SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James E. d'Auguste** **PART 55**

Justice

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DINA FRANTS,

Plaintiff,

- v -

LINCOLN CENTER FOR THE PERFORMING ARTS, INC., NEW YORK PUBLIC LIBRARY FOR THE PERFORMING ARTS, THE CITY OF NEW YORK,

Defendants.

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INDEX NO. 151181/2018

MOTION DATE 11/03/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103

were read on this motion to/for SUMMARY JUDGMENT.

In this action for damages resulting from an alleged sidewalk defect, the defendants Lincoln Center for the Performing Arts, Inc. ("Lincoln Center") and the City of New York, in Mot. Seq. 004, move pursuant to CPLR 3212 for summary judgment, dismissing plaintiff Dina Frants' complaint and all claims and cross-claims against them. The plaintiff opposes the motion. For the reasons set forth below, the motion is denied.

On February 25, 2017, the plaintiff parked her car at the Icon garage located at 160 West 65th Street (NYSCEF Doc. No. 69). Plaintiff allegedly crossed West 65th Street, turned left, and walked along West 65th Street towards Lincoln Center (NYSCEF Doc. No. 69). Plaintiff fell due to an alleged sidewalk defect approximately 171 feet and 4 inches east from the southeast corner of West 65th Street and Amsterdam Avenue and approximately 10 feet 8 inches south from the curb of West 65th Street, causing injuries (NYSCEF Doc. Nos. 69, 79). She sues for personal injuries allegedly sustained when she was "caused to be violently precipitated to the ground" (NYSCEF Doc. No. 69).

Initially, Frants argues transcripts relied on by the moving defendants are not executed by the respective witnesses, and no proof exists the witnesses were provided their transcripts for review and execution, thus, non-executed transcripts are not proof in admissible form, and are insufficient to establish judgment as a matter of law (*see Marks v. Robb*, 90 AD3d 863, 864 (2nd Dep't 2011; NYSCEF Doc. No. 93). Contrary to plaintiff's assertion, the transcripts of her deposition are admissible pursuant to CPLR 3116(a) because "[i]f the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed" (*see Zamir v. Hilton Hotels Corp.*, 304 A.D.2d 493, 1st Dep't 2003; NYSCEF Doc. No. 100). Defendants transmitted the deposition transcript to plaintiff on July 23, 2021 (NYSCEF Doc. No. 100). Also, it is well established a party may rely on its own, unsigned transcript in support of summary judgment, (*see Franco v. Rolling Frito-Lay Sales Ltd.*, 103 AD3d 543 (1st Dep't 2013; NYSCEF Doc. No. 100) as defendants are doing. Thus, Frants' additional assertion that the deposition of defendants' witness is inadmissible because it is unsigned is without merit.

Next, plaintiff submitted an errata sheet on February 4, 2022, which is over six months after receiving her deposition. Without any explanation for the delay, the errata sheet sought to substantively alter her testimony by claiming confusion as to the location of the alleged sidewalk defect where her fall occurred (NYSCEF Doc. No. 96). But, when shown multiple photos of and questioned about the location of the alleged defect and subsequent fall, plaintiff was unable to identify the premises outlined in the original complaint (NYSCEF Doc. No. 74 at Exh. E). In the errata sheet, plaintiff alters her allegedly confused testimony to align with the location of the alleged defect and fall outlined in the original complaint (NYSCEF Doc. No. 96). Where a plaintiff attempts to alter her testimony materially and substantively with an errata sheet without reason, the errata sheet shall be stricken (*see* *Horn v. 197 5th Ave. Corp.*, 123 A.D.3d 768, 770

(2nd Dept. 2014). Further, the errata sheet is untimely as it was submitted more than sixty days after the deposition transcript was submitted to the witness without demonstrating cause for the delay or substantive changes beyond "further reflection" years after the encounter with the alleged defect. CPLR 3116(a); (*see* *Parra v. Cardenas*, 183 A.D.3d 462 (1st Dept. 2020); *Kelley v. Empire Roller Skating Rink, Inc.*, 34 A.D.3d 533 (2nd Dept. 2006); NYSCEF Doc. Nos. 74, 96).

