Vasquez v Zion Lutheran Church
2022 NY Slip Op 34354(U)
October 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 505714/2018
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of October 2022.

PRESENT:
CARL J. LANDICINO, J.S.C.

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AURELIA VASQUEZ, Index No. 505714/2018

Plaintiffs,

-against- DECISION AND ORDER

ZION LUTHERAN CHURCH a/k/a ZION NORWEGIAN EVANGELICAL LUTHERAN CHURCH, METROPOLITAN NEW YORK SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, LUTHERAN HOSPITAL, PARK RIDGE FAMILY HEALTH CENTER and ALVIN BERGER,

Motions Sequence #5, #6, #7

Defendants.

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	144-151, 152-154, 157-181,
Opposing Affidavits (Affirmations).....	183-187, 189-192, 195, 196, 199,
Reply Affirmation or Affidavit	194, 198, 200-202, 212[1]

After a review of the papers and oral argument, the Court finds as follows:

This is an action for personal injuries claimed by the Plaintiff Aurelia Vasquez (the "Plaintiff") from an alleged trip and fall accident on June 23, 2015 on a sidewalk adjacent to properties located at or between 6307 and 6317 Fourth Avenue, Brooklyn, New York. At the time of the alleged incident, the property located at 6307 Fourth Avenue was apparently owned by Zion Lutheran Church (hereinafter "Zion Lutheran") and the property located at 6317 Fourth Avenue was owned by Defendant Alvin Berger

[1] Although certain additional supplemental papers were requested to be part of the record, only NYSCEF Doc. #212, providing an image that the Court was previously unable to view, was permitted. The additional documents were rejected.

(hereinafter "Defendant Berger"). The Berger Property was purportedly leased by Defendant Berger to Defendant NYU Langone Health System (s/h/a Lutheran Hospital and hereinafter referred to as "NYU").

Defendants NYU and Berger now move (motion sequence #5) for an order, pursuant to CPLR 3212, granting them summary judgment, and dismissing all claims and cross-claims against them. Defendants NYU and Berger contend that they did not owe the Plaintiff a duty and as a result summary judgment in their favor should be granted. Specifically, these Defendants contend that the accident did not occur on their property (6317 Fourth Avenue) and as such they did not have a duty to maintain the sidewalk flag at issue. Defendants NYU and Berger also contend that they did not cause or create the alleged defect.

The Plaintiff opposes the motion.[2] The Plaintiff contends that her accident occurred on the property line between the two properties. Plaintiff argues that the place of the accident serves to raise an issue of fact as to whether Defendants NYU and Berger replaced the sidewalk flag adjacent to 6317 Fourth Avenue in such a way that it was uneven and contributed to the creation of the alleged defective condition. The Plaintiff also argues that Defendants NYU and Berger failed to proffer sufficient evidence regarding when the flagstone at issue was placed. The Plaintiff further contends that the motion should be denied as defective as the motion fails to annex the pleadings.

Defendant Park Ridge Family Health Center (hereinafter "Park Ridge") also moves (motion sequence #6) for an order, pursuant to CPLR 3212, granting them summary judgment, and dismissing all claims and cross-claims against them. Park Ridge argues that it did not owe a duty to the Plaintiff given that the accident did not take place adjacent to the property it leases (6317 Fourth Avenue) and it has no obligation to maintain the sidewalk flag at issue. Further, Park Ridge argues that it was not responsible

[2] The Plaintiff also contends that the motion (motion sequence #5), which seeks relief pursuant to CPLR 2221, does not provide good cause as to why a new motion should be permitted when the prior motion for the same relief was denied. However, the prior motion was denied as premature pending completion of discovery and was not denied on the merits. Discovery has apparently since been completed. Accordingly, the motion is appropriate and permitted.

for maintenance of the property, it did not cause or create any arguable defective condition, and it made no special use of the property.

