas served a notice of claim upon the City on or about January 13, 2012, and that he commenced this action on or about January 29, 2013 under index number 160776/2014 in New York County Supreme Court against Empire and Consolidated Edison Co. of New York, Inc. (Con Edison).

By order dated March 16, 2015, this court (Chan, J.) consolidated the matter with index number 160776/14 under the instant action's index number and caption.

The court file reflects that, on December 1, 2016, the court (Chan, J.) rendered a decision dismissing the complaint as to defendants Restani Construction Corp. and Vales Construction Corp. holding that "they performed no work at the subject location and did not in any way contribute to the condition of the roadway or pedestrian median that caused plaintiff's accident."

The City's Department of Transportation's (DOT) Citywide Concrete Unit installed and repaired the subject traffic median from September 2010 through the fall of 2010 (City's motion, exhibit K and Empire's motion, exhibits G and H).

Empire is a company that owns telecommunication manhole and conduit infrastructure in Manhattan and the Bronx and leases that space to telecommunication companies. According to its construction manager, Daniel Tergesen (Tergesen), Empire is the owner of the manhole

described as adjacent to the subject median in this litigation (Empire's motion, exhibit I at 8-9, 12, 15-16).

In his complaint as it pertains to the remaining three defendants, plaintiff claims that the City was negligent in its ownership, operation, maintenance, management and control of the curb of the pedestrian median; that Empire was negligent in its installation, ownership, maintenance, management, repair and control of a manhole cover or utility cap as well as the 12 inches of the surrounding area in or about the roadway, sidewalk and curb of the pedestrian median; and that Con Edison was negligent in ownership, operation, maintenance, management, control, construction and repair of the curb of the pedestrian median.

II. Legal Standard

The principle is well settled that 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 eliminate any material issues of fact from the case *(Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown "facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). However, "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad*, 64 NY2d at 853; *People v Grasso,* 50 AD 3d 535, 545 [1st Dept 2008]).

III. Motion Sequence Number 006: The City's Motion for Summary Judgment

A. Contentions

In its motion papers, the City argues that it did not receive prior written notice of the subject condition pursuant to New York City Administrative Code § 7-201 (c) (2) (Administrative Code § 7-201), nor did it cause or create the subject condition.

The City contends that it met its burden to establish entitlement to summary judgment on the basis that Rojas failed to plead prior written notice of the alleged condition as a cause of action in his notice of claim and summons and complaint. Furthermore, the City alleges that it did not either receive prior written notice of the specified alleged defect by way of the DOT record searchers who performed a review of the block encompassing the location of the alleged accident.

In any event, the City claims that plaintiff puts forth no evidence that it caused or created an immediate dangerous condition on the subject roadway. Furthermore, it avers that it is immune from suit because the metal curbing or lack thereof comports with the intended design and function, and its design is a product of a governmental discretionary act.

The City's motion is opposed by both plaintiff and Empire.

Plaintiff concedes that the City did not have prior written notice of the defect. Notwithstanding the foregoing, plaintiff claims that the City did not set forth prima facie evidence permitting the granting of summary judgment. Plaintiff contends that the City created the defect or hazard through its affirmative negligence in the construction, maintenance, control and repair of the area.

Plaintiff alleges that it is undisputed that the City constructed the median and the particular area where plaintiff's accident occurred and that the City pled and claims that the

defect or hazard causing plaintiff's accident was created through the affirmative negligence of defendants in the construction, maintenance, control and repair of the area.

Plaintiff argues that the City relies on the speculation of one of its workers', namely Leonardo Aozate (Aozate), that the defect was not there when the construction was completed and that it may have been caused by a vehicle hitting the location, or the City's own conjecture that it was due to general wear and tear about the condition of the location at the time of the accident. However, no evidence is presented as to what the location looked like upon completion of the project, i.e. as to whether or not the City created the defect or how the location of the accident appeared at the completion of the project. Therefore, plaintiff argues that there isn't sufficient evidence in the record that demonstrates that the City did not create the condition causing plaintiff's accident.

Plaintiff also argues that there is a question of fact regarding the negligent design of the location, namely the appropriateness of the lack of a metal cap over the manhole cover and the curb at the location. The testimony of the City's affiants, Aozate and James Pyun (Pyun) are at odds. On the one hand, Pyun's affidavit states that the design was to accommodate access to the manhole cover, and not necessary to protect the area from vehicles, but there is no mention about pedestrian safety at the location. On the other hand, Aozate surmises that the defect was caused by a vehicle hitting the curb.

In its opposition papers, defendant Empire argues that the City caused and created the subject defect, a direct and immediate result of the City's improper construction of the curb. Empire refers to Pyun's affidavit, which states that the City constructed the subject median between September and November 2010 and that it decided not to use metal curbing to support the curb at the area of the defect.