Defendants contend plaintiff's alleged injuries are in no way due to negligence on the part of moving defendants. They claim Frants did not come within 50 feet of the claimed defect that caused her fall (NYSCEF Doc. No. 79). Also, defendants assert Frants is unable to identify the specific location of her fall, noting there were no sidewalk defects in the general vicinity of the location Frants identified in her deposition as the accident location (NYSCEF Doc. Nos. 79, 114). Moving defendants note Frants' sworn testimony clearly indicates she never traversed the alleged accident location identified in either the notice of claim, complaint, or bill of particulars (NYSCEF Doc. Nos. 79, 114).

Registered architect, non-party Bruce H. Corke, AIA, visited the subject location and testified that in order for the accident to have occurred in the location Frants identified in the pleadings, she would have been traveling west towards Amsterdam Avenue at the time of the accident, yet she specifically testified she was walking in the opposite direction—east towards Broadway—at that time (NYSCEF Doc. Nos. 77 at Exh. H; 80, 103). Additionally, Corke testified he inspected the subject location to ascertain if any tripping hazards existed in the location Frants testified she fell, inspecting the entire area depicted in defendants' Exhibit D—that plaintiff testified was the general area where she fell—and his inspection revealed no "2 [inch] high and 12 [inch] long elevated panels or cracks, as claimed by Ms. Frants" (NYSCEF

Doc. Nos. 77 at Exh. H; 79, 80, 103). As such, moving defendants argue Frants is unable to establish any negligence on their part and dismissal is warranted.

Director of Design and Construction for Lincoln Center, non-party Maria Fernandez, testified she is responsible for overseeing repairs on the southern sidewalk abutting 65th Street between Amsterdam Avenue and Broadway, and was unable to find any record of sidewalk repairs on the south side of West 65th Street since February 2017, after a search of her records (NYSCEF Doc. Nos. 78, 79, 107, 109). However, plaintiff argues defendants' "search" did not appear to include inspections, repairs, complaints, or maintenance before Frants' accident. Frants also initially asserted that as Fernandez has not appeared for a deposition, there is no discovery concerning the scope of such searches, including time frames and available databases. Thus, plaintiff argues the motion is premature (NYSCEF Doc. No. 93) and warrants denial of summary judgment. *Rupp v. City of Port Jervis*, 10 A.D.3d 391 (2nd Dep't 2004) (holding summary judgment "premature since substantial discovery remains outstanding").

In a July 19, 2022, interim order, the Court ordered that Lincoln Center perform a new search of its records concerning repairs of the subject area for two years before Frants' accident. Additionally, the Court directed production of Maria Fernandez for a deposition, and supplemental submissions thereafter based on the results of the new search and deposition (NYSCEF Doc. No. 105). After the new search and Fernandez's deposition were performed, supplemental briefings were submitted to the Court; Frants notes the result of defendants' search for prior repairs yielded "no results" (NYSCEF Doc. Nos. 107, 108). Frants points out a search of the records, revealing no repairs were found on any portion of the sidewalk on the south side of West 65th Street between Amsterdam Avenue and Broadway, was from February 2017, until the date of the subject affidavit by Fernandez in November 2022, and such search only included

repairs done by outside contractors (NYSCEF Doc. No. 109 at Tr. 45:19-25, 46:2-9). Frants also contends Fernandez testified that before November 2021, defendants did not maintain any records of "in-house" sidewalk repairs – if the repairs were less than approximately 25 linear feet, or approximately three sidewalk flags (NYSCEF Doc. Nos. 108, 109 at Tr. 30:10-24). Defendants' witness, non-party Harry Haouari, an associate director of operations, also testified that if repairs, cleaning or inspections of an area were needed, they were performed, but no records were maintained of any such repairs, inspections or cleaning of an area (NYSCEF Doc. No. 76 at Tr. 75:4-19).