The Plaintiff and Metropolitan New York Synod of the Evangelical Lutheran Church in America ("Synod") oppose this motion. They contend that Park Ridge has improperly cross-moved for summary judgment against a non-moving party. Specifically, the Plaintiff contends that to the extent that the motion by Park Ridge seeks to refer to the exhibits provided in the motion by Defendants NYU and Berger, the cross-motion by Park Ridge is deficient in as much as it does not also contain a copy of the pleadings.[3] The Plaintiff also argues that the motion by Park Ridge has failed to meet its *prima facie* burden.

The Plaintiff also moves (motion sequence #7) for an order, pursuant to CPLR 3212, granting her summary judgment on the issue of liability with respect to Defendant Synod. The Plaintiff argues that Synod was the owner of 6307 4th Avenue when the Plaintiff's accident occurred, that the accident was caused by a defective condition of its sidewalk, and Synod did not comply with the applicable "Sidewalk Law".

Synod opposes the motion. Synod contends that there are material issues of fact regarding the creation of the alleged defective condition sufficient to deny the Plaintiff's motion. Moreover, Synod contends that the Plaintiff has failed to establish that the defective condition was substantial and not *de minimis*.

As an initial matter, the Court finds that the failure of the moving Defendants to annex the pleadings to their motions does not render their respective motions (motions sequence #5 and #6) defective. "Although the [defendants] failed to include a copy of the pleadings with their motion for

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[3] To the extent that the Plaintiff opposes the motion by Park Ridge as defectively labeled as a cross-motion, the Court finds that although it was improperly labeled as a cross-motion it should, nonetheless be considered on the merits. See *Daramboukas v. Samlidis*, 84 AD3d 719, 721, 922 N.Y.S.2d 207, 209 [2d Dept 2011]; *Kleeberg v. City of New York*, 305 AD2d 549, 550, 759 N.Y.S.2d 760, 762 [2d Dept 2003]. In any event, the Plaintiff subsequently moved (motion sequence #7) for summary judgment as well, rendering this objection academic.

summary judgment, the [plaintiffs] submitted a copy of the pleadings in connection with their opposition and cross motion for summary judgment. "Under the particular circumstances presented here, we find that the record is sufficiently complete, and there is no proof that a substantial right of the defendants was impaired by the plaintiffs' failure to submit copies of the pleadings." *Long Island Pine Barrens Soc'y, Inc. v. Cnty. of Suffolk*, 122 A.D.3d 688, 691, 996 N.Y.S.2d 162, 166 [2d Dept 2014]. What is more, "CPLR 2001 permits a court '[a]t any stage of an action,' to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced" *Newfeld v. Midwood Ambulance & Oxygen Serv., Inc.*, 204 AD3d 813, 815, 164 N.Y.S.3d 497, 498 [2d Dept 2022], *quoting Avalon Gardens Rehab. & Health Care Ctr., LLC v. Morsello*, 97 A.D.3d 611, 612, 948 N.Y.S.2d 377, 378 [2d Dept 2022]. Also, the pleadings were previously provided and are available on NYSCEF. Accordingly, the Court will not treat the motions as defective and there is no evidence that the Plaintiffs have been substantially prejudiced by the moving defendants' failure to submit a copy of the pleadings with their motion papers.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to

establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure on the part of the movant to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Sidewalk liability is covered by § 7-210 of Administrative Code of City of N.Y. (hereinafter "the Sidewalk Law"). The Sidewalk Law provides in pertinent part that:

> **b. 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.**
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> **c. 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. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.**

