SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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SHEILA BERNSTEIN,

Plaintiff,

- v -

CITY OF NEW YORK, 11 E. BROADWAY GROUP, LLC, 31 OLIVER ST. NYC, LLC,29 OLIVER CONDO CORP.,

Defendants.

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31 OLIVER ST. NYC, LLC,

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

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INDEX NO. 156590/2017

MOTION DATE 9/1/20

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

Third-Party
Index No. 595741/2020

The following e-filed documents, listed by NYSCEF document number, were considered on this motion for summary judgment (sequence 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

Plaintiff Sheila Bernstein commenced this action against Defendants to recover damages allegedly sustained in a May 9, 2016 trip and fall on a sidewalk between 29 and 31 Oliver Street, New York, New York. Defendant City of New York (the "City") now moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint, arguing: (1) that pursuant to N.Y.C. Admin. Code § 7-210, the City is not liable for Plaintiff's injuries based on the defect location; and (2) that the City did not cause or create the defect. No opposition was filed.[1] For the reasons below, the Court grants the motion, dismisses the action, and respectfully refers the balance of the action to a Justice of a non-City part.

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

[1] After the motion was submitted and referred to the undersigned from the Motion Submission Part, the Court emailed the parties on September 9, 2020 and provided additional time to oppose. The Court did not receive any response.

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.

Here, the City has demonstrated that Plaintiff's testimony consistently identified the location of the defect as a sidewalk between 29 and 31 Oliver Street (*NYSCEF 35* 10:2-14, 11:15-21, *NYSCEF 36* 45:24-46:10, 53:23-24; *NYSCEF 28* ¶ 2; *NYSCEF 31* ¶ 2). The City also attaches the affidavits of Department of Finance employee David Atik, who conducted a Property Tax System database search which reveals that the subject properties are neither owned by the City nor classified as one-, two-, or three-family residential solely residential property (*NYSCEF 45, 46*). Accordingly, the City is not liable for the subject sidewalk unless it created or caused the subject defect.

The City argues that the burden shifts to the non-movant to demonstrate a triable issue of fact as to whether the City caused or created the subject defect. 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* ¶ 26 *et seq.*).

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, the City nevertheless satisfies its burden. The City attaches the results of a record search, which revealed only two permits to City permittees, neither near the location of Plaintiff's fall (*City Affirm* ¶ 28, citing *NYSCEF 39* pp 62-86). In any event, as the City argues, the issuance of permits does not indicate that the work was actually performed, or otherwise impute liability (*see Bermudez v City of NY*, 21 AD3d 258 [1st Dept 2005]; Chomsky *v City of NY*, 2017 NY Slip Op 32713[U], *7 [Sup Ct, NY County 2017] ["…issuance of a permit by the City does not constitute prior written notice of a defective condition, and that the City cannot be held liable for merely issuing a permit"], citing *Meltzer v City of New York*, 156 AD2d 124, 124 [1st Dept 1989]). It is therefore

ORDERED that the City of New York's motion for summary judgment is granted and the complaint is dismissed as to the City with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that said claims are severed and the balance of the action shall continue; and it is further

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

ORDERED that, the City having been dismissed, the Clerk of Court shall transfer the matter to a Justice of a non-City part.

This constitutes the decision and order of the Court.

10/6/2020
DATE

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