SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 23, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Sweeny, Renwick, Richter, JJ.

10012 New York City Housing Authority, Index 400159/08
Plaintiff-Appellant,

-against-

Pro Quest Security, Inc., et al.,
Defendants-Respondents.

_____

Kelly D. MacNeal, New York (Gil Nahmias of counsel), for appellant.

Kaufman Borgeest & Ryan, LLP, Valhalla (Adonaid C. Medina of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 7, 2011, which granted defendants' motion to dismiss the complaint for spoliation of evidence, unanimously reversed, on the law, without costs, to reinstate plaintiff's complaint and preclude plaintiff from entering the redacted video into evidence or eliciting testimony concerning its contents.

Plaintiff, New York City Housing Authority (NYCHA), brought this action against defendants, Pro Quest Security, Inc. (Pro Quest) and its employee Kuuba Saba, seeking damages resulting

from a fire that occurred in the cafeteria of a building located at 90 Church Street, in Manhattan. At the time of the fire, plaintiff leased seven floors in the building, including the 6th floor, which contained the employee cafeteria. Pro Quest was employed by the landlord of the building to provide 24-hour security.

On February 1, 2007, at around 4 a.m., a fire began in the cafeteria. The fire was extinguished shortly thereafter, and the fire marshal arrived by 9 a.m. to conduct an investigation. In the Fire Incident Report, the fire marshal concluded that the fire began in the wastebasket in the cafeteria and that it "appeared to have [been] started by a careless discard of smoking materials" into the wastebasket. As part of the investigation, the fire marshal interviewed Saba, a security guard employed by Pro Quest, who was working the 12 a.m. to 8 a.m. shift. Saba stated that, although he was a smoker, he did not smoke in the cafeteria that day. The fire marshal marked the case as "closed NFA [not fully ascertained] accidental careless discard of smoking material." Several hours after the fire, the wastebasket was disposed of by either the building management or its cleaning company, neither of which is a party to this action.

The day after the fire, Patrick O'Hagan, the Director of

Security for NYCHA, reviewed the surveillance video of the 6th floor from around the time of the fire. O'Hagan edited the video footage, deleting camera views he considered unnecessary, because those portions of the video showed no one on the 6th floor at the relevant times. O'Hagan saved the images from several different cameras. The saved images showed three different men, one of whom O'Hagan asserts is Saba, walking around the 6th floor near the cafeteria between 2:38 and 4:59 a.m. the morning of the fire. Two weeks after the fire, O'Hagan gave this redacted video to the fire marshal.

In January 2008, NYCHA brought this action against defendants, seeking damages based on Saba's alleged negligence in contributing to the fire and Pro Quest's vicarious liability for Saba's negligence. During discovery, defendants requested the wastebasket and an explanation for why portions of the surveillance video were missing. In an order dated December 29, 2009, the court ordered NYCHA to produce the unredacted video. When NYCHA failed to do so, defendants moved to dismiss the action pursuant to CPLR 3126, claiming spoilation of evidence. The trial court granted defendants' motion and dismissed NYCHA's complaint, incorrectly concluding that NYCHA had willfully refused to comply with a court order. The video had actually

been edited long before any court action began, and NYCHA did not have an unredacted copy when the December 29 order was issued.

As a threshold issue, NYCHA unconvincingly argues that no sanction is appropriate because litigation was not pending when the video was edited. For a spoliation sanction to be applicable, there need only be the "reasonable anticipation of litigation" (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 43 [1st Dept 2012] [internal quotation marks omitted]; *see also Samaroo v Bogopa Serv. Corp.*, __AD3d__, 964 NYS2d 255 [2d Dept 2013]). The day after the fire, O'Hagan was already viewing and editing the video, identifying images he thought would be relevant to determine how the fire started. These actions indicate that NYCHA may have been contemplating litigation, or at least wanted to identify the culpable person, and therefore the records were destroyed with a "culpable state of mind" (*Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 482 [1st Dept 2010] [internal quotation marks omitted]; *see Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570, 571 [1st Dept 2013]). For the purposes of a spoliation sanction, "[a] culpable state of mind . . . includes ordinary negligence" (*VOOM HD Holdings LLC*, 93 AD3d at 45 [internal quotation marks omitted]; *see Squitieri v City of New York*, 248 AD2d 201, 203 [1st Dept 1998]).

