SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART 5**

Justice

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HUASCAR ROSA,

Plaintiff,

- v -

COLUMBUS PARKWAY ASSOCIATES, ANDY-ROO CORP., 360 DELI CORP,

Defendants.

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COLUMBUS PARKWAY ASSOCIATES, ANDY-ROO CORP.

Third-Party Plaintiffs,

-against-

CITY OF NEW YORK,

Third-Party Defendant.

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INDEX NO. 151218/2017

MOTION DATE 10/6/20

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

Third-Party
Index No. 595727/2017

The following e-filed documents, listed by NYSCEF document number, were considered on this summary judgment motion (sequence 005): 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 145, 146, 147, 148, 149, 150, 151, 152, 153

Plaintiff Huascar Rosa commenced this action against Defendants Columbus Parkway Associates ("Columbus Parkway"), Andy-Roo Corp. ("Andy-Roo"), and 360 Deli Corp. ("360 Deli") to recover damages allegedly sustained in an October 12, 2015 trip-and-fall on a sidewalk adjacent to 360 West 110th Street, also known as 360 Cathedral Parkway, New York, New York. Columbus Parkway and Andy-Roo (the "Third-Party Plaintiffs"), represented by the same counsel, commenced a third-party action against Third-Party Defendant City of New York (the "City"). The City now moves, pursuant to CPLR 3212, for summary judgment dismissing the Third-Party Complaint, arguing that: (1) based on the site of Plaintiff's fall, pursuant to N.Y.C. Admin. Code § 7-210, the City is not liable for Plaintiff's injuries: and (2) the City did not cause or create the subject condition. Third-Party Plaintiffs oppose, arguing that an issue of fact exists as to whether the City caused or created the subject condition. For the reasons below, after oral argument, the motion is granted and the Third-Party Complaint is dismissed.

Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact (*id.*). To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant's initial burden is a heavy one; on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party

(*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

N.Y.C. Administrative Code § 7-210(b) provides:

> Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

N.Y.C. Administrative Code § 7-210(c) provides, in relevant part:

> Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition.

In support of its motion, the City attaches the affidavit of David Atik, an employee of the New York City Department of Finance, which maintains the Property Tax System ("PTS") database (*NYSCEF 134* ["Atik Aff"] ¶¶ 1-3). Atik avers that his PTS database search for 360 West 110th Street/360 Cathedral Parkway, located at Block 1845 Lot 3 in New York County, revealed that on October 12, 2015, the City did not own the property, which was designated as Building Class K1 (store building), not a one-, two-, or three-family solely residential property (*Atik Aff* ¶¶ 4-6). Accordingly, the City is not liable for maintenance of the area under N.Y.C. Admin. Code § 7-210. Third-Party Plaintiffs do not oppose this point, and have thus conceded it. Thus, analysis shifts to whether the City created the subject condition or caused it to occur through a special use.

As an initial matter, the Court notes that the City incorrectly reverses the burden to the non-movant to demonstrate a triable issue of fact. The City analogizes the situation here to one where a municipality has demonstrated a lack of prior written notice, thereby shifting the burden to a non-movant to demonstrate an exception to the prior written notice law, such as a municipality's creation of a condition (*City Affirm* ¶ 24). In that context, however, a municipality's creation of a defective condition is an explicit exception to N.Y.C. Admin. Code § 7-201(c)'s prior written notice requirement.

However, a municipality's creation of a defective condition is an explicit exception to N.Y.C. Admin. Code § 7-201(c)'s prior written notice requirement. Here, no such rule exists, and therefore no exception and burden-shifting exist; rather, it is the City's affirmative obligation to demonstrate that it did not cause or create the subject condition. Phrased another way, it is not, in this context, a plaintiff's initial obligation to prove that the City *did* create the condition, but the City's obligation to prove that it did *not* (*see Gomez v NYC*, 175 AD3d 1502, 1503 [2d Dept 2019] ["Administrative Code § 7-210 does not shift tort liability for injuries proximately caused by the City's affirmative acts of negligence…the City met its prima facie burden for summary judgment…by establishing that the premises did not fall within the exception for one-, two-, or three-family owner occupied residential properties, *and that it did not affirmatively cause or create the alleged defect in the sidewalk.*"] [emphasis added]; *Gjeloshaj v 2979 LLC*, 83 AD3d 583, 584 [1st Dept 2011] [reversing and denying summary judgment where defendant failed to satisfy its initial burden to establish, as a matter of law, that it did not cause or create the alleged defect]; *Serano v NY City Hous. Auth.*, 66 AD3d 867, 868 [2d Dept 2009] [NYCHA failed to establish its prima facie entitlement to judgment as a matter of law *by demonstrating that it neither created the allegedly defective condition nor caused it to occur through a special use of the sidewalk*] [emphasis added]).

