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

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IRIS ALBSTEIN,

Plaintiff,

-against-

PARK SOUTH TENANTS CORPORATION, 200 CPS RETAIL HOLDINGS LLC, 200 CPS PROPERTIES LLC 200 CPS MANAGEMENT LLC,

Defendant.

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DECISION AND ORDER

Index #152742/2015

Mot. Seq. 7 & 8

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PARK SOUTH TENANTS CORPORATION,

Plaintiff,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

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Third Party Index No. 595706/2016

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendant Third-Party Plaintiff Motion / Affirmation in Support	1	165-191
Third-Party Defendants MTA/Transit's Motion/ Affirmation in Support	2	192-213
Third-Party Defendants MTA/Transit's Affirmation in Opposition	3	214-216
Defendant Third-Party Plaintiff Affirmation in Opposition	4	219-231
Third-Party Defendants MTA/Transit's Reply	5	232
Plaintiff's Opposition to Defendant Third-Party Park South	6	236

LISA A. SOKOLOFF, J.

In this action to recover damages for injury from a slip and fall, Defendant Third-Party Plaintiff Park South Tenants Corporation (Park South) moves in motion sequence 7 for summary judgment and to dismiss the complaint of Plaintiff Iris Albstein and the answer and affirmative defenses of Third-Party Defendants Metropolitan Transportation

Authority (MTA) and New York City Transit Authority (NYCTA) (MTA and NYCTA, collectively Transit). In motion sequence 8, Transit moves for summary judgment and to dismiss the third-party complaint of Park South and any cross-claims against it, on the grounds that Park South has failed to state a cause of action.

This action arises out of a trip and fall from a defective condition on the sidewalk adjacent to the co-op apartment building known as 200 Central Park South, New York, New York. On December 20, 2014 at approximately 6:00 p.m., Plaintiff was walking westbound on the south side of 59th Street between 7th Avenue and Broadway when her right foot "got stuck in a crack in the sidewalk" due to a large crescent-shaped chip missing from a black stone in the sidewalk. Plaintiff claims that Park South, as the abutting property owner, was negligent in failing to properly maintain the sidewalk.

Park South contends that it owes no obligation to Plaintiff as the defect falls within an area located within 12 inches of Transit's underground vault cover hardware, or alternatively, because Transit assumed an obligation to repair and maintain the area as a result of its special use of the sidewalk.

Transit opposes claiming that whether or not the underground vault constitutes a special use, based on the controlling statute, Plaintiff's accident occurred outside Transit's zone of responsibility, and therefore, Park South, as the abutting property owner, is responsible for the defective condition.

Park South acknowledges ownership and control of the abutting sidewalks on Central Park South in that its superintendent, Roosevelt Thomas, testified that he maintains the sidewalk, fixes defective sidewalk conditions, and contracts for sidewalk repairs and repaving, including the repair of cracks. He also does a daily inspection of the sidewalks, which give him both actual and constructive notice of any defective conditions in the

sidewalk. All parties agree that the sidewalk vaults at issue are constructed, owned, and maintained by NYCTA.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212[b]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [NY 1985]). Only if the proponent meets this burden, will the burden shift to the party opposing summary judgment, who must then establish the existence of a material issue of fact, through evidentiary proof in admissible form, that would require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its *prima facie* case for summary judgment, its motion must be denied, regardless of the sufficiency of the opposing papers action (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

An owner of property has a duty to maintain his or her premises in a reasonably safe condition (*Kellman v 45 Tiemann Assoc. Inc.*, 87 NY2d 871, 872 [1995]), and in the City of New York, that duty extends to the sidewalks abutting the property (New York City Administrative Code § 7-210; *Sangaray v West River Associates, LLC*, 26 NY3d 793 [2016]). Failure to maintain a sidewalk in a reasonably safe condition includes the negligent failure to install or repair defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk (§ 7-210 [a], [b]).

Rules of City of New York Department of Transportation (34 RCNY) § 2-07(b)(1) removes from this obligation covers, gratings and concrete pads installed around the covers and gratings. 34 RCNY § 2-07(b)(2) requires the owners of covers and gratings on a street to monitor and repair them as well as any street condition extending 12 inches outward from the perimeter of the cover or grating. 34 RCNY § 2-01 includes a "sidewalk" within the definition of "street" (*Flynn v City of New York*, 84 AD3d 1018 [2nd Dept 2011]).