Although NYCHA should be sanctioned for the destruction of portions of the surveillance video, the dismissal of the complaint was too harsh a remedy. Dismissing an action is "usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability" (*Russo v BMW of N. Am., LLC,* 82 AD3d 643, 644 [1st Dept 2011]). It is a "drastic sanction" and should only be done when a party has destroyed key evidence (*Dauria v City of New York*, 127 AD2d 459, 460 [1st Dept 1987]; *see Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 16 [1st Dept 2000], *lv dismissed* 96 NY2d 937 [2001]).

The record does not support defendants' contention that dismissal is required because the unredacted video is key evidence without which they will be "substantially prejudiced" (*Sage Realty*, 275 AD2d at 17; *see Metropolitan N.Y. Coordinating Council on Jewish Poverty v FGP Bush Term.*, 1 AD3d 168 [1st Dept 2003]). There are no cameras located inside the cafeteria, and no portion of the saved or deleted film would show exactly how the fire started. Moreover, defendant Pro Quest is not without the means to defend itself, because it could depose the people who were present in the building at the time of the fire, including Saba (*see Shan Palakawong v Lalli*, 88 AD3d 541, 542

[1st Dept 2011] [denying motion to dismiss because, although spoliation had occurred, there was other evidence available to the moving party]; *see also Mendez v La Guacatala, Inc.*, 95 AD3d 1084, 1085 [2d Dept 2012]). As the security company, Pro Quest should have records of which employees were on duty at the time. Pro Quest also does not claim it has no access to information from other tenants whose employees or visitors might have entered the building during the critical period.

Nevertheless, some sanction is warranted because it is uncontested that O'Hagan purposefully deleted the video images, and it would be unfair to Pro Quest to allow NYCHA to use the inculpatory images without defendants having an opportunity to see all the camera views (*see Palakawong*, 88 AD3d at 541-542 [in an action arising from a motor vehicle accident, it was an appropriate sanction to preclude the defendant from presenting evidence of the condition of his motorcycle after the accident because he intentionally altered the motorcycle]). Defendants should not have to rely on NYCHA's statement that the deleted views are irrelevant, but should have been given an opportunity to view those images for themselves. Because NYCHA deprived defendants of this opportunity, NYCHA should be precluded from entering the redacted video into evidence or having a witness

testify to its contents (*see Baldwin v Gerard Ave., LLC,* 58 AD3d 484, 485 [1st Dept 2009] [sanction of preclusion was "appropriately tailored to restore balance" where the plaintiff was prejudiced by the defendant's failure to produce records of repairs completed on the stairwell where the plaintiff was allegedly injured]; *see also Kirkland*, 236 AD2d at 173).

Finally, no sanction should be imposed for plaintiff's failure to produce the wastebasket. The destruction of the wastebasket cannot be attributed to any willful or negligent act on the part of NYCHA. Moreover, as neither party had the opportunity to examine the wastebasket prior to it being removed,

both parties are equally prejudiced by its absence (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 479 [1st Dept 2011]; *Maliszewska v Potamkin N.Y. LP Mitsubishi Sterling*, 281 AD2d 353 [1st Dept 2001]; *Cruz v Foremost Mach. Corp.*, 6 AD3d 484 [2d Dept 2004]).

We have considered the parties' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 23, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Feinman, Clark, JJ.

9331 Hector Gautier, Index 310005/09
Plaintiff-Respondent,

-against-

941 Intervale Realty LLC,
Defendant,

East 163rd LLC,
Defendant-Appellant.

_____

Morgan Melhuish Abrutyn, New York (Paul A. Tripodo of counsel), for appellant.

Greenstein & Milbauer, LLP, New York (Andrew W. Bokar of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 13, 2012, which denied defendant East 163rd LLC's motion for summary judgment dismissing the complaint as against it, affirmed, without costs.