An owner subject to the Sidewalk Law must "provide any evidence showing that she properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff's injuries." *See James v. Blackmon*, 58 AD3d 808, 809, 872 N.Y.S.2d 179, 180 [2d Dept 2009]. "Thus, in support of a motion for summary judgment dismissing a cause of action pursuant to Section 7–210, the property owner has the initial burden of demonstrating, *prima facie*, that it neither created the hazardous condition nor had actual

or constructive notice of its existence for a sufficient length of time to discover and remedy it." *Harakidas v. City of New York*, 86 AD3d 624, 627, 927 N.Y.S.2d 673, 676 [2d Dept, 2011]."Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Fasano v. Green-Wood Cemetery*, 21 AD3d 446, 446, 799 N.Y.S.2d 827, 828 [2d Dept 2005]. Such facts and circumstances include "the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury." *Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 978, 688 N.E.2d 489, 490 [1997], *quoting Caldwell v. Vill. of Island Park*, 304 N.Y. 268, 107 N.E.2d 441 [1952]. Also, in a trip and fall case, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 AD3d 498, 499, 818 N.Y.S.2d 578 [2d Dept 2006]; *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2d Dept 2005].

Turning to the merits of the motion (motion sequence #5) Defendants NYU and Berger rely on the depositions of the Plaintiff, Mark Goodwin, the property manager for Synod, Krist Kamberi, facilities manager for NYU, and John Litke, an employee of St. Peter's Lutheran Church. Defendants NYU and Berger argue that the sidewalk defect at issue was not located adjacent to their property located at 6317 Fourth Avenue and Defendants NYU and Berger did not cause or create the condition at issue. When asked to describe the sidewalk defect where she tripped, the Plaintiff stated "[i]t was separated, the sidewalk, two inches or more." (See Motion by Defendants NYU and Berger, NYSCEF Doc 52, Page 17).[4] When asked to identify the specific location, the Plaintiff stated "[b]etween the church and the clinic,

[4] Although Defendants NYU and Berger annex the March 13, 2020 deposition of the Plaintiff to their motion, the refer to the prior, November 13, 2017 deposition of the Plaintiff in their Attorney Affirmation. As a result, that deposition is referred to by its NYSCEF document number, 52.

it's in between, but I fell where the church starts and I fell in front of the clinic." (See Motion by Defendants NYU and Berger, NYSCEF Doc 52, Page 19).

What is more, NYU and Berger point to the Affidavit of Saeid Jalilvand. Mr. Jalilvand is a surveyor and states in his affidavit that "[u]sing the plaintiff's deposition testimony and the photograph identified at her deposition as Exhibit "I" as a reference, I was able to locate the specific portion of the sidewalk which she circled to represent the alleged uneven condition that caused her to fall." Mr. Jalilvand also states that "[b]ased on my inspection of the area, my performance of the survey, the marking out of the property line as well as my review of the photographs, it is my opinion within a reasonable degree of certainty in the field of surveying that the alleged sidewalk defect that caused the construction joint is also in front of the property owned by the Zion Lutheran Church and not the property owned by Alvin Berger and occupied by NYU Langone." (See Motion by Defendants NYU and Berger, NYSCEF Doc 61, Paragraphs 5 and 7).

Defendants NYU and Berger also point to the deposition of Krist Kamberi, facilities manager for NYU. When asked how long he has been working for Defendant NYU he stated "I worked as a tenant coordinator since 2012 at NYU Langone." When asked if he was in that position from 2012 through 2016, he stated "[t]hat's correct." (See Motion by Defendants NYU and Berger, Exhibit "D", Page 16) When asked to describe his position he stated that "Yes, we coordinate work, facility related work, we do small minor repairs to the facility, we take in requests, and essentially coordinate work with vendors, facility related work." (See Motion by Defendants NYU and Berger, Exhibit "D", Page 17). When asked whether the sidewalk has always been the same since he began working there, he stated "[y]eah." (See Motion by Defendants NYU and Berger, Exhibit "D", Page 30). When asked if the sidewalk flag adjacent to 6317 Fourth Avenue adjacent to the property of the Defendants NYU and Berger was ever replaced, he stated "[n]ot to my knowledge." When asked if that sidewalk flag was straight and level, Mr. Kamberi stated

"[s]traight and level in our area, to my knowledge." (See Motion by Defendants NYU and Berger, Exhibit "D", Page 32). When asked how often he would conduct periodic inspections of the sidewalk at this property, Mr. Kamberi stated "[m]aybe once a week." When asked if he kept a log book he stated "[n]o." (See Motion by Defendants NYU and Berger, Exhibit "D", Page 35-36). When asked if there were repairs conducted to the Synod property, he stated "[t]he neighboring building had a depression on their sidewalk, and that's where I see the white-ish, the gray-ish, kind of lighter gray repair material there." (See Motion by Defendants NYU and Berger, Exhibit "D", Page 45).

