SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 05
Justice

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SUMMER DAMON,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK UNIVERSITY, THE UNIVERSITY MARKET PLACE, INC., SKYLINE RESTORATION INC., DELICIOUS MARKET, INC.,

Defendants.

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INDEX NO. 150068/2015

MOTION DATE 08/04/2021, 07/23/2021, 07/26/2021, 07/26/2021

MOTION SEQ. NO. 002 003 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 157, 160, 168, 170

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 156, 161, 166

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 158, 162, 171, 173

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 159, 163, 167, 169, 172

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff, Summer Damon (plaintiff), commenced this action seeking damages for personal injuries arising from a June 24, 2014 trip and fall in a depressed area within a tree well located on the sidewalk abutting 20 East 16th Street, in the County, City, and State of New York (NYSCEF doc. no 107, notice of claim at ¶ 3). In motion sequence 002, defendant Skyline Restoration, Inc. (Skyline) now moves for summary dismissal of the complaint. In motion sequence 003, defendant Delicious Market, Inc. (Delicious Market), now moves for summary dismissal of the complaint. In motion sequence 004, defendant, the City of New York (the City), now moves for summary dismissal of the complaint. In motion sequence 005, defendant, New York University (NYU), moves for summary dismissal of the complaint. The motions, except for motion sequence 003, are opposed. For the for the following reasons, and after oral argument on November 23, 2021, the respective motions of Skyline, Delicious Market, and NYU are granted, and the City's motion is denied.

FACTUAL BACKGROUND

Plaintiff testified that she fell after stepping onto a rectangular shaped dirt-covered area of the subject sidewalk. Specifically, plaintiff testified that her ankle rolled when she stepped from the concrete onto the dirt. Plaintiff described the condition that caused her to fall as "a hole" and that "it looked like the sidewalk but that the slab was removed." Plaintiff further testified that the hole plaintiff fell was approximately three by three feet and that the height discrepancy between the dirt and concrete sidewalk was approximately six inches. When asked whether there was a tree present in the dirt area, plaintiff testified that "I think there was, but I don't remember." Plaintiff further testified that a scaffolding pole was erected within the dirt area.

NYU was the owner of the premises abutting the tree-well where plaintiff's accident occurred. Skyline was a contractor hired by NYU to perform certain work on the exterior of the premises. As part of the construction at the premises, Skyline hired a subcontractor to erect a scaffold adjacent to the sidewalk.

Skyline's project manager for the work testified that the dirt within the tree well was uneven prior to the erection of the scaffold. The project manager further stated that prior to beginning the work to erect the scaffold, he "[o]bserved that the tree well at that time did not contain any tree, and further that the soil level in the subject tree well was lower than the surface of the abutting sidewalk" (NYSCEF doc. no. 77 at ¶ 7). The project manager further indicates that he inspected the scaffold two days after its completion, wherein he observed that the dirt level and tree well were not altered by the construction. Another Skyline employee, Edgar Cajilima (Cajulima), also testified that Skyline did not displace any dirt within the subject tree well prior to plaintiff's fall.

According an NYU facilities manager, "[b]etween January of 2014 and June 24, 2014, NYU did not perform any work inside the [subject] tree well and did not alter or change the soil level inside the tree well in any way" (NYSCEF doc. no. 125 at ¶ 14). The facilities manager further states that NYU never made special use of the tree well or the surrounding dirt portion that is on the sidewalk adjacent to the premises (*id.*)

The City's records concerning the subject tree well reveal that an inspection of the subject tree and tree well occurred on October 13, 2013, wherein it was discovered that the tree was leaning. The inspection document recommended that the tree be removed. The records further indicate that a tree at the location of plaintiff's accident was removed on January 23, 2014. The work order corresponding to the tree-removal further indicates that the tree stump within the tree well remained after the tree removal. Another a work order reveals that stump removal was scheduled for January 24, 2014, but the parties do not submit records confirming the removal of the tree stump.

DISCUSSION

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]). 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]).

The City

The City contends that it is entitled to dismissal of the complaint because it did not have prior written notice of the alleged defective condition. In order to hold the City liable for injuries resulting from roadway and sidewalk defects, including an alleged tree well defect, a plaintiff must demonstrate that the City has received prior written notice of the subject condition (Administrative Code § 7-201 [c]; *Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *Tucker v City of New York*, 84 AD3d 640, 643 [1st Dept 2011]). "[P]rior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City" (*Katz v City of New York*, 87 NY2d 241, 243 [1995]). Prior written notice provisions enacted by the legislature in derogation of common law are strictly construed (*see Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]).