Plaintiff alleges that he slipped and fell on a wet substance that was on the stairway of defendant's apartment building. Defendant moved for summary judgment on the ground that it did not create or have actual or constructive notice of the hazard. In support of the motion, defendant submitted the deposition testimony of its superintendent about the building's regular janitorial schedule. However, it offered no evidence

that the schedule was followed on the day of the accident (*see Williams v New York City Hous. Auth.*, 99 AD3d 613 [1st Dept 2012]). Moreover, constructive notice remains an issue in this case because defendant made no showing as to when the stairway was last inspected before plaintiff's accident (*see e. g. Aviles v 2333 1st Corp.*, 66 AD3d 432 [2009]). In *Williams*, we reversed an order granting a property owner's motion for summary judgment holding that because the owner "failed to present competent evidence that [its] janitorial schedule was followed on the day of the accident, it did not show that it lacked constructive notice of the complained-of condition" (*id.*). Defendant's proof that a janitorial schedule merely existed does not suffice for purposes of showing that it was followed. *Love v New York City Housing Authority* (82 AD3d 588 [1st Dept 2011]), which the dissent cites, is distinguishable inasmuch as we noted in that case testimony by the Housing Authority's caretaker that "she *followed* the janitorial schedule" (*id.* [emphasis added]).

Standing alone, proof that "stairs were routinely cleaned on a daily basis" is not germane to the dispositive issue of lack of notice of an alleged defective condition (*Rivera v 2160 Realty Co., L.L.C.*, 10 AD3d 503, 505 [1st Dept 2004, Sullivan J.,

dissenting], *revd on other on other grounds*, 4 NY3d 837 [2005]).[1] This proposition is even supported by other cases the dissent cites. For example, it is no coincidence that in *Rodriguez v New York City Housing Authority* (102 AD3d 407 [1st Dept 2013]), we based a finding of a lack of constructive notice of a dangerous condition on the testimony of a "caretaker who cleaned the building on the day before the early-morning accident" (*id.*). Accordingly, in *Rodriguez* the Housing Authority made a prima facie showing that a janitorial schedule not only existed but was followed at around the time of the accident. Similarly, in *Pfeuffer v New York City Housing Authority* (93 AD3d 470 [2012]), another case the dissent cites, the record included a caretakers'

[1]In *Rivera,* the Court of Appeals reversed this Court's order finding no issue of fact as to constructive notice because the plaintiff admitted that bottle he tripped over was not in the stairwell during the evening before his 5:00 a. m. accident (*id.* at 838). This admission involved the critical question of the condition of the premises within a reasonable time before the accident - a question the moving defendants did not address in this case, *Williams* or *Aviles.*

logbook *from the date of the accident*. We noted that the logbook "[did] not indicate that a hazardous condition existed in any stairwells" within, at most, three hours before the accident (*id.* at 470-472).

All concur except Andrias, J.P. and Saxe, J. who dissent in a memorandum by Andrias, J.P. as follows:

ANDRIAS, J.P. (dissenting)

Because I believe that defendant established its entitlement to summary judgment, and that plaintiff has not raised a triable issue of fact, I respectfully dissent.

Plaintiff alleges that he slipped and fell on a partially dried and sticky puddle of urine that spanned several steps in the interior stairwell of defendant's building. Plaintiff did not see the urine on the steps before he slipped.

Defendant made a prima facie showing of its entitlement to judgment as a matter of law with evidence that it neither created nor had actual or constructive notice of the allegedly hazardous condition. The building superintendent's deposition testimony, corroborated by a member of defendant LLC, established that the stairs were swept every morning and mopped three times a week, at about 7:00 a.m., in accordance with a regular maintenance schedule, and that there were never any prior accidents on the steps caused by any foreign substance (*see Rodriguez v New York City Hous. Auth.*, 102 AD3d 407 [1st Dept 2013]; *Serrano v Haran Realty Co .*, 234 AD2d 86 [1st Dept 1996]). The accident occurred at 3:00 a.m. and a landlord cannot be required to work around the clock on the chance that a dangerous condition might be created at any given moment (*see Pfeuffer v New York City Housing*

Authority., 93 AD3d 470, 472 [1st Dept 2012]; *Love v New York City Hous. Auth.*, 82 AD3d 588 [1st Dept 2011] [A defendant cannot be expected to "patrol its staircases 24 hours a day"]). The two or three instances of a dog urinating on the stairs was insufficient evidence of a recurring condition (*see Guittierez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138 [1st Dept 2004]; *Peso v American Leisure Facilities Mgt. Corp.*, 277 AD2d 48 [1st Dept 2000]), and even if it was, it was not routinely left unaddressed in light of undisputed evidence that the superintendent cleaned the stairs daily and confronted the subtenant who had the offending dog, which was later removed *(see Pfeuffer v New York City Housing Authority*, 93 AD3d at 472).