In opposition, the Plaintiff relies primarily on the affidavit of Vincent Pici, a Professional Engineer (PE), who states that "I have been retained by the law firm of Subin Associates LLP, attorneys for Plaintiff Aurelia Vasquez, to review pertinent materials and information provided related to the sidewalk fall of Aurelia Vasquez which occurred on June 23, 2015 at approximately 11:00 A.M, on the sidewalk adjacent to the property, located at 6307 Fourth Avenue, Brooklyn, New York." (See Plaintiff's Affirmation in Opposition, Exhibit "B", Paragraph 4) Mr. Pici also states that "[t]he defective conditions occur across the width of the sidewalk and adjacent the building known as 6307 Fourth Avenue, Brooklyn, New York and is shown in the marked photographs, and is located just north of the main entrance of the building known 6317 Fourth Avenue, Brooklyn." (See Plaintiff's Affirmation in Opposition, Exhibit "B", Paragraph 9). Mr. Pici also states that "[b]ased on the photographs marked as exhibits, the defect illustrated includes a significant vertical height difference to the abutting concrete sidewalk slabs and is consistent with Ms. Vasquez's testimony." (See Plaintiff's Affirmation in Opposition, Exhibit "B", Paragraph 10). Mr. Pici opines that "The sidewalk at this location was significantly displaced from the adjoining slabs creating an uneven walking surface." (See Plaintiff's Affirmation in Opposition, Exhibit "B", Paragraph 33). Mr. Pici then states that "[t]he concrete sidewalk illustrated in exhibits identified by Ms. Vasquez contained an observable vertical height difference between resulting from the mis-leveled concrete slab,

and the mis-leveling of the joint with the immediately adjacent sidewalk slab." (See Plaintiff's Affirmation in Opposition, Exhibit "B", Paragraph 35). Mr. Pici opined that "with a reasonable degree of engineering certainty that based on these images, photographs and testimony entered into the record that the defect was of sufficient size to alert the property owner that the subject condition needed to be addressed, and that due to the location of the defect either or both property owners could have taken steps to correct the condition and eliminate the tripping hazard." (See Plaintiff's Affirmation in Opposition, Exhibit "B", Paragraph 38). Mr. Pici also opined that "[i]t is my opinion with a reasonable degree of engineering certainty, that had NYU Langone replaced the sidewalk flag, they would have contributed to the defective condition, if they had placed the flag at a higher level than the Synod's (church's) flagstone." (See Plaintiff's Affirmation in Opposition, Exhibit "B", Paragraph 48)

In opposition, the Synod relies primarily on the affidavit of Angela DiDomenico, Ph.D., CPE. Dr. DiDomenico states "[a]s part of my analysis, I conducted a site inspection on January 31, 2019 at the subject premises wherein I inspected the site, including the sidewalk adjacent to 6307 and 6317 Fourth Avenue in Brooklyn, New York, where the subject trip and fall incident allegedly occurred. During my site inspection, observations and measurements were taken and documented." (See Affirmation in Opposition, Affidavit of Angela DiDomenico, Paragraph 12). She also stated that "[i]t was observed that there was an elevation differential created by the adjacent sidewalk flags in the area indicated by Ms. Aurelia Vasquez, although it is noted that at the time of my site inspection there was a concrete patch covering part of the expansion joint at the subject location." Dr. DiDomenico opined that "I conclude with a reasonable degree of scientific certainty that the elevation differential was created by the location of the adjacent sidewalk flags, and not due to the depression of the sidewalk flag entirely located in front of 6307 Fourth Avenue." (See Affirmation in Opposition, Affidavit of Angela DiDomenico, Paragraph 21). This is significant as an owner cannot merely show that the defect is on an adjacent property.

