SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NICHOLAS W. MOYNE **PART 52**

Justice

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INA GAIL GOLDBERG,

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 156278/2018

MOTION DATE 02/14/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55

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

Plaintiff Ina Goldberg (plaintiff or "Goldberg") moves for summary judgment on the issue of the defendant's liability and to dismiss the affirmative defense of culpable conduct on the part of the plaintiff. The defendant opposes the motion.

Plaintiff testified that on September 28, 2017, as she was walking on the sidewalk on East Broadway between Canal Street and Jefferson Street, adjacent to Seward Park, she noticed that there were cracks in the sidewalk and the sidewalk was quite uneven, and she moved to her left to try and avoid the damaged are of the sidewalk (Exh. D, April 16, 2018, Tr at 11, 14 - 15). The sidewalk was very uneven, and there were some depressed areas and some elevated areas of the sidewalk (*Id.* at 18). The toe of plaintiff's left foot hit one of the elevated areas while the rest of the foot was in a depressed area of the sidewalk, and this caused plaintiff to trip and fall (*Id.*).

"The proponent of a summary judgment motion must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the

motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion" (CPLR § 3212[b]). However, a shadowy semblance of an issue is not enough to defeat the motion (*S. J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

The defendant City of New York had prior written notice of the alleged defect.

The defendant City contends that they did not have sufficient prior written notice of the alleged defects in the sidewalk. Pursuant to Administrative Code § 7–201(c)(2), prior written notice is a condition precedent to maintaining an action against the City for damages relating to a street or sidewalk defect (*see* NYC Admin. Code § 7-201[c][2]; *see also Katz v City of New York*, 87 NY2d 241, 243 [1995]). "[T]he Administrative Code does not set forth any requirements for the specificity of the notice. Therefore, since the prior notice law is a derogation of the common law and must be strictly construed against the City of New York, a notice is sufficient if it brought the particular condition at issue to the attention of the authorities" (*Weinreb v City of New York*, 193 AD2d 596, 598 [2d Dept 1993] [internal citations omitted]).

In order to show that the City had prior written notice of the defect, plaintiff cites to a Big Apple Map stamped October 23, 2003; a Parks field inspection form dated October 2, 2015; a Parks field inspection form dated October 25, 2015; a parks site inspection report dated June 20, 2016; and a July 26, 2016, citizen 311 complaint for an uneven sidewalk at 188 East Broadway. Plaintiff contends that a marking (a line) on the Big Apple Map denoting a raised section of concrete is at the precise location where plaintiff tripped.

"Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon" (*Katz v City of New York*, 87 NY2d 241, 243 [1995]). Only the Big Apple Map that is closest in time to the accident will suffice to give the City notice of the defect (*Id.*). Generally, the issue of whether a Big Apple map showing a broken or uneven curb and an obstruction protruding from the sidewalk gave defendant sufficient notice of the broken sidewalk on which plaintiff fell is for the jury to decide (*see Vasquez v City of New York*, 298 AD2d 187 [1st Dept 2002]). Accordingly, the Big Apple Map is not enough, on its own, to establish that the City had notice of the defect as a matter of law. However, here the plaintiff has also presented reports (Plaintiff's Exh. H, J, L, M, N) by the New York City Department of Parks and Recreation ("Parks Department"). The Parks Department records note that there are defects in the sidewalk, although they do not state with precision where along the block the defects are. However, the photographs taken by the Parks Department and provided by the Defendant as part of its discovery response (Plaintiff's Exh. N, NYSCEF Doc. No. 38, bottom right photo; Plaintiff's Exh. M, NYSCEF Doc. No. 37, page 397), shows a defect on the sidewalk with the same unique shape as that identified by the plaintiff as the defect which caused her to fall at her Examination Before Trial and her GML § 50-h hearing (Plaintiff's Exh. H, NYSCED Doc. No. 27; Plaintiff's Exh. J, NYSCEF Doc. No. 29). The defect is readily identifiable by its unique shape and coloration. This clearly shows that the City had notice of the defect. Accordingly, the plaintiff has established as a matter of law that the City had notice of the defect.