In opposition, plaintiff failed to raise a triable issue of fact as to actual or constructive notice. There is no evidence that the condition had been visible and apparent for long enough to permit defendant to discover and remedy it (*see Wellington v Manmall, LLC*, 70 AD3d 401 [1st Dept 2010]; *compare Hill v Lambert Houses Redevelopment Co.*, __ AD3d __, 2013 NY Slip Op 2829 [2013]).

The majority believes that *Love v New York City Housing Authority* (82 AD3d 588, *supra*) is inapposite and that defendant failed to make a prima facie showing because defendant offered no

evidence that its janitorial schedule was followed on the day of the accident or as to when the stairway was last inspected. However, in *Pfeuffer v New York City Housing Authority, supra*, *citing Love,* this Court held that the defendant sustained its prime facie burden where "[t]he NYCHA caretaker submitted an affidavit stating that each morning, he walked down all of the staircases in the building to remove garbage and debris prior to reporting to his supervisor [,] . . . that later in the morning, he swept and mopped the halls and stairs beginning with the 13th floor and working his way down the stairs [,] . . . that he completed his cleaning of the 'B' stairs between the 7th and 6th floors shortly before his lunch break at 12:00 p.m. each day [and] . . . that he conducted a second inspection of the staircases in the afternoon at 3:30 p.m." [internal quotation marks omitted]). In *Rodriguez v New York City Hous. Auth.* (102 AD3d 407, supra), again *citing Love,* this Court held that defendant made a prima showing where the caretaker "testified that she inspected the subject stairs twice every morning and once every afternoon, and promptly mopped any urine or other spills she found during her inspections." In *Torres v New York City Housing Authority* (85 AD3d 469 [1st Dept 2011]), this Court held that the defendant established its entitlement to summary

judgment where "[t]he building's supervisor of caretakers stated that the janitorial schedule for the building included that the subject stairs be cleaned in the hour before plaintiff fell."

Accordingly, I would reverse the order and grant defendant's motion for summary judgment.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 23, 2013

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

10326 The People of the State of New York, Ind. 2802/11
Respondent,

-against-

Daniel Torres,
Defendant-Appellant.

_____

Mahler & Harris, P.C., Kew Gardens (Stephen R. Mahler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered May 29, 2012, as amended January 15, 2013, convicting defendant, after a jury trial, of robbery in the first and second degrees, attempted gang assault in the first degree, and assault in the second degree, and sentencing him to an aggregate term of six years, unanimously affirmed.

The assault-related convictions were based on legally sufficient evidence and were not against the weight of the evidence. The evidence supports the inference that when defendant told his companions to "get" the victim, with whom he had just had a physical altercation, he intended for the assailants to commit the ensuing assault (*see generally* Penal Law § 20.00; *People v Allah*, 71 NY2d 830 [1988]). Further, defendant

does not dispute that, if we were to find that sufficient evidence supported the jury's conclusion that the "get him" comment revealed his intent that the assailants assault complainant, the same conclusion would apply to the robbery charge.

In any event, the evidence supports the inference that defendant also intended that the assailants take the victim's money. The complainant was collecting entry fees for the party at the club where he and defendant were before the complainant fled (prompting defendant to say "get him") and there was testimony that defendant, who apparently was an owner of the club, paid a great deal of attention to the money being handled by the complainant that evening, reminding him repeatedly to place the money in a box the complainant was holding for that purpose.