Empire relies on its expert, James P. Quinn (Quinn), a licensed professional engineer, who affirms in his affidavit that the City improperly constructed the subject curb at the accident location by failing to use a curb casting and to install an expansion joint between the curb and the sidewalk as required by the City's own curb construction standards. Quinn also contends that the City, instead, made a semi-circle opening in the concrete median and curb over the manhole creating a non-continuous curb surface. Quinn adds that the City installed the concrete curb semi-circle monolithically, i.e. without a joint, with the concrete sidewalk in contravention with the DOT's standard drawings and specifications, which require the installation of an expansion joint between the new curb and sidewalk to limit cracking and resultant freeze-thaw deterioration. Furthermore, this construction exposed the non-steel faced curb semi-circle around the manhole casting to impacts by vehicles including snow plows, car and truck wheel rims, and street sweepers. Both of these construction defects existed at the time of the installation of the subject curb.

Empire stresses that prior written notice of the defect is not required when the municipality was affirmatively negligent in causing or creating the defective condition. Empire also refutes the City's argument that the defect did not exist in its final form as shown in the plaintiff's photographs at the time of the construction because the City improperly constructed the curb.

According to Empire, contrary to Pyun's statements in the affidavit, the issue of fact for trial with respect to the City's liability is whether the City failed to follow its own required standards for curb construction in constructing the subject curb without the necessary expansion joint, not whether there existed a safer design such as in Empire's opposition's exhibit B. Empire contends that it is not a discretionary design issue as the City argues.

In reply, the City argues it established prima facie that it did not have prior written notice and that prior written notice was never alleged as a theory of liability. The City contends that it did not cause or create the alleged condition. It reiterates that it is immune from suit in regard to allegedly negligently designing and constructing the median as the design of the median is a product of a governmental discretionary act. Therefore, the City argues that there are no issues of material fact regarding the City's non liability.

First, the City notes that neither plaintiff nor Empire disputes that the City's construction and decisions in design were discretionary governmental actions and therefore they should be deemed conceded. Municipality liability may not result from a discretionary act, that is conduct involving the exercise of reasoned judgment, even if the conduct is negligent. According to case law, there is municipal immunity where the conduct complained of involves the exercise of professional judgment, however poor, or notwithstanding injury to a member of the public.

Furthermore, the City cites to jurisprudence for the proposition that considered decisions of a governmental planning body with respect to highway and building safety and design are not subject to judicial review.

With respect to Empire's affidavit submitted by its expert, the City argues that the median was built in 2010 and the accident occurred in November 2011 while the expert visited the location of the accident two times in 2017, approximately seven years after the project was completed and thus the expert did not see the median immediately after the completion, nor was he present during the construction, thus any determination made about the condition of the curb eight years after the fact is pure speculation.

Although Empire's affidavit states that upon completion, the construction defects existed, and that it argues that it was immediate and apparent, the City contends that the actual condition

complained of, namely a deteriorated curb, not metal casting or an expansion joint, would need to be immediately apparent upon completion. Deterioration over time is not sufficient to establish affirmative negligence according to case law.

The City highlights that Empire relies on standards that the City's Department of Design and Construction (DDC) use, which differ from those used by the City's DOT, which is a separate entity. Nonetheless, the City argues that Pyun's affidavit establishes that the curbing around the manhole cover is standard practice of the City and this decision is made when Citywide Concrete goes out to the field based on their judgment and discretion in their official capacity, which is subject to immunity.

In conclusion, the City argues that arguments such as the City "should have" or "could have" used certain designs or implemented different types of covers or curbing is exactly the type of second guessing the doctrine of qualified governmental immunity serves to preclude.

B. Discussion

It does not appear that the term "curb" is specifically defined in the Administrative Code or the Rules and Regulations of the City of New York. However, a curb is generally understood to be "the stone or concrete edging forming a gutter along the street" (*Takebe v New York City Hous. Auth.*, 22 Misc 3d 1120[A], 2009 NY Slip Op 50194[U], *1 [Sup Ct, NY County 2009], quoting Webster's New World College Dictionary, 4th edition).

According to Section 7-201 of the Administrative Code, which pertains to actions against the City:

> "(a) The term "street" shall include the curbstone, an avenue, underpass, road, alley, lane, boulevard, concourse, parkway, road or path within a park, park approach, driveway, thoroughfare, public way, public square, public place, and public parking area.

> (b) The term "sidewalk" shall include a boardwalk, underpass, pedestrian walk or path, step and stairway"

(7 NYCRR 7-201 [c] [1] [a] and [b]).