The plaintiff has established entitlement to summary judgment on the issue of liability.

The plaintiff has established entitlement to summary judgment on the issue of liability as a matter of law. Defendant disputes whether the accident occurred as the plaintiff says it did –

noting that the only evidence that the accident happened is plaintiff's self-serving testimony. However, the defendant has not provided any evidence to rebut the plaintiff's sworn account of how her accident occurred. Unrebutted, sworn, deposition testimony is sufficient as a matter of law to establish liability (*see Rue v Stokes*, 191 AD2d 245, 246 [1st Dept 1993]; *see also Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 583 [1st Dept 2018]).

The plaintiff has made a prima facie showing that the defendant violated its duty to maintain the sidewalk abutting its property in a reasonably safe condition by failing to repair and replace the sidewalk on which she tripped. Pursuant to the New York City Administrative Code, a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch or where a sidewalk flag contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch or more in depth, constitutes a substantial defect (NYC Admin. Code § 19-152[a][4]). The plaintiff testified that the defect she tripped on was part of a patch in the sidewalk and that the portion of the patch that caught the front of her shoe was raised at least half an inch above the rest of the patch in the sidewalk (Plaintiff's Exh I, Defendant's Exh. H, June 17, 2019 Tr at 46). Furthermore, the photograph on which the plaintiff marked the defect that caused her to fall (Plaintiff's Exh. H, NYSCED Doc. No. 27; Plaintiff's Exh. J, NYSCEF Doc. No. 29) clearly shows that the defect is greater than one inch in all horizontal directions. Furthermore, the Park Inspection Photo Report photo of the same defect that plaintiff alleges she tripped on has a notation "Total sidewalks patched, cracked, uplifted or deteriorated along perimeter of park" (Plaintiff's Exh. N, NYSCEF Doc. No. 38, bottom right photo; Plaintiff's Exh. M, NYSCEF Doc. No. 37, page 397). Here, the defendant has failed to come forth with any facts to controvert plaintiff's estimate that the defect was at least a half inch in height. Accordingly, the plaintiff has made a prima facie showing that the

sidewalk was not reasonably safe (*see Tropper v Henry St. Settlement*, 190 AD3d 623 [1st Dept 2021]).

Defendant's alternative argument that it is not responsible because the defect was open and obvious is also rejected. "[E]ven if a hazard qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition" (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 70 [1st Dept 2004]).

"To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (*Rodriguez v City of New York*, 31 NY3d 312, 324-25 [2018]).

The plaintiff is not entitled to summary judgment dismissing the affirmative defense of culpable conduct on the part of the plaintiff.

The plaintiff testified that she noticed that there were cracks in the sidewalk and the sidewalk was quite uneven, and she moved to her left to try and avoid the damaged are of the sidewalk (Exh. D, April 16, 2018, Tr at 11, 14 - 15). This raises the question of why she did not actually avoid the damaged area of the sidewalk. Therefore, there is a question of fact as to whether the plaintiff's conduct contributed to her tripping and falling. Accordingly, summary judgment dismissing this affirmative defense is not warranted.

Conclusion.

For the reasons set forth hereinabove, and it appearing to the court that plaintiff is entitled to judgment on liability and that the only triable issues of fact arising on plaintiff's motion for summary judgment relate to plaintiff's comparative fault and the amount of damages to which plaintiff is entitled, it is

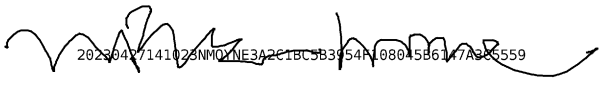
ORDERED that the motion is granted with regard to liability; and it is further

ORDERED that an immediate trial of the issues regarding plaintiff's comparative fault and damages shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

This constitutes the decision and order of the court.



4/21/2023
DATE

NICHOLAS W. MOYNE, 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