Defendant failed to preserve his claim that the court should have given the jury a circumstantial evidence charge, and we decline to review it in the interest of justice. As an alternative holding, we find that no such charge was necessary, because defendant's guilt was established by direct evidence from which the inference of accessorial liability could be inferred (*see People v Roldan*, 88 NY2d 826 [1996]; *People v Daddona*, 81

Y2d 990 [1993]). The court thoroughly instructed the jury on the issues of intent and accessorial liability. For similar reasons, we reject defendant's ineffective assistance of counsel claim. The fact that counsel did not request a circumstantial evidence charge met an objective standard of reasonableness, and the absence of such a charge did not deprive defendant of a fair trial or affect the outcome (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

The court properly exercised its discretion in receiving very limited evidence that some witnesses were reluctant to testify or cooperate with the police. That evidence was relevant in context and was not unduly prejudicial. By failing to object, by making only generalized objections, and by failing to request further relief after objections were sustained, defendant failed to preserve his remaining claims of prosecutorial misconduct, and

we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. To the extent there were any improprieties, the court's curative actions were sufficient to prevent any prejudice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 23, 2013

CLERK

Tom, J.P., Friedman, Freedman, Feinman, JJ.

10353 John Fayolle, Index 115715/08
Plaintiff-Appellant,

-against-

East West Manhattan Portfolio L.P., et al.,
Defendants-Respondents.

_____

Padilla & Associates, PLLC, New York (Jeffrey W. Padilla of counsel), for appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for East West Manhattan Portfolio L.P., respondent.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for Gallery House Condominium and John J. Grogan & Associates, Inc., respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered August 7, 2012, which denied plaintiff's motion for summary judgment, and granted defendants' motions for summary judgment dismissing the complaint, affirmed, without costs.

Plaintiff seeks damages for injuries sustained when he tripped and fell on a sidewalk located in front of a condominium building owned by defendant Gallery House Condominium. The court properly dismissed the action against defendant East West Manhattan Portfolio L.P., the owner of the first floor commercial unit, because it is not an "owner" within the meaning of

Administrative Code of the City of New York § 7-210 and owed no other duty to maintain the sidewalk (*see Araujo v Mercer Sq. Owners Corp.*, 95 AD3d 624, 624 [1st Dept 2012]). Moreover, the condominium declaration and bylaws limit the commercial unit owner's interest to the interior of the building and place responsibility for the common elements with the condominium's board, which maintained the sidewalk.

The court also properly found that the alleged defect — a three-quarter-inch expansion joint, which was not filled to grade level, coupled with a one-fourth-inch height differential between slabs — was "trivial" and therefore nonactionable as a matter of law (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]). Unlike in *Young v City of New York* (250 AD2d 383 [1st Dept 1998]), the defect here is not alleged to have run along the full width of the sidewalk.

Plaintiff fails to support its claim that statutorily-defined substantial defects exist and fails to raise a triable issue as to the existence of an actionable defect. Plaintiff's expert's opinion that the expansion joint's width exceeded Department of Transportation (DOT) specifications relies on a specification that applies to construction. Given the absence of any evidence that the sidewalk, which was constructed more than

five years before the expert's inspection, was constructed with this defect, the DOT specification cannot serve as the basis for imposing liability. Further, while plaintiff maintains that the failure to fill the expansion joint grade constitutes a violation of a DOT specification, he fails to identify the DOT specification claimed to have been violated by this failure.

All concur except Feinman, J. who dissents in part in a memorandum as follows:

FEINMAN, J. (dissenting in part)

I agree with the majority that the motion court properly dismissed the action as against defendant East West Manhattan Portfolio L.P. because, unlike the abutting landowners, defendants Gallery House Condominium and John J. Grogan & Associates, Inc. (together the Gallery House defendants), it had no duty to maintain or repair the sidewalk where plaintiff's accident occurred. However, in my view, the motion court erred in granting summary judgment and dismissal of the action as against the Gallery House defendants on the ground that the sidewalk defects at issue were "trivial" as a matter of law. If the motion court was correct as to this point, then property owners in New York City may ignore the law regarding construction and maintenance of their abutting sidewalks without consequence. The motion court's approach, approved by the majority, reduces safety design specifications to mere recommendations. Accordingly, I respectfully dissent in part.

In March 2008, plaintiff contends, he was caused to trip and fall and sustain injury when the "outside of [his] sneaker got caught in the crack" in front of the condominium building owned by defendant Gallery House Condominium. The "crack" is a sidewalk expansion joint. The sidewalk was constructed (i.e.,

repaved) by the Gallery House defendants in 2003 or 2004. In 2007, former third-party defendant Etna Contracting, Inc. inspected the sidewalk and proposed to replace missing caulking in the sidewalk's expansion joints. The Gallery House defendants rejected the proposal, and never replaced the caulking.