> **To be sure, the location of the alleged defect and whether it abuts a particular property is significant concerning that particular property owner's *duty* to maintain the sidewalk in a reasonably safe condition. That does not, however, foreclose the possibility that a neighboring property owner may also be subject to liability for failing to maintain its own abutting sidewalk in a reasonably safe condition where it appears that such failure constituted a proximate cause of the injury sustained. Thus, to the extent that *Montalbano* and other cases interpreting section 7-210 can be interpreted as holding that only the landowner whose property abuts the *defect* upon which the plaintiff trips may be held liable, they should no longer be followed for that premise. Simply put, section 7-210 (b), by its plain language, does not restrict a landowner's liability for accidents that occur on its own abutting sidewalk where the landowner's failure to comply with its duty to maintain its sidewalk in a reasonably safe condition constitutes a proximate cause of a plaintiff's injuries. Furthermore, our interpretation of section 7-210 as tying liability to the breach of that duty when it is a cause of the injury is consistent with the purpose underlying the enactment of that provision, namely, to incentivize the maintenance of sidewalks by abutting landowners in order to create safer sidewalks for pedestrians and to place liability on those who are in the best situation to remedy sidewalk defects.**

Sangaray v. W. Riv. Assoc., LLC, 26 NY3d 793, 798-799, 28 N.Y.S.3d 652 [2016]

An owner must show that "a portion of the flagstones, which allegedly caused the height differential, did not abut their property." *Zborovskaya v. STP Roosevelt, LLC*, 175 AD3d 1594, 1595, 109 N.Y.S.3d 344 [2d Dept 2019]. Accordingly, the motion (motion sequence #5) is denied.

Turning to the merits of the motion (motion sequence #6) Park Ridge argues that it did not have a duty to the Plaintiff as it was not either an owner or lessee of the adjacent property with the responsibility of maintaining or repairing the sidewalk adjacent to the property. In its Attorney Affirmation (Paragraph 10) Park Ridge contends that it "is a medical faculty group practice operated by codefendant NYU Langone at 6317 Fourth Avenue." However, there is no testimony or other evidence that supports or clarifies this position. It is well settled that "[a]n attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance." *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455, 456, 826 N.Y.S.2d 152, 153 [2d Dept 2006]. Instead, Park Ridge simply points to the deposition testimony of Krist Kamberi, facilities manager for NYU. When Kamberi was asked about Defendant Park Ridge, he stated "[t]hey are connected in some way, yeah. To my knowledge, they are

part of NYU Langone." When asked if they were owned by NYU, he stated"[t]hey are not owned by NYU Langone; they're operated by NYU, but not owned." (See Defendant NYU's Motion, Exhibit "D", Page 21). When asked if he knew whether there was any type of lease agreement between Defendant NYU and Defendant Park Ridge he stated "[n]o." This testimony, without more, is not sufficient for Defendant Park Ridge to meet its burden pursuant to CPLR 3212(b) which provides in pertinent part that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." What is more, "[a] conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponents *prima facie* burden." *JMD Holding Corp. v. Cong. Fin. Corp.,* 4 N.Y.3d 373, 384–85, 828 N.E.2d 604, 612 [2005].

Since the Defendants failed to meet their *prima facie* burden, there is no need to consider the sufficiency of the opposition papers. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 643 [1985]; *Ortiz v. Town of Islip*, 175 A.D.3d 699, 700, 107 N.Y.S.3d 394, 395 [2d Dept 2019].

Turning to the merits of the motion (motion sequence #7), the Plaintiff argues that summary judgment should be granted in its favor as against Synod given that Synod owns and operates the property located at 6307 Fourth Avenue, Brooklyn, New York. Specifically, the Plaintiff argues that the defect that caused the Plaintiff's injuries was located as part of a sidewalk flag wholly adjacent to this property and as the owner of this property, Synod had a non-delegable legal duty to maintain the sidewalk in a safe condition. In support of this application, the Plaintiff relies on the deposition of the Plaintiff, Mark Goodwin, the property manager for Synod, Krist Kamberi, facilities manager for NYU, and John Litke, an employee of St. Peter's Lutheran Church.