Section 19-101 of the Administrative Code, which addresses streets and sidewalks, specifically, their construction, maintenance, repair, obstruction, or closure, defines "sidewalk" as "that portion of a street between the curb lines, or the lateral lines of a roadway, and that adjacent property line, but not including the curb, intended for the use of pedestrians" (19 NYCRR 19-101 [d]).

It is well settled by a long line of cases that "a municipality has a duty to maintain its roads and highways in a reasonably safe condition and liability will flow for injuries resulting from a breach of that duty" (*Wittorf v City of New York*, 23 NY3d 473, 480 [2014], citing *Friedman v State of New York*, 67 NY2d 271, 283 [1986]). In *Friedman*, the Court of Appeals stated that "[i]t has long been held that a municipality owe[s] to the public the absolute duty of keeping its streets in a reasonably safe condition," quoting *Weiss v Fote* (7 NY2d 579, 584 [1960] [internal quotation marks omitted]). In support of the aforementioned holding, the *Weiss* court relied on *Annino v City of Utica* (276 NY 192, 196 [1937]), which cited *Storrs v City of Utica* (17 NY 104, 108 [1858]).

1. Prior Written Notice Requirement

The foregoing duty, however, is limited in the City of New York by a prior written notice statute providing that the City may not be subjected to liability for injuries caused by a defective condition unless it has received written notice of the defect or unsafe condition (General

Municipal Law § 50-e [4]; Administrative Code § 7-201 (c) (2) (7 NYCRR 7-201 [c] [2][1]); *Amabile v City of Buffalo*, 93 NY2d 471, 473-474 [1999]). There are two exceptions to the written notice requirement, namely an affirmative act of negligence where plaintiff demonstrates that the City has caused or created the defect or hazard (*Kiernan v Thompson*, 73 NY2d 840, 842 [1988]; *Elstein v City of New York*, 209 AD2d 186, 187 [1st Dept 1994]), or where special use confers a benefit upon the municipality (*Amabile*, 93 NY2d at 474).

Here, as conceded by Rojas, the City did not receive prior written notice of the allegedly defective curb, and as such this concession constitutes a judicial admission that is binding on plaintiff (*Cron v City of New York*, 55 Misc 3d 1219 [A], 2017 NY Slip Op 50658 [U], *4 [Sup Ct, NY County 2017]).

2. Interplay between 34 RCNY § 2-07 (b) (2) and the City's Duty to Maintain its Streets in a Reasonably Safe Condition

At the outset, the court focuses first on whether it is the responsibility of the City or Empire to maintain the curb.

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> "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 thereto, being out of repair, unsafe, 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 by 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, 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 court notes that the DOT Commissioner is authorized to promulgate rules regarding streets and highways in the City pursuant to § 2903 of the New York City Charter and Title 19 of the Administrative Code (*see* 34 RCNY §§ 2-01 et seq. [Highway Rules]).

Section 2-07 (b) (1) and (2) of Title 34 of the Rules and Regulations of the City of New York, which pertains to DOT's Highway Rules as to Underground Street Access Covers, Transformer Vault Covers and Gratings provides:

> "(b) Maintenance requirements. (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 twelve inches outward from the perimeter of the hardware.
> (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 twelve inches outward from the perimeter of the cover or grating. Such owner must obtain a permit to maintain a steel plate that is covering such cover or grating or such street condition."

(34 RCNY § 2-07 [b] [1] and [2]).

It appears that there are two inconsistent mandates: on the one hand, the City has an absolute duty, dictated by precedent, to maintain the streets, including the curbs, in a reasonably safe condition while on the other hand, the owner of a manhole cover is responsible for monitoring as well as repairing any defective street condition within 12 inches from said cover. In this context, however, it is worth underscoring that 34 RCNY § 2-01 [Definitions] is silent about curbs, which are not included in the definition of the street.

Where one attempts to reconcile seemingly conflicting duties, one must take into consideration that if the Commissioner had the authority and desire to shift liability for accidents involving curbs exclusively to the owners of covers or gratings on a street in derogation of the common law, he or she would have had to use specific and clear language to accomplish that goal (*see Vucetovic v Epsom Downs*, Inc., 10 NY3d 517, 521 [2008] [Section 7-210 of the

Administrative Code does not impose civil liability on an abutting property owner for injuries that occur in city-owned tree wells in light of the fact that "legislative enactments in derogation of common law, and especially those creating liability where none previously existed, must be strictly construed"] [internal quotation marks omitted]).