Plaintiff moved for summary judgment on the ground that the sidewalk expansion joint in which he tripped constituted a defective and dangerous condition. He submitted an affidavit and notarized report by Michael Kravitz, a licensed professional engineer, who inspected the sidewalk in March 2010 and found the following defects, which he opined were *created at the time of construction*: (1) the width of the expansion joint measured three-quarters of an inch; (2) the expansion joint lacked sufficient caulking such that there was a one-inch-deep crevice between flags; and (3) a height differential of one-quarter inch existed between the adjacent sidewalk flags. These conditions constituted violations of sections 7-210 and 19-113 of the Administrative Code of the City of New York and section 2-09 of Title 34 of the Rules of City of New York Department of Transportation (34 RCNY 2-09), as well as New York City Department of Transportation Specifications and, according to Kravitz, are a "substantial defect." Although plaintiff also

submitted photographs of the sidewalk allegedly taken shortly after his 2008 accident, defendants contend, and it was conceded at oral argument, that they should not have been considered because they were unauthenticated.

The Gallery House defendants also moved for summary judgment seeking dismissal of the complaint as against them on the ground that the allegedly missing caulking was "trivial" as a matter of law. In support of their motion and in opposition to plaintiff's motion, the Gallery House defendants submitted an affidavit from John Natoli, a licensed engineer who inspected the site in July 2010. Natoli found that the width of the expansion joint was seven-eighths of an inch at its widest, the depth of the caulking ranged between three-eighths to one-half of an inch, and the height differences were "less than one-half inch." Natoli's report explained that the "depth of the expansion joint will not remain static unless filled periodically with caulking."

The motion court granted the Gallery House defendants' motion, finding no question of fact as to the trivial nature of the alleged defect and that any difference in the width of the expansion joints was de minimis. The court denied plaintiff's motion, ruling that he had not established that the width of the expansion joints was required by statute or ordinance to be "an

undeviating 1/4 inch," and held that the one-quarter-inch variance between sidewalk flags, as found by plaintiff's engineer, was "as a matter of law, too trivial to be actionable." Plaintiff has appealed from both the denial of his summary judgment motion and the grant of defendants' summary judgment motion.

The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). In deciding the motion, the court will draw all reasonable inferences in favor of the nonmoving party (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]). If the moving party fails to make a prima facie showing of entitlement to summary judgment, its motion must be denied (*Vega*, 18 NY3d at 503).

There is no rule that a sidewalk defect of a particular depth or height or width is deemed as a matter of law to be either trivial or substantial (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). "[W]hether a dangerous or defective condition exists . . . so as to create liability depends on the

peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*id.* [internal quotation marks omitted]). In *Trincere*, after examining all the facts, including that the slab at issue was a "little over a half-inch above the surrounding paving slabs" (*id.*), as well as the time, place and circumstance of the injury, it was held that the defect was trivial (*id.* at 977-978). By comparison, in *Young v City of New York* (250 AD2d 383 [1st Dept 1998]), a crevice between sidewalk flags that was five-eighths of an inch wide and one-inch deep, running the full width of the sidewalk, was held not to be, as a matter of law, a defect "too trivial" for a jury to find liability (*id.* at 383-384). Similarly, in *Gomez v Congregation K'Hal Adath Jeshurun, Inc.* (104 AD3d 456 [1st Dept 2013]), we held there were triable issues of fact as to whether a one-half-inch differential between the sidewalk flags was a "substantial defect" under 34 RCNY 2-09 and Administrative Code § 19-152(a)(4) and (a-1)(5).

The Gallery House defendants' motion should have been denied. They did not meet their prima facie burden of demonstrating that the sidewalk defect was "trivial" as a matter of law. According to plaintiff's engineer, the width of the expansion joint was three-quarters of an inch, which is wider

than the expansion joint in *Young*. Like the expansion joint in *Young*, the engineer found that the expansion joint here was one inch deep. In addition, unlike *Young*, there was a one-quarter-inch height differential between sidewalk flags.