"Where the City establishes that it lacked prior written notice under the Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule--that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

To satisfy its burden on summary judgment, the City must establish that, "Through an affidavit from an appropriate official, that a search of the Department of Transportation's records was conducted and that there was no prior written notice of the defective condition" (*Campisi v Bronx Water & Sewer Serv.*, 1 AD3d 166 [1st Dept 2003]). Here, the City meets its initial burden that it did not have prior written notice of the subject defect by submitting the deposition testimony, of Damion Francis, a NYC Department of Transportation (DOT) employee assigned to search for records maintained by the DOT, demonstrating that a search of the DOT records for the two years prior to plaintiff's accident did not reveal prior written notice of the alleged defective condition.

In opposition, plaintiff and NYU argue that an issue of fact exists as to whether the City created the subject defect. In support of its contention, NYU submits the affidavit of its expert engineer, wherein the engineer indicates that "[t]here is a change in level between the concrete sidewalk edge and the edge of the tree well. The earth filling the tree well was not installed properly so that there should have been a smooth transition between the tree well and the concrete sidewalk" (NYSCEF doc. no. 126, fig. 6). The engineer further opines that the City "[d]id not place sufficient soil in the tree well or tree pit to allow for settlement, or did not compact the soil to its proper density when expanding the tree well to its current size and dimensions" resulting in an immediately dangerous condition (*id.* at ¶ 14). The parties do not dispute that it was the City's responsibility to maintain the tree well. The City's records, namely

the January 24, 2014 work order directing the removal of the tree stump, coupled with the expert's affidavit indicating that the City's removal of the tree left the tree well in a dangerous condition is sufficient to demonstrate that an issue of fact exists as to whether the City created the subject defect.

Skyline and NYU

In support of their motions, both Skyline and NYU argue in principal that they did not owe plaintiff a duty of care. Skyline argues that it did not create the condition because the dirt within the tree well was uneven before Skyline erected the scaffolding and that the erection of the scaffolding did not displace or alter the dirt. NYU also contends that it did not create the alleged condition, since it did not perform any work at the premises.

Administrative Code of the City of New York § 7-210 (a) places the duty to maintain a sidewalk in a reasonably safe condition on the owner of the property abutting the sidewalk, and provides for civil liability for injuries proximately caused by the failure to so maintain the sidewalk. A tree well does not fall within the applicable Administrative Code definition of "sidewalk" and, thus, "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells" (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]; see Administrative Code of City of NY § 7-210; *see also Fernandez v 707, Inc.*, 85 AD3d 539 [1st Dept 2011]; *Vigil v City of New York*, 110 AD3d 986 [2d Dept 2013]). Thus, liability may be imposed on the abutting landowner in such instances only where that landowner affirmatively created the dangerous condition, negligently made repairs to the area, or caused the dangerous condition to occur through a special use of that area" (*Fernandez*, 85 AD3d at 540; *Kleckner v Meushar 34th St., LLC*, 80 AD3d 478, 479 [1st Dept 2011]).

Here, Skyline and NYU both meet their prima facie burden demonstrating that they did not create the subject condition. The affidavits and testimony of the project manager and Cajulima demonstrate that Skyline's work did not contribute to the further depression of the dirt. In opposition, there is no evidence beyond speculation that the erection of the scaffold created the complained of defect—the height differential between the dirt within the tree well and surrounding sidewalk. NYU also demonstrates that it did not perform any work at the premises or alter the dirt within the tree well prior to plaintiff's fall. Thus, the only avenue for liability against NYU would be vicarious liability, which as discussed, is foreclosed given that the above determination that Skyline is not liable for plaintiff's accident (*see Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 837 [2d Dept 2008], quoting *Karaduman v Newsday, Inc.*, 51 NY2d 531, 546 [1980] ["A claim of vicarious liability cannot stand when "there is no primary liability upon which such a claim of vicarious liability might rest"]).

Delicious Market

Delicious Market's unopposed motion for summary judgment is granted, as there is no indication that Delicious Market performed any work at the premises or otherwise caused plaintiff's accident.

Accordingly, it is hereby

ORDERED that Skyline Restoration Inc.'s motion pursuant to CPLR 3212 to dismiss the complaint and crossclaim is granted, and the complaint and crossclaims are dismissed against that defendant; and it is further

ORDERED that the City of New York's motion pursuant to CPLR 3212 is denied; and it is further

ORDERED that Delicious Market, Inc.'s motion pursuant to CPLR 3212 to dismiss the complaint and crossclaim is granted, and the complaint and crossclaims are dismissed against that defendant; and it is further

ORDERED that New York University's motion pursuant to CPLR 3212 to dismiss the complaint and crossclaim is granted, and the complaint and crossclaims are dismissed against that defendant; and it is further

ORDERED that Skyline Restoration Inc. shall serve a copy of this decision and order upon all parties, with notice of entry, within fourteen (14) days of entry.

This constitutes the decision and order of the Court.

11/23/2021
DATE

DAKOTA D. RAMSEUR, J.S.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