Even though *Irizarry v Rose Bloch 107 Univ. Place Partnership* is not binding precedent on this court and also deals with a different duty than the one under consideration in the instant matter, the court agrees with the determination reached there (12 Misc 3d 733, 737-738 [Sup Ct, Kings County 2006]). In *Irizarry*, the court ruled that although Section 7-210 of the Administrative Code imposes an affirmative duty on certain abutting landowners to maintain the sidewalk in a reasonably safe condition, curbstones remain the responsibility of the City. In reaching its decision, the court relied specifically on the definition in Section 7-201 of the Administrative Code which includes curbstone as part of the street. The court noted that Section 7-201 of the Administrative Code was not amended when Section 7-210 of the Administrative Code was enacted and that the legislative intent, as revealed in that section's Bill Jacket, was to mirror the duties and obligations set forth in Section 19-152 of the Administrative Code, which remained silent about curbstones (*id.* at 737). Therefore, the abutting property owner could not be held liable for negligence arising from a trip and fall accident involving a broken curb (*id.* at 738).

While they also involve the application of Section 7-210 of the Administrative Code and the instant matter does not, two cases from the Appellate Division, First Department, which deal with curbstones are particularly instructive. This court notes that, in cases involving the duty to maintain sidewalks abutting their property, the First Department has repeatedly ruled that abutting landowners have no obligation to maintain curbs under the Administrative Code.

In *Ascencio v New York City Hous. Auth.*, the First Department held that in a slip and fall case involving a curb, the New York City Housing Authority (NYCHA) was not obligated to maintain the curb because Section 7-210 of the Administrative Code only requires that NYCHA maintain sidewalks abutting its property (77 AD3d 592, 593 [1st Dept 2010]). The court turned to Section 19-101(d) of the Administrative Code, which excludes the term curb from the sidewalk definition. In *Garris v City of New York*, 65 AD3d 953 [1st Dept 2009], the Appellate Division court granted summary judgment to defendant Lighthouse in a case where plaintiff tripped on the gap between the metal portion of the curb and the concrete portion of the curb on the sidewalk. The court, relying on Administrative Code § 19-101 (d), which defines the sidewalk to exclude the curb, found that defendant was not obligated to maintain the curb (*id.* at 953).

Based on the foregoing, the court finds that 34 RCNY § 2-07 (b) (2) cannot be interpreted to contradict what has long been established, namely, that the City is generally considered the owner of curbs and has a non delegable duty to maintain same.

3. Cause and Create Exception to Prior Written Notice Requirement

Having established that the curb is the City's responsibility to maintain, the court now turns to plaintiff's claims of negligence. In the absence of prior written notice, where the City, as here, remains responsible for the maintenance of the curb, liability against the City requires evidence that it caused and created the defect alleged.

Where the exception of affirmative negligence is raised, plaintiff must establish that the City's construction or any repair work immediately resulted in the existence of a dangerous condition, rather than developed over time (*Bielecki v City of New York*, 14 AD3d 301, 301 [1st Dept 2005] [prior notice requirement applies and ankle-deep hole in pedestrian's pathway is not

affirmative act of negligence by City because subject defect was not immediately apparent after negligent repair. Rather, the dangerous condition developed over time]; *see also Torres v City of New York*, 39 AD3d 438, 438 [1st Dept 2007]).

In *Yarborough v City of New York*, the Court of Appeals ruled, in this action arising from a trip and fall in a pothole, that the City's liability was precluded where there was no prior written notice and the requirement of immediacy was not met. Even assuming an allegedly negligent repair, plaintiff's expert conceded that the deterioration of the asphalt patch, the condition that caused plaintiff's injury, developed over time with environmental wear and tear ([10 NY3d 726, 728 [2008] [limiting the affirmative negligence exception "'to work by the City that immediately results in the existence of a dangerous condition,'" quoting *Oboler v City of New York*, 8 NY3d 888, 889 [2007]).

Here, the record establishes that the trip and fall accident happened in November 2011 while the construction of the subject median was completed in the fall of 2010.

The DOT's Leonardo Aozate (Aozate) confirmed at his EBT that he was one of the crew members who constructed the median at the subject location. During his examination, plaintiff's counsel (Mr. Miraglia) and Empire's counsel (Ms. Ashman) questioned Aozate about photographs of the subject location. Counsels asked the following:

"CONTINUED EXAMINATION BY MR. MIRAGLIA:
Q. In November of 2011, do you recall working in the area of Plaintiff's Exhibit 1 and 2?
A. I don't remember the year, but I remember I was working on this.
Q. The photo shown here, would this be photos [sic] after the project was completed or are these in the middle of the project, if you can tell from the Plaintiff's 1 and Plaintiff's 2.
A. These photos were taken after it was completed.

"CONTINUED EXAMINATION BY MS. ASHMAN:
Q. How do you know that?