Additionally, the sidewalk law, § 7-210, does not supplant the provisions of 34 RCNY § 2–07 or the statutory obligations of a grate owner to maintain its property (*Storper v Kobe Club*, 76 AD3d 426, 427 [1st Dept 2010]).

The basis of Third-Party Plaintiff Park South's argument is that hardware beneath the sidewalk which makes up the subsurface vault, as well as the subterranean structural support for the vault covers, extend to within eight inches of the sidewalk defect, and are therefore within Transit's statutory 12-inch zone of responsibility.

However, as depicted in the photograph submitted with both the motion and opposition papers (Defendant's Exhibit B, dated 10/29/15; Exhibit E to Transit's opposition), and measured by Plaintiff's counsel, the broken, rutted sidewalk where the accident occurred, was to the west of the vault cover edge and sidewalk seam, an inch and a half beyond the 12-inch *visible* perimeter that marked Transit's zone of responsibility.

The Court rejects Park South's strained interpretation of 34 RCNY §2-07, that the 12-inch guideline is measured not from the cover, grating, surrounding concrete pad, or other hardware visible at street level, but from subterranean, unseen hardware or basement access panels, as contrary to precedentsset by the Appellate Division (*Alexander v City of New York*, 118 AD3d 646 [2nd Dept 2014]; *Doyley v Steiner*, 107 AD3d 517 [1st Dept 2013]; *Flynn v City of New York*, 84 AD3d 1018 [2nd Dept 2011]; *Storper v Kobe Club*, 76 AD3d 426, 427 [1st Dept 2010]). Both public policy and logic demand that the requirement that street hardware be flush with the surrounding *street surface* (34 RCNY §2-07[b][3])(emphasis added) refers to street hardware *visible at street level*, not, as Park South suggests, to hardware embedded below street level, such as the bracket supporting Transit's underground vault cover.

How, as Transit observed, is an abutting property owner supposed to accurately and appropriately establish its area of legal responsibility if the subterranean, unseen hardware

from which the 12 inches is purportedly measured cannot be visualized? It is axiomatic that "where statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Raritan Dev. Corp. v Silva*, 91 NY2d 98, 106 (1997); *Commonwealth of the Northern Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55 (2013). Here, the clear and unambiguous language of 34 RCNY § 2-07(b)(2) does not support the labored interpretation proposed by Park South.

Nor does Park South claim that Transit performed work on the area of sidewalk over which they have responsibility and did so defectively. Finally, there is no evidence to indicate that Transit derived a special use from the location of the sidewalk where the accident occurred. A special user of a public sidewalk has a duty to maintain the area of the special use in a reasonably safe condition (*Weiskopf v City of New York*, 5 AD3d 202 [1st Dept 2004]). An entity is liable for injuries that occur at a location even if the entity does not own the location if it is determined that the entity made a special use of the location and the result of that "special use" was a defective condition which caused or resulted in the injuries sustained by the plaintiff (*Terilli v Peluso*, 114 AD3d 523 [1st Dept 2014). Here, there is no evidence that use of Transit's underground vault resulted in the defective condition. Insofar as Transit neither owned, controlled, derived a special use from, nor created the dangerous condition on the area of sidewalk where Plaintiff's accident occurred, as a matter of law, Transit may not be held liable for plaintiff's injury. In opposition, Park South has failed to raise a triable issue of fact.

Accordingly, it is

ORDERED, that the motion for summary judgment of Defendant Third-Party Plaintiff Park South Tenants Corporation is denied; and it is further

ORDERED, that the motion of Third-Party Defendants Metropolitan Transportation Authority and New York City Transit Authority for summary judgment is granted; and it is further

ORDERED that all claims and cross-claims against Third-Party Defendants Metropolitan Transportation Authority and New York City Transit Authority are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of Third-Party Defendants Metropolitan Transportation Authority and New York City Transit Authority, dismissing the claims and cross-claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Any requested relief not expressly addressed has nonetheless been considered and is expressly rejected.

Dated: October 8, 2019
New York, New York

ENTER:

Lisa A. Sokoloff, J.C.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**