SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **05M**

Justice

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SHAZELL HAMILTON,

Plaintiff,

- v -

THE CITY OF NEW YORK, ONE 9 THREE 9 CORPORATION, VINCENT SOLLAZZO LAMPKIN, AUDREY C. WATSON

Defendant.

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INDEX NO. 162136/2018

MOTION DATE 02/03/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 59, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 121, 136, 137, 138, 139, 140, 141

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

With the instant motion, Defendant THE CITY OF NEW YORK (hereinafter, "the City") moves for an order, pursuant to CPLR §3212, granting summary judgment to the City, and dismissing plaintiff Shazell Hamilton's ("plaintiff") complaint and any cross-claims as against the City.

Plaintiff claims that on July 15, 2018, she sustained personal injuries on a public sidewalk in front of premises located at 101 West 136 Street, New York, New York. Plaintiff alleges in her bill of particulars that defendants, including the City, were negligent in the ownership maintenance and control of the property

DISCUSSION

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d

883 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 NY2d 525 [1999]). A motion for summary judgment should be "granted if, upon all the papers and proof submitted, the cause of action… shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR §3212[b]).

Moreover, a party may not defeat summary judgment with speculative arguments consisting of "mere conclusions, expressions of hope or unsubstantiated allegations" (*see Kalbacher v. Paez*, 215 AD2d 628, 628 [2d Dept 1995]; *citing Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Where a party cannot demonstrate material triable issues in accordance with these standards, summary judgment is "a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources" (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 312 [2004]).

Here, the City has established that it is exempt from liability under Administrative Code §7-210. That statute shifts tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner, except for sidewalks abutting one-, two- or three-family residential properties that are owner-occupied and used exclusively for residential purposes (*see Santos v City of New York*, 59 Misc 3d 1211[A] [Sup Ct, Bronx County 2018]; *see also Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520 [2008]). Here, the Atik affirmation and the Menjivar affidavit establish that the City did not own the premises at the time of plaintiff's accident and that the premises was not a one-, two-, or three-family residential property. The affidavit of David Schloss adds further evidence that the City was not the owner of the subject property on the date of

plaintiff's alleged incident. Therefore, the City bears no statutory liability for the public sidewalk in front of premises located at 101 West 136 Street (*see e.g., Gallis v 23-21 33 Rd., LLC*, 198 AD3d 730, 732 [2d Dept 2021] ["[w]here a sidewalk may have been damaged by growing tree roots, abutting property owners are responsible for remedying the condition and are liable for damages that may occur because of the defect"]).

Likewise, the City has also established that it did not cause or create the defective sidewalk condition through an affirmative act of negligence based on the evidence submitted (*see Rizzo v City of New York*, 178 AD3d 503, 503-04 [1st Dept 2019]). Even if the City had not submitted evidence establishing the same, the court notes that the City does not have the burden of proving the exceptions to § 7-210, such as the "cause and create" exception here. Rather, it is plaintiff, as the party opposing the motion for summary judgment pursuant to Administrative Code § 7-210, who bears that burden (*see generally Yarborough v. City of New York*, 10 NY3d 726 [2008]).

Notably here, during discovery, a search was performed by the Department of Transportation ("DOT") for records pertaining to the sidewalk at the subject location. Larisa Dubina, an employee of the DOT, personally conducted a two-year search for permits, applications for permits, OCMC files, CARs, NOVs, NICAs, inspections, contracts, maintenance and repair orders, sidewalk violations, complaints, and Big Apple Maps for the sidewalk located at West 136th Street between Lenox Avenue and Adam Clayton Powell Boulevard (side of 101 West 136th Street). The DOT record search revealed that out of twenty-two (22) permits, only one was issued to a City agency or contractor. Specifically, permit number M01-2018088-B03 was issued to E-J ELECTRIC INSTALLATION COMPANY pursuant to Contract Number 15MNTR921 with the DOT. The permit was issued for purpose of making streetlight foundation repairs.

Plaintiff's pleadings, testimony, and photographs do not indicate that her alleged incident occurred near or due to a streetlight foundation. Indeed, Plaintiff identified the location of the subject incident on photographs marked as exhibits at her 50-h hearing. None of the photographs depict a streetlight foundation and, in particular, the area marked at the 50-h hearing by plaintiff does not show any streetlight foundations. Consequently, the permit cannot relate to work performed at the specific location of plaintiff's alleged accident and, as such, it cannot indicate that the City caused or created the alleged condition. Furthermore, a permit alone is not evidence of actual work performed, but rather, a permit is only evidence that an entity was permitted to perform work at the specific location (*see Bolanos v. City of New York*, 29 AD3d 455 [1st Dept 2006]). Indeed, the City cannot be held liable for merely issuing a permit (*see Meltzer v. City of New York*, 156 AD2d 124, 124 [1st Dept 1989]). Finally, to the extent work was performed pursuant to permit number M01-2018088- B03, there is no evidence to show that any work caused or created an immediately apparent dangerous condition, as an inspection conducted on May 14, 2018, pursuant to said permit resulted in a passing inspection.

Where, as here, there is no evidence to show that the City caused or created a sidewalk condition that could have caused plaintiff's incident, the City's motion must be granted (*see Yarborough*, 10 NY3d 726, *supra*). Plaintiff's arguments to the contrary are unavailing. Indeed, plaintiff's argument that issues of fact exist as to whether the City had prior written notice of the defect or caused the subject condition, are futile. To be sure, in a circumstance like this where the City does not have a duty under Administrative Code §7-210, "it cannot be liable even if it had prior written notice of the defective condition" (*Khywad v Persaud*, 2015 NY Slip Op 50830[U], *2 [Sup Ct, Queens County 2015] *citing Adamson v City of New York*, 104 AD3d 533 [2d Dept

2013]). Consequently, plaintiff has failed to rebut the City's showing of entitlement to judgment as a matter of law.

Finally, plaintiff's contention that summary judgment is premature is also without merit. CPLR §3212(a) states in pertinent part that "any party may move for summary judgment in any action, after issue has been joined." Here, plaintiff does not argue that issue has not been joined. Rather, plaintiff contends that the City's motions is premature because discovery has not been completed. Contrary to plaintiff's assertion, summary judgment is not premature merely because discovery is not complete. The "mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to [deny such a motion for summary judgment]" (*Nervaev v Solon*, 6 AD3d 510, 510-511 [2d Dept 2004]; *see also Flores v The City of New York*, 66 AD3d 599 [1st Dept 2009]). That is particularly true here, where plaintiff has failed to "[show] that discovery might lead to relevant evidence" (*Bacchus v Bronx Lebanon Hosp. Ctr*., 192 AD3d 553, 554 [1st Dept 2021]).

In light of the foregoing, it is

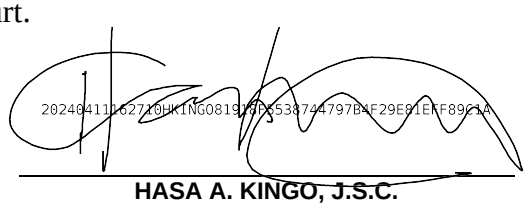
ORDERED that the motion for summary judgment by defendant the City of New York, is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that within thirty days from entry of this order, counsel for the City of New York 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.



4/11/2024
DATE

HASA A. KINGO, J.S.C.

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