A. I see the concrete on top, even this (indicating), even this (indicating,) was done.

MS. BRISARD[2]: So there's no indication there's ongoing construction in this picture?
THE WITNESS: No.
MS. ASHMAN: Can I mark this?
Q. Pointing to the photograph at the bottom of Plaintiff's Exhibit 1, is this how the sidewalk looked following the conclusion of the project?
A. No, this photo show [sic] me somebody crash into that part of the steel of the curb."

(City's motion, exhibit L at 29, 30).

As reflected in the transcript, Aozate, who provided the only first hand account of the condition of the curb at the time it was completed, denied that the curb appeared defective in the way it was shown in the photograph at the time of the conclusion of the construction job.

Plaintiff and Empire fail to advance any evidence of the condition of the curb at the time the construction job was completed. Neither is there any evidence in the record of complaints or maintenance and repair records for the subject defect. Nor did Quinn provide any expert opinion that the subject hazardous condition appeared immediately after the work concluded. Therefore, plaintiff fails to raise an issue of fact as to whether the City's work immediately resulted in the defective condition complained of.

4. Alleged Negligent Design and Construction of the Curb

Plaintiff claims in opposition that the City affirmatively created the dangerous condition which caused the accident through various specified acts of negligence in the design and construction of the curb. The hazard complained of is attributed to the lack of metal casting of the curb surrounding the manhole according to plaintiff's expert.

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[2]Ms. Brisard is City's counsel.

To sustain its prima facie burden, the City must demonstrate that it did not create the unsafe condition through an affirmative act of negligence by showing that this exception does not apply. The City gives the following explanation for the lack of steel framing.

The City's first expert, Pyun, is the DOT's Director of the Citywide Concrete Unit and has served in this role since 2010 (City's motion, exhibit K). Pyun states that he oversaw the installation of the median island at the subject location by the Citywide Concrete Unit between September and November 2010. Pyun states the following in his affidavit:

> "5. Metal curbing is generally placed near heavy traffic lanes in order to protect the curb structure from plows and heavy truck vehicles hitting and damaging the curb. Metal curbing is not installed to protect pedestrians or pedestrian traffic. The decision to place metal curbing on any given curb is typically made when the Citywide Concrete Crew goes to the location and inspects the area. If the adjacent sidewalks have metal curbing, then the Citywide Concrete crews will match the surrounding curbs and add metal curbing accordingly.
>
> "6. In some instances, the Citywide Concrete Unit will not install metal curbing. Those instances include, but are not limited to, when there are curves in the curb line, or if there is no other metal curbing in the area.
>
> "7. In this instance, the inward portion of the curb of the median island that curves around the manhole cover, and is located on Amsterdam Avenue, was cut to accommodate access to the manhole cover by the utility owner. It is standard practice to not place metal curbing around the inward curved curb of a median island. Metal curbing is not necessary when the curb curves inward because plows and heavy vehicles cannot impact it.
>
> "8. Based on my own experience, the above described practice is the standard practice when the Citywide Concrete Unit is constructing median islands in the City of New York around manhole covers"

(*id.* at 2).

The City also presents the transcript of the EBT of Aozate who serves as a highway repair foreman in the DOT's Citywide Concrete Unit and who holds the equivalent of an associate's degree as designer mechanical technician as well as several civil service licenses

(City's motion, exhibit L). Prior to becoming a foreman in or about 2017, Aozate served as a New York City inspector for one year, and a crew leader for a gang for five years and crew member for a gang for four years working on jobs using concrete to construct, repair or replace sidewalks.

As mentioned earlier, during his EBT, Aozate confirmed that he was part of the crew that constructed the median at the subject location. He testified that the work involved removing and replacing one of the islands on St Nicholas Avenue, building up a new center median, and extending the island on the other side (*id.* at 16-17). The work involved a combination of new construction and replacement of parts of the sidewalk, including the extension, i.e. framing, of the center median/island and the curb (*id.* at 17, 21-22). Upon being questioned by plaintiff's counsel as to why there were no metal strips between the curb and the roadway, i.e. framing, where the manhole cover is, Aozate responded:

> "A. We cannot frame on top of the cover for the sidewalk.
> Q. Was that the crew's decision, was that part of the blueprints you describe [sic] before, something else?
> A. The blueprint.
> Q. You've been working for the Citywide Concrete crew for ten years, correct?
> A. Yes.
> Q. Have you ever encountered a situation where you've built a sidewalk where there's a manhole cover?
> A. Yes.
> Q. Is that the standard practice for New York City?
> A. Yes.
> Q. Is it also standard practice not to have any metal framing around it where this seems to be a cut out for the manhole cover, correct?
> A. Yes"

(*id.* at 24).

Empire's counsel then continues the examination as follows:

> "Q. Is there a reason the steel casing didn't extend through this area where it could have stopped the broken manhole?

