SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **05RCP**

Justice

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JENNIE WADE,

Plaintiff,

- v -

THE CITY OF NEW YORK, MURAT REALTY LLC

Defendants.

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INDEX NO. 151070/2019

MOTION DATE 09/27/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by defendant the City of New York (the "City") for summary judgment dismissing this action is denied for the reasons set forth below.

On January 31, 2019, plaintiff commenced this action for injuries sustained on June 23, 2018, when she tripped and fell on the sidewalk abutting 302 East 126th Street, New York, New York, which she alleges was negligently maintained by defendant Murat Realty LLC ("Murat") as owner of 302 East 126th Street and by the City as owner of the neighboring property, a vacant lot designated as Block 1802, Lot 1 (the "Property") (Id. at ¶¶14, 23-25, 50-53). However, plaintiff's Bill of Particulars and General Municipal Law §50-h testimony subsequently clarified that she fell on the "sidewalk abutting the premises designated as Block 1802 and Lot 1" which was "adjacent to 302 East 126th Street" (NYSCEF Doc. Nos. 87 [Bill of Particulars at ¶2] and 91 [GML §50-h Tr.]).

On January 24, 2020, Murat moved for summary judgment dismissing plaintiff's complaint as against it on the grounds that it did not own the Property (NYSCEF Doc. No. 36 [Keane Affirm.

at ¶¶13-14]). On October 9, 2020, the Court (Hon. Dakota D. Ramseur) granted Murat's motion (NYSCEF Doc. No. 57 [October 9, 2020 Decision and Order]).

The City now moves, pursuant to CPLR §3212, for summary judgment dismissing this action on the grounds that it did not own the Property at the time of plaintiff's accident and is therefore exempt from liability under Administrative Code §7-210. In support of its motion, the City submits: (i) the affidavit of David Atik, an employee for the New York City Department of Finance ("DOF"), in which he attests that a review of the DOF's Property Tax System database reveals that the Property was not owned by the City on the date of plaintiff's accident and that the Property is classified as "vacant land" and not a one-, two-, or three-family residential property (NYSCEF Doc. No. 95 [Atik Affirm. at ¶¶4-6]); (ii) the affidavit of David Schloss[1], Senior Title Examiner for the New York City Law Department, attesting to a title search revealing that "MTA Bridges and Tunnels" held title to the Property at the time of plaintiff's accident (NYSCEF Doc. No. 96 [Schloss Aff. at ¶¶1-4]); (iii) the affidavit of Larisa Dubina, an employee for the New York City Department of Transportation ("DOT"), detailing the results of her search of DOT records for the sidewalk of East 126th Street, between First Avenue and Second Avenue—including the Harlem River Drive northbound entrance to East 126th Street, Robert F. Kennedy Bridge, and Triboro Bridge—for the two-year period prior to and including the date of the subject accident (NYSCEF Doc. No. 93 [Dubina Aff. at ¶¶3-4]); and (iv) the records produced by Dubina's search (NYSCEF Doc. No. 92 [DOT Records]).

Plaintiff opposes the motion, arguing that a December 2017 permit issued to the New York City Department of Environmental Protection ("DEP") permitting DEP to "open the roadway

[1] Although Schloss' affidavit was notarized out-of-state and is not accompanied by a certificate of conformity, the absence of such a certificate is of no moment as this is a "mere irregularity and not a fatal defect" and plaintiff has not alleged any prejudice (Charnov v NY City Bd. of Educ., 171 AD3d 409, 409-410 [1st Dept 2019]).

and/or sidewalk" at the intersection of Second Avenue and 126th Street in New York, New York, which was produced by the City as part of the DOT records search (the "DEP Permit"), establishes that work was performed by the City between December 3, 2017 and January 1, 2018 close to the site of plaintiff's fall, and therefore "questions of fact exist as to the nature and specific location of the work performed by DEP in the months before plaintiff's accident, and as to whether this work contributed to the defective condition of the sidewalk that caused plaintiff to trip" (NYSCEF Doc. No. 98 [Smith Affirm. in Opp. at 14]) precluding summary judgment.

In reply, the City argues that it has established its lack of liability under Administrative Code §7-210 and also established that it did not cause or create the subject condition (though it maintains that it does not bear the burden to do so). In connection with this latter point, the City asserts that the existence of the DEP Permit does not establish that any work was performed at or near subject location and adds that the time and date listed on the application for the DEP permit is merely an indication of the date the application was submitted rather than the dates work was performed[2] (NYSCEF Doc. No. 101 [Lynch Affirm. at ¶16]).