When asked what caused her to trip the Plaintiff stated "the sidewalk was lifted where the clinic starts, it was lifted." (See Plaintiff's Motion, Exhibit J, Page 15). When asked what caused her to fall she stated "[t]he sidewalk was broken." (See Plaintiff's Motion, Exhibit J, Page 17). When asked to describe the defect further, she stated "[i]t was separated, the sidewalk, or more." (Page 17). When asked about the location of her fall she stated "[b]etween the church and the clinic, it's in between, but I fell where the church starts and I fell in front of the clinic." (Page 19).

During his testimony, when asked what his position was with Synod, Mr. Mark Goodwin stated "Synod Property Manager." (See Plaintiff's Motion, Exhibit O, Page 7). When asked how long he had been employed by Synod he stated "[o]ne year." He clarified that "[p]rior to that, another year part time." When asked what his duties were, he stated "[l]ook after the maintenance on the property that the Synod owns." When asked how many properties that involves, he stated "I would say the average is twelve." (See Plaintiff's Motion, Exhibit O, Page 8). When asked how often he visits each property he stated "I would visit each property at least once a month, once a week if I have a lot of work going on there." (Page 12). When asked if there is anyone else that works under him that inspects the properties he stated "[n]o one that works under me. I have subcontractors and contractors that I hire at my direction." (Page 12). When asked if he was the property manager in June of 2015, Mr. Goodwin stated "[n]o, I was not." When asked if he knew who the property manager was at that time, he stated, "[n]o, I do not." (Page 14). When asked if the former manager maintained any written records of his inspections of the properties, he stated "I don't know." (Page 14).

Mr. John Litke also testified on behalf of Synod. When asked if he was a member of Synod Council, Mr. Litke stated "[y]es." (See Plaintiff's Motion, Exhibit P, Page 11). When asked if he had been a member of the council for more than ten years, he stated "[y]es." When asked if Synod controlled the property pursuant to Synod administration, Mr. Litke answered "[y]es." (Page 44). When asked whether

Synod also managed the property, Mr. Litke stated "[y]es, I believe Synod would be responsible for managing the property at this point." (Page 45).

As part of his affidavit, Vincent Pici, P.E., stated that "[m]y findings and opinions are based upon my observations and my review of the above documents, photographs, and testimony as well as the relevant statutory authority and my knowledge and experience in the field of engineering." (See Plaintiff's Motion, Exhibit T, Paragraph 7). Mr. Pici also stated that "[t]he defective conditions occur across the width of the sidewalk and adjacent the building known as 6307 Fourth Avenue, Brooklyn, New York and is shown in the marked photographs, and is located just north of the main entrance of the building known 6317 Fourth Avenue, Brooklyn." (Paragraph 9). Mr. Pici also stated that "[t]he sidewalk at this location was significantly displaced from the adjoining slabs creating an uneven walking surface." (Paragraph 33). He then stated that "[t]he location of the defect as confirmed in the affidavit of Professional Land Surveyor Saeid Jalilvand (December 13, 2018), and illustrated in the land survey number 66526, he prepared is in front of the property owned by the Zion Lutheran Church [which was taken over by the Synod], and is located roughly 2 inches to the north of the shared property boundary." (Paragraph 37). As a result, Mr. Pici opined that "[i]t is my opinion within a reasonable degree of engineering certainty that the Synod, as property owner of the building that abutted the raised sidewalk flag that caused Ms. Vasquez to trip, was responsible for maintaining said sidewalk flag sidewalk in a reasonably safe condition in accordance with NYC Administrative Code 7-210." (Paragraph 39).