A. We stop over there because we cannot cover up the lid for the manhole.
Q. Why?
A. This has to be accessible for other companies"

(*id.* at 31-32).

Aozate appeared to answer in the positive plaintiff's counsel's question as to whether it was the City's design to form a curve, or construct the edge of the sidewalk in a circular fashion around the manhole (*id.* at 37) and reiterated that the City does not use curb casting in the subject situation (*id.* at 38).

In support of his contentions that the curb was defectively designed, plaintiff proffers the affidavit of Quinn, a licensed professional engineer specializing in forensic, construction and civil engineering. Plaintiff's expert relies on several documents, including plaintiff's photographs of the alleged defect marked at plaintiff's deposition and the City's sidewalk records. To establish his claim that a curb casting device is standard to ensure a safe, continuous surface for pedestrian and vehicular traffic, Quinn attaches a picture of what he describes as same, which he attributes, in his affidavit, as the City's DDC standard for constructing a concrete median, sidewalk or curb (Empire's opposition, exhibit A, exhibit 3) as well as DOT standard drawings (*id.*, exhibit 5) and DOT Standard Highway Specifications (*id.*, exhibit 6).

Here, the legal issue is whether the design and construction of the curb violated accepted industry safety standards applicable at the time it was constructed, not whether there was a way to construct the curb in order to avoid any possibility of an accident for pedestrians. In order to support a negligent design claim, plaintiff's "expert must do more than merely assert a personal belief that the claimed industry-wide standard existed at the time the design was put in place," but "must offer concrete proof of the existence of the relied upon standard at the relevant time,

such as 'a published industry or professional standard or ... evidence that such a practice had been generally accepted in the relevant industry' at the relevant time" (*Hotaling v City of New York*, 55 AD3d 396, 397-398 [1st Dept 2008], *affd* 12 NY 3d 862 [2009], quoting *Jones v City of New York*, 32 AD3d 706, 707 [1st Dept 2006]).

DOT's Standard Specifications and Standard Detail Drawings, which Quinn relies upon in his affidavit, are listed in Section 2-09 (a)(2) of the Rules and Regulations of the City of New York, which pertains to Sidewalk, Curb and Roadway Work, and specifically to Compliance with requirements, including current highway engineering practice, as well as various publications for the design and installation of all public infrastructure work (34 RCNY 2-09 [a][2]).

The Appellate Division, First Department has ruled, however, that the publications cited in that subdivision are insufficient to support a cause of action, or raise an issue of fact because they do not contain "a particularized mandate or a clear legal duty" *(Fazzolari v City of New York*, 105 AD3d 409, 410 [1st Dept 2013] [internal quotation marks and citation omitted] [plaintiff who stepped off curb onto roadway to assist a motorist with directions failed to raise an issue of fact by relying on publications cited in 34 RCNY 2-09(a)(2), which lack a particularized mandate or a clear legal duty and thus are insufficient to support a cause of action that the curb was defective or dangerous by reason of its height]; *Cambio v City of New York*, 118 AD3d 577, 578 [1st Dept 2014] [DOT's "Standard Details of Construction" for sidewalk, curb, and roadway work (*see* 34 RCNY 2-09[a][2]) did not impose a particularized mandate or a clear legal duty, for purposes of legally blind pedestrian's claims for negligence and malpractice in designing curb from which he fell]).

Therefore, plaintiff's evidence of the purported standard or departure from accepted engineering practices, is without probative value as to what constitutes good and accepted engineering standards requiring curb casting [and an expansion joint] over the manhole. Nor does Quinn establish how the aforementioned DDC standard mandates a particular design feature.

Moreover, "something more than a mere choice between conflicting opinions of experts is required before the State or one of its subdivisions may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public" (*Weiss*, 7 NY2d at 588).

Based on the foregoing, plaintiff failed to raise an issue of fact as to the City's negligence in the design and construction of the subject curb.

5. Qualified Immunity for Discretionary Acts

In any event, with respect to design concerns, the Court of Appeals has stressed time and again that a municipality is afforded qualified immunity from liability arising out of highway planning, design and maintenance and decisions in the area of roadway safety, which are considered proprietary functions:

> "As noted, there are certain categories of actions that have long been held to fall definitively within either the proprietary or the governmental end of the spectrum. . . . Highway planning, design, and maintenance, by contrast, are proprietary functions, arising from a municipality's "proprietary duty to keep its roads and highways in a reasonably safe condition" (*Wittorf*, 23 NY 3d at 480, 991 NYS 2d 578, 15 NE 3d 333). A municipality's proprietary duty to keep its roadways in a reasonably safe condition is well settled (*see Friedman v State of New York*, 67 NY2d 271, 283, 502 NYS2d 669, 493 NE2d 893 [1986]; *see* generally *Riss v City of New York*, 22 NY 2d 579, 581, 293 NYS2d 897, 240 NE 2d 860 [1968]; *Oeters v City of New York*, 270 NY 364, 368, 1 NE 2d 466 [1936])."