To establish a prima facie case that it lacked constructive notice of a hazardous condition, defendants must offer some evidence as to when the accident site was last inspected or cleaned before Frants' fall. (*Negrelli v. 531 W. 19th LLC*, 2020 N.Y. Misc. LEXIS 3404 (citing *Reyes v. Latin Am. Pentecostal Church of God Inc.*, 181 A.D.3d 459 (1st Dep't 2020). Frants argues, at a minimum, triable issues of fact remain concerning actual or constructive notice, and negligence, given the parties' testimonies and defendants' failure to maintain inspection, maintenance, or repair records for the subject sidewalk (*see Bernardo v. 444 Route 111, LLC*, 83 A.D.3d 753 (2nd Dep't 2011); NYSCEF Doc. No. 108). Frants claims denial of defendants' motion for summary judgment is warranted as Fernandez testified that defendants did not have a written or verbal policy and procedure to perform sidewalk inspections, did not perform inspections or hire anyone to do so, thus, also, have no records of when the subject sidewalk was last inspected before her fall (NYSCEF Doc. Nos. 108, 109 at Exh. A). Moreover, Fernandez also testified that defendants were responsible to maintain the south side of West 65th Street prior to Frants' accident on February 25, 2017 (NYSCEF Doc. Nos. 78, 79, 109 at Tr. 24:12-24).

Additionally, while Frants testified she could not be certain regarding the location of her fall (NYSCEF Doc. No. 74), and generally, a plaintiff may not maintain a negligence cause of action where the cause of the subject accident is based on speculation (*see Bernstein v. City of New York*, 69 NY2d 1020, 1021 (1987), the Appellate Division, First Department has ruled that dismissal based on a plaintiff's alleged inability to pinpoint exactly where she fell on a street block is insufficient grounds upon which to dismiss the action where enough information and detail has been provided by plaintiff to warrant a trial of this matter. *Negrelli* (citing *Tomaino v. 209 E. 84th St. Corp.*, 72 A.D.3d 460 (1st Dep't 2010)).

It is well settled that an affidavit submitted in opposition to a summary judgment motion cannot "raise a triable issue of fact where the affidavit 'can only be considered to have been tailored to avoid the consequences of…earlier testimony'" (*See Fields v. Lambert Houses Redevelopment Corp.*, 105 AD3d 668, 671 (1st Dep't 2013). Thus, while defendants assert that Frants' affidavit contradicts her deposition and 50-h testimony and appears to be a feigned attempt to avoid any ramifications of her sworn testimony (NYSCEF Doc. No. 100), Justice Hagler, in *Negrelli*, held "any alleged inconsistency in [plaintiff's] testimony respecting the precise location and the precise cause of her accident is one to be resolved by the trier of fact." *Id.*; citing *Patton v. Taszo Coffee, LLC*, 156 A.D.3d 443 (1st Dep't 2017).

Defendants argue that the condition of the south sidewalk of West 65th Street, 171 feet and 4 inches east of the southeast corner of West 65th Street and Amsterdam Avenue, and 10 feet 8 inches South from the curb of West 65th Street – either before or after the accident date – is irrelevant as Frants was never there. In fact, defendants claim the condition of the rest of the West 65th Street sidewalk is also irrelevant as Frants does not claim she fell anywhere else on West 65th Street (NYSCEF Doc. No. 114). Defendants contend that Frants' own testimony

makes clear that she did not come within 55 feet of the claimed accident location on February 25, 2017, or that she fell anywhere else or any other defects exist, thus, her accident could not have been proximately caused by a sidewalk defect that she did not come within 55 feet of. Further, defendants assert that Corke's affidavit also established that the subject parking garage from which Frants emerged is 229 feet east of the corner of West 65th Street and Amsterdam Avenue. As such, defendants allege summary judgment dismissing Frants' complaint against them is warranted (NYSCEF Doc. Nos. 103, 114).

However, the Court concludes that where genuine issues of material fact are presented, as discussed above, summary judgment is precluded. *Lyons v. 40 Broad Del., Inc.*, 307 A.D.2d 868 (1st Dep't 2003). The Court notes issues exist of whether defendants had constructive notice of the alleged hazardous condition, and regarding any inconsistencies in Frants' affidavit with her prior testimony, that are to be resolved by a trier of fact.

Accordingly, it is

ORDERED that, defendants' Lincoln Center for the Performing Arts, Inc.'s and City of New York's motion for summary judgment in Mot. Seq. 004 is denied.

This constitutes the decision and order of this Court.

05/22/2023
DATE

James d'Auguste, J.S.C.

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