In opposition, Synod relies primarily on the affidavit of Angela DiDomenico, Ph.D., CPE. Dr. DiDomenico states "[a]s part of my analysis, I conducted a site inspection on January 31, 2019 at the subject premises wherein I inspected the site, including the sidewalk adjacent to 6307 and 6317 Fourth Avenue in Brooklyn, New York, where the subject trip and fall incident allegedly occurred. During my site inspection, observations and measurements were taken and documented." (See Affirmation in

Opposition, Affidavit of Angela DiDomenico, Paragraph 12). She also stated that "[i]t was observed that there was an elevation differential created by the adjacent sidewalk flags in the area indicated by Ms. Aurelia Vasquez, although it is noted that at the time of my site inspection there was a concrete patch covering part of the expansion joint at the subject location." Dr. DiDomenico opined that "I conclude with a reasonable degree of scientific certainty that the elevation differential was created by the location of the adjacent sidewalk flags, and not due to the depression of the sidewalk flag entirely located in front of 6307 Fourth Avenue." (See Affirmation in Opposition, Affidavit of Angela DiDomenico, Paragraph 21).

However, whether the defect was caused by the raising of the sidewalk flag abutting the Berger/NYU Property does not excuse Synod from its nondelegable duty to abide by the sidewalk law. See *Xiang Fu He v. Troon Mgt., Inc.*, 34 NY3d 167, 114 N.Y.S.3d 14 [2019]. Although Synod may seek indemnity or contribution from a neighboring landowner responsible for the creation of the defect, the owner of the property abutting the sidewalk defect is generally liable for injuries sustained as a result of the defect. See *Sangaray*. Notwithstanding the above, whether a defect exists and constitutes a dangerous condition is "…generally a question for the jury." See *Curry v.* Eastern, 202 AD3d 907, 159 N.Y.S.3d 684 [2d Dept 2022]. However, in *Tropper v. Henry St. Settlement*, 190 AD3d 623 [1st Dept 2021], the Court determined that a 3 inch displacement constituted a defect and addressed constructive notice. Here, the Plaintiff's allegations of a defective condition are supported by the affidavit of Vincent Pici, who found without site inspection, the displacement to be approximately 2 inches, and that the condition violated sections of the administrative code. Although a violation of a code, regulation or ordinance constitutes some evidence of negligence, the height differential coupled with the violations arguably constitutes negligence in this case, subject to comparative negligence, if any, on part of the remaining parties. However, in opposition, Angela DiDomenico, Ph.D, based upon her site inspection states that "[t]he sidewalk adjacent to 6307 Fourth Avenue was in good condition, without substantial defect…" and

"[a]lthough the expansion joint was at most two inches over the property line on to 6307 Fourth Avenue, the sidewalk flag on the right side of the expansion joint, facing the buildings, was predominantly in front of 6317 Fourth Avenue…" This serves to raise an issue of fact as to which property fronted the sidewalk that contained the subject condition. Accordingly, the motion (motion sequence #7) is denied.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant NYU and Berger's motion (motion sequence #5) is denied

Defendant Park Ridge's motion (motion sequence #6) is denied.

The Plaintiff's motion (motion sequence #7) is denied.

This Constitutes the Decision and Order of the Court.

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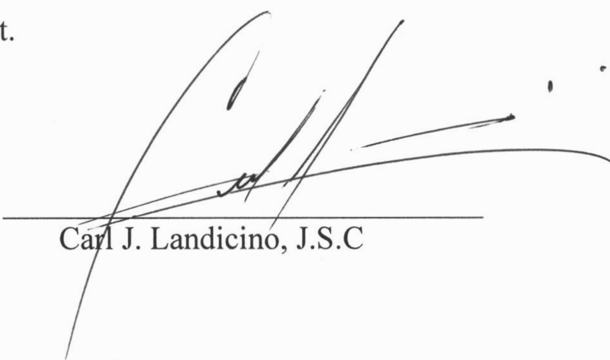

Carl J. Landicino, J.S.C

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