(*Turturro v City of New York,* 28 NY3d 469, 479 [2016].)

There is no doubt that the type of act that is under scrutiny here is one that involves the "exercise of reasoned judgment" and it is entitled to qualified immunity (*Lauer v City of New York*, 95 NY2d 95, 99 [2000]). In *Lauer*, the Court of Appeals drew the following distinction:

> "[a] public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent. By contrast, ministerial acts—meaning conduct requiring adherence to a governing rule, with a compulsory result—may subject the municipal employer to liability for negligence"

(*id.*).

The City's experts explained that it is standard practice to curve the curb adjacent to a manhole and that no metal casting is installed to accommodate access to the cover.

Therefore, plaintiff's line of inquiry, or second-guessing, whether in its opposition papers or at Aozate's EBT, as to whether there could have possibly existed a better or safer alternate design is of no moment.

Indeed, plaintiff does not point to "conduct requiring adherence to a governing rule, with a compulsory result" nor does plaintiff advance any proof that the decision to design and construct the curb without metal casting lacked a reasonable basis which would subject the City to tort liability (*see Friedman,* 67 NY2d at 283-284 [traffic design engineering] and *Weiss*, 7 NY2d at 585-589 [traffic signal lights] [in the field of traffic, highway or road design and planning, qualified immunity from liability is granted to actions unless there is evidence of bad faith or the action is taken without reasonable basis]).

Based on the foregoing, summary judgment is granted to the City and the complaint is dismissed as against it.

IV. Motion Sequence No. 008: Empire's Motion for Summary Judgment

A. Contentions

At the outset, Empire does not dispute that the defect is located within 12 inches of its manhole cover. However, Empire points out that it was the City, not Empire, which created the subject traffic median curb, and that Empire did not perform any work at the subject location, and therefore it did not create the alleged defective curb condition.

Empire argues that the subject manhole is located in the roadway or street of Amsterdam and not on the traffic median created by the City. Empire also points out that the alleged defect existed on the curb and that the language of 34 RCNY § 2-01, which defines the terms roadway, street and sidewalk, does not include a curb as part of the roadway, street, or sidewalk.

Empire contends that it is well settled that a curb is a structure separate from the surrounding street, roadway or sidewalk, and that the City is the only entity responsible for maintaining the curb adjacent to the manhole. Furthermore, there is no requirement that the owner of the cover maintain the adjacent curb. Empire argues that any derogation to the common law, and especially one which creates liability where none previously existed must be strictly construed.

Finally, Empire draws an analogy between this case and jurisprudence involving the responsibility of abutting property owners under the sidewalk law. According to Administrative Code § 7-201 et seq., a property owner cannot be held responsible for separate structures and appurtenances on their abutting sidewalk because the owners of the structures or appurtenances maintain the primary responsibility for their upkeep and repair. The Court of Appeals has held that the curb is a separate structure from a sidewalk and declined to hold abutting property owners liable for curb defects under that provision.

In opposition, plaintiff argues that there is no statutory exception for a curb under 34 RCNY § 2-07. Nor does the case law cited by Empire hold that a curb exception exists to this regulation.

Secondly, plaintiff contends that Empire's own witness creates a question of fact as to whether Empire is responsible for the repair and maintenance of the 12-inch perimeter surrounding the manhole at issue here.

Lastly, even if the court were to accept the curb exception argument, a portion of the defect where plaintiff fell is on the sidewalk, past the curb line, in the area Empire admits is their responsibility to repair and maintain.

The City also submits opposition papers wherein it argues that the court should deny Empire's motion as it is untimely.

The City contends that Justice Margaret A. Chan issued a case scheduling order on January 8, 2014 whereby she ordered that "Summary Judgment Motions: Shall be filed no later than 60 days after filing of the Note of Issue unless otherwise directed by the court" (City's opposition, exhibit A, ¶ 12). However, Empire filed its first motion for summary judgment nine days after the summary judgment filing deadline passed as plaintiff filed his note of issue on May 3, 2017 (*id.*, exhibit B), thus the sixty day deadline is July 3, 2017. Empire then withdrew its motion due to clerical errors, and filed the instant motion on July 17, 2017, which is 14 days after the deadline. Empire filed these motions without providing good cause as to why its motion should be accepted after the deadline had passed, and it is well settled case law that good cause must be shown for making a late motion regardless of the motion's merits.