That said, a movant "need not specifically disprove every remotely possible state of facts on which its opponent might win the case" (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]), "particularly when the opponent's theorizing is farfetched" (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160 [2016]). Here, the City attaches the results of a Department of Transportation (DOT) record search for two years prior to the subject incident, accompanied by the affidavit of DOT paralegal Gabriela Paiz, and the affidavit of Department of Design and Construction (DDC) Engineer in Charge Nitish Tailor, who avers that "neither DDC nor one of its contractors performed work" at the subject location in the two years prior to the subject incident (*NYSCEF 135-138*). Tailor's affidavit does concede construction of a pedestrian ramp on the southeast corner or Columbus Avenue and West 110th Street, but not at the subject location (*NYSCEF 138* ¶ 5). The City's submissions are sufficient to meet its *prima facie* burden of demonstrating that it did not cause or create the subject condition.

In opposition and at oral argument, Third-Party Plaintiffs highlights the testimony of Third-Party Plaintiff witness Scott Shurgin, who testified that the "bus stop [at the accident location] was moved at some point in time" (*3d Party Pls Opp* ¶ 4-5, citing *NYSCEF 146*), and attach Google Maps/Street View images demonstrating that the bus stop did, indeed, appear to have moved between September 2015 and October 2016, when the images were updated (*NYSCEF 147-148*). Third-Party Plaintiffs also point to the testimony of City witness Omar Codling, who could not testify conclusively as to whether or not there was any construction work

at the subject location (*3d Party Pls Opp* ¶ 9). As to the latter, as noted above, a movant "need not specifically disprove every remotely possible state of facts on which its opponent might win the case"; here, Third-Party Plaintiffs do not, other than the argument regarding the bus stop, point to any specific theory of the City having caused or created the subject defect.

As to the bus stop, in reply, the City attaches the relevant portion of the DDC search, which shows a "Request for Temporary Removal of a Bus Stop Shelter" submitted by Triumph Construction for a bus stop at the southeast corner of West 110th Street and Columbus Avenue dated February 15, 2016, several months after the subject incident (*NYSCEF 151* [the "Bus Stop Request"]). Because "the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion," (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]), the Bus Stop Request is permissible because it responds directly to a new argument made in Third-Party Plaintiffs' opposition, and ultimately eliminates any issue of fact as to the City having caused or created the subject defect.

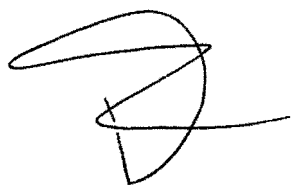
Finally, to the extent that Third-Party Plaintiffs argued, at oral argument, that the existence of post-incident permits relating to the bus stop create an issue of fact as to whether pre-incident prep work caused the subject defect, Third-Party Plaintiffs provide no support for this contention. To the contrary, if the issuance of permits is insufficient, by itself, to raise a question of fact as to whether such work was actually performed (*Bermudez v City of NY*, 21 AD3d 258, 258 [1st Dept 2005]), then it logically follows that issuance also would not raise an issue of fact as to preparation for that work. It is therefore

ORDERED that the Third-Party Defendant City of New York's motion for summary judgment (005) is **GRANTED**, and the complaint is dismissed with costs and disbursements to Third-Party Defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the City of New York shall, within 30 days of receipt of this order, e-file and serve upon all parties a copy of this order with notice of entry; and it is further

ORDERED that based on this determination, the Clerk of Court shall transfer this action to a Justice of a non-City part.

This constitutes the decision and order of the Court.



10/6/2020
New York, NY

DAKOTA D. RAMSEUR, J.S.C.

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