The majority distinguishes the present case from *Young* on the ground that the defect in that case ran the full width of the sidewalk. Even if the sidewalk defects described in this case affect only a part of the sidewalk, which is not clear from the record, this cannot mean that such a defect is insignificant as a matter of law. In fact, the alleged defects here appear to be more substantial in nature than the defect at issue in *Young.*

Plaintiff's expert's report opining that the sidewalk defects meet the statutory definition of "substantial" also undermines defendants' argument. In *D'Amico v Archdiocese of N.Y.* (95 AD3d 601 [1st Dept 2012]), we found there was a question of fact as to whether the defect was trivial because the plaintiff's expert opined that the defect was "substantial" under 34 RCNY 2-09(f)(5)(iv). In *Narvaez v 2914 Third Ave. Bronx, LLC* (88 AD3d 500, 501 [1st Dept 2011]), we held that the report and affidavit of the plaintiff's expert stating that the raised sidewalk flag was a tripping hazard, along with the plaintiff's deposition testimony that she tripped as she was walking, looking

straight ahead, raised questions of fact as to whether the defect was trivial. So too, here, we should find that the contents of the plaintiff's engineer's report runs counter to the claim that the sidewalk defects were trivial.

Both 34 RCNY 2-09(f)(5)(viii) and section 19-152(a)(8) of the Administrative Code provide that noncompliance with the DOT specifications for sidewalk construction is a "substantial defect." Here, the reports of both the plaintiff's and defendants' engineers agree that DOT specifications provide that the sidewalk expansion joints in question "shall be" one-quarter-inch wide and "shall be" filled to the sidewalk surface with sealant. Both reports indicate that the sidewalk joint was over one-half inch. Therefore, one must conclude that the sidewalk in question does not comply with the DOT specification and is a "substantial defect" as a matter of law. However, the Gallery House defendants argue, without citing any authority, that the specification that an expansion joint "shall be" one-quarter inch refers to the required minimum dimension. Their engineer's report stated that it is accepted industry practice that expansion joints should never be less than one-quarter inch, but that expansion joints of more than one-quarter inch do not violate the DOT rules.

The DOT specifications, as written, do not suggest this interpretation. Rather, the specifications are clear when a required measurement is a minimum amount or a specific amount. For example, section 4.13.4(E) provides that "dummy scored joints *shall be not less than* one-half (1/2") inch in depth."[1] Therefore, the "shall be" language contained in the DOT specification pertaining to the expansion joint here indicates a required measurement, not a minimum.

Finally, the Gallery House defendants argue that the DOT specifications only govern construction of sidewalks, not maintenance. This assertion, even if correct, carries little weight because the report of plaintiff's engineer expert states that "[g]ood and accepted engineering and safety practice was violated" *at the time of construction* of the sidewalk.

Because the Gallery House defendants fail to meet their prima facie burden of demonstrating the absence of questions of fact, I would reverse the order granting the Gallery House defendants' motion for summary judgment and would grant plaintiff

---

[1] The City of New York Department of Transportation, Standard Highway Specifications, Volume I of II, http://www.nyc.gov/html/ddc/downloads/pdf/pub_intra_std/_DOT/hwy_std_specs_101101_vol_1.pdf (last updated Nov. 1, 2010) (emphasis added).

partial summary judgment only to the extent of finding that the sidewalk condition constituted a "substantial defect" as a matter of law. However, there remain triable issues of fact as to how the accident occurred and plaintiff's comparative negligence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 23, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse JJ.

10094 In re 20 Fifth Avenue, LLC, Index 109920/11
Petitioner-Respondent,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Appellants.

_____

Gary R. Connor, New York (Dawn Ivy Schindelman of counsel), for New York State Division of Housing and Community Renewal, appellant.

Bardavid Law, New York (Joshua E. Bardavid of counsel), for 20 Fifth Avenue Tenants Association, appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 10, 2012, affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Dianne T. Renwick
Leland G. DeGrasse, JJ.

10094
Index 109920/11

_____x

In re 20 Fifth Avenue, LLC,
Petitioner-Respondent,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Appellants.