In reply, Empire contends that plaintiff failed to submit any evidence that Empire caused or created the condition or was responsible to maintain the curb of the traffic median where the subject defect was located.

Empire argues that plaintiff mistakenly argues that 34 RCNY § 2-07 applies to the City's curbs. Rather, Empire interprets the regulation to mean that the area is the street, not a curb, fire hydrant, building wall, pedestrian ramp, pole, sign, bollard, sidewalk vendor's shed, tree well, another utility's cover, an aqueduct, etc. because a curb and the foregoing structures do not qualify as the street under 34 RCNY § 2-01.

Third, Empire asserts that plaintiff's argument that the defect extended to the sidewalk is without merit and unsupported by the record. Plaintiff testified that the accident occurred at the curb when he was about to step off from it into the street (Empire's motion, exhibit E at 27-29, 132, 133 and exhibit O). In addition, Empire refers the court to Aozate's description of the defect as a hole in the curb (*id.*, exhibit K at 30-31 and exhibit L at 1) and Quinn's expert opinion also places the defect on the curb (*id.*, exhibit M).

Finally, Empire contends that plaintiff mistakenly argues that the deposition testimony of construction manager Daniel Tergesen creates liability under 34 RCNY § 2-07. An opinion testimony does not change statutory interpretation nor is it relevant with respect to liability under this regulation. In any event, Tergesen stated Empire would not fix the subject defect (Empire's motion, exhibit I at 13-14).

In reply to the City's opposition, Empire argues that the City's affirmation in opposition itself is late, and in any event baseless as Justice Chan's Part Rules (Empire's reply, exhibit P) provide 120 days, pursuant to CPLR 3212 (a) and New York County Local Rule 17, to file a summary judgment motion. Empire claims that the court's orders after Empire was impleaded

(*id.*, exhibit Q) do not contain any 60-day limitation on the time period to file summary judgment motions and Justice Chan ruled in a separate action that an order limiting the time to file for summary judgment does not apply to a party that was not in the case at the time the order was issued. Empire was not a party to the case at the time of that order and therefore it does not apply to it.

B. Discussion

1. Timeliness of Empire's Motion for Summary Judgment

The court takes note that plaintiff filed his note of issue on May 3, 2017 (NYSCEF Doc Nr. 118). In accordance with Justice Chan's order, 60 days from May 3, 2017 is Sunday, July 2, 2017. Therefore, Empire would ordinarily have had until Monday, July 3, 2017 to file its motion pursuant to General Construction Law § 25-a.

However, on January 8, 2014, Empire was not a party to the action under which Justice Chan's case scheduling order is captioned. At that time, the City and Restani Construction Corp. were the only defendants in this action. As previously mentioned, the case involving defendants Empire and Con Edison under index number 160776/14 was only consolidated on March 16, 2015 into the instant matter. And, as pointed out by Empire, the record does not reveal any order imposing a 60 day limitation period for the filing of a summary judgment motion that is applicable to Empire. Nor is there any order in the action captioned under index number 160776/14 directing Empire to comply with a 60 day deadline.

In *O'Gormley v City of New York*, a case cited by Empire, Justice Chan noted that she had issued a case scheduling order (order) setting forth that "summary judgment motions shall be filed no later than 60 days after the filing of the note of issue" [internal quotation marks omitted] (2014 NY Slip Op 31662[U] [Sup Ct, NY County 2014]). The order was pertinent to

the City and Con Edison, which were defendants in the action at the time of the date of the order. However, the court determined that the order was not relevant to the Verizon defendants as there was no order setting a shorter deadline than the time restriction under Local Rule 17 and CPLR 3212 (a) generated in the separate action brought against them, which was consolidated with the instant matter.

Taking into consideration the 120-day time limit prescribed by CPLR 3212 (a) and Local Rule 17, Empire would have had until August 31, 2017 to file its motion. In light of the fact that the instant motion was filed on July 17, 2017, it is well within the time requirements for making a summary judgment motion.

Based on the foregoing, the court deems Empire's motion timely.

2. Question of Liability

The court does not find that the cause of the accident extended to a defect in the sidewalk as raised by the City in its opposition papers. The record is contrary to this argument.

Empire's motion for summary judgment dismissing the complaint is hereby granted based on the court's finding in motion sequence number 006 and in the absence of evidence that Empire performed any work at the subject location or contributed to the hazardous condition that caused plaintiff's injury.

III. Conclusion

Accordingly, it is ORDERED that motion sequence nos. 6 and 8 are granted and the complaint is dismissed insofar as asserted against defendants The City of New York and Empire City Subway Company Ltd. This constitutes the decision and order of the Court.

Dated: April 3, 2018

ENTER:

Alexander M. Tisch, J. S. C.

HON. ALEXANDER M. TISCH