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been

[2] The parties spend a portion of their papers arguing about the proper inference to draw from a directive in the DEP Permit that work should not block buses from "loading/unloading." Plaintiff argues that, as she disembarked from a bus stop prior to her fall, this language suggests that any work performed pursuant to the permit was proximate to the site of her fall. In response, the City submits Google Maps from 2014 and 2019 (neither of which are from the year of the accident, 2018) which, it contends, show that the bus stop plaintiff disembarked from was across the street from the site of plaintiff's fall, suggesting that any work performed under the DEP Permit was close to this bus stop and not proximate to the site of plaintiff's fall, across the street. These arguments rely entirely on conjecture and for that reason have no relevance to the determination of this motion.

made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

Here, the City's submission of the Atik affirmation and Schloss affidavit establish that it did not own the Property on the date of plaintiff's accident and that the Property was not a one-, two-, or three-family residential property (See e.g., King v City of New York, 2014 NY Slip Op 31428[U], *4 [Sup Ct, NY County 2014]). Moreover, it is undisputed that the owner of the Property, MTA Bridges and Tunnels—more commonly known as the Triborough Bridge and Tunnel Authority—is a public benefit corporation that is a separate and distinct entity from the City (See Public Authorities Law §552[1]; Goodman v New York, 46 Misc 2d 432, 434 [Sup Ct, Richmond County 1965] citing NY Post Corp. v Moses, 10 NY2d 199, 204 [1961]).

While the City has established it bears no liability for the subject condition under Administrative Code §7-210 it may still be liable if its affirmative negligence immediately created the hazardous condition or it made a special use of the sidewalk which contributed to that condition (Yarborough v City of New York, 10 NY3d 726, 728 [2008]). Contrary to the City's contention, under the circumstances herein it remains the City's burden to establish that it did not cause and create this condition (See Rosa v Columbus Parkway Associates, 2020 NY Slip Op 33312(U) [Sup Ct, NY County 2020] [Administrative Code §7-201 expressly places the burden on plaintiff to establish that the City caused and created a defect for which it had no prior written notice, but no such burden shifting exists under Administrative Code §7-210]).

The City has not met this burden. Although the City is correct that a permit is not, in and of itself, proof that work was performed, under the circumstances at bar the existence of the DEP

Permit is sufficient to create a question of fact as to whether work was performed, rendering summary judgment inappropriate (See e.g., Plana v Coalition for the Homeless, Inc., 2013 NY Slip Op 32321[U] [Sup Ct, NY County 2013]; see also Millington v City of New York, 2019 WL 2568075 [Sup Ct, NY County 2019] ["between the markings on the Big Apple Map and the work permits issued to DEP, issues of fact remain as to whether the City had notice of the alleged defect and/or caused or created it"]; see also Stein v City of New York, 12 AD3d 587 [2d Dept 2004] [where DOT records searcher testified that the DOT granted the DEP a permit to open the street at or near where the accident occurred, Supreme Court "directed the defendant, inter alia, to produce a witness from the DEP"]).

The City's argument that permits, as a matter of law, are insufficient to raise such a question of fact on a motion for summary judgment is incorrect, and relies on inapposite caselaw in which permits were found insufficient to create an issue of fact in the face of testimony and documentary evidence from the movant attesting to the precise location where work was performed (or that no work was performed at all) (See e.g., Ingles v Architron Designers and Builders, Inc., 136 AD3d 605 [1st Dept 2016]; Amini v Arena Const. Co., Inc., 110 AD3d 414 [1st Dept 2013]; Bermudez v City of New York, 21 AD3d 258 [1st Dept 2005]). By contrast, no such proof concerning the scope of any work performed pursuant to the DEP Permit has been submitted here. Finally, the City's argument that the DEP Permit is insufficient to raise a question of fact as to whether work was performed that immediately created a dangerous condition is similarly unavailing—whether any work was performed and the nature of such work must be addressed before this issue can be reached.

In light of the foregoing, it is

ORDERED that the City of New York's motion for summary judgment is denied; and it is further

ORDERED that, notwithstanding the Note of Issue filed on August 18, 2022, the City of New York is directed to produce a DEP witness for an examination before trial on or before September 15, 2023; and it is further

ORDERED that within ten days from the date of this decision and order, counsel for plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of 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 this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

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6/30/2023
DATE

HON. JUDY H. KIM, 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