_____x

Respondents appeal from the judgment of the Supreme Court, New York County (Eileen A. Rakower, J.), entered January 10, 2012, granting the petition to annul a determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated June 30, 2011, which vacated a percentage of a Major Capital Improvement rent increase that had previously been granted to petitioner building owner and ordered a refund of any increase collected from the tenants, and remanding the matter to DHCR for further proceedings.

Gary R. Connor, New York (Dawn Ivy Schindelman of counsel), for New York State Division of Housing and Community Renewal, appellant.

Bardavid Law, New York (Joshua E. Bardavid of counsel), for 20 Fifth Avenue Tenants Association, appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz, Sherwin Belkin and Phillip Billet of counsel), for respondent.

RENWICK, J.

In this appeal, we consider whether the New York State Division of Housing and Community Renewal (DHCR) is authorized to implement an apparently new policy to provide that when a building owner files a Major Capital Improvement (MCI) Application for exterior renovation (waterproofing and pointing), and defects (water damage) relating to the improvement are found in a relatively small number of the building's apartments, DHCR will deny the MCI application for all apartments in the building. We find that DHCR's failure to set forth its reasons for altering its policy – by going beyond the denial of the MCI as to the individual apartments affected – rendered its revocation order arbitrary and capricious.

Petitioner 20 Fifth Avenue, LLC is the owner of a residential apartment building located at 20 Fifth Avenue in Manhattan. The building contains 108 apartments, 72 of which are rent-regulated. 20 Fifth Avenue, LLC (the owner) spent approximately $987,229 to upgrade the building, which project involved interior renovation (intercom service, boiler/burner, elevator, water tank) and exterior renovation (pointing and waterproofing). The exterior renovation part of the upgrade cost $547,410.

An owner of rent-regulated apartments may seek to pass along the costs of an MCI to its tenants by filing an application with DHCR once the work is completed (*see* Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-511 [c][6][b]; Rent Stabilization Code [9 NYCRR] § 2522.4[a][2][i]). In June 2001, the owner applied to DHCR to increase the rents of its regulated apartments on the basis that the internal and external renovation project qualified as an MCI. Some tenants objected to the external renovation aspect of the application because the construction work had resulted in water from the exterior of the building seeping into their apartments and these conditions had not been rectified.

On June 11, June 22 and June 23, 2005, and January 31, 2006, a DHCR inspector examined the building and reported water infiltration and peeling paint, among other things, in 10 out of the 72 rent-regulated apartments. On March 3, 2006, the DHCR rent administrator (RA) granted an MCI rent increase with regard to the apartments unaffected by the water damage. With regard to the affected apartments, the RA held that they would be "exempted," that is, those apartments would be subject to the exterior renovation MCI increase only after the owner certified completion of necessary repairs to the apartments.

In response to the rent increase, 20 Fifth Avenue Tenants'

Association (tenants' association) filed a petition for administrative review (PAR). The tenants' association argued that DHCR should have disapproved of the entire exterior renovation MCI rent increase because the evidence of water damage to the 10 exempted apartments rendered the entire renovation work defective and "unworkmanlike."

On May 20, 2010, DHCR denied the PAR. Addressing the tenants' association's water damage objection, DHCR ruled that "[t]he fact that a limited number of tenants (in this case, 10 out of a total of 108) may be experiencing problems with the work is not sufficient to warrant a denial of the MCI rent increase." Instead, the DHCR found that "the Rent Administrator properly exempted only the affected apartments from the exterior restoration increase."

On August 25, 2011, the tenants' association commenced an article 78 proceeding seeking annulment of DHCR's determination. In its petition, the tenants' association reiterated its position that the exterior renovation MCI rent increase should be revoked as to all regulated apartments because of the water damage in the exempted apartments. DHCR cross-moved to remand the matter to DHCR for further proceedings. Specifically, DHCR stated that it "wishes to review its order and *evaluate our policy* governing the grant of MCI rent increase applications where problematic

conditions exist in individual apartments and/or common areas stemming from the MCI in question [emphasis added]"

By an order dated November 1, 2010, Supreme Court granted DHCR's cross motion, remanding the proceeding to DHCR. On remand, DHCR conducted new inspections of the exempted apartments. This time, the inspector found no evidence of water damages in four of the exempted apartments. Of the remaining six apartments, only one had a significant moisture reading ("100% percent wet") and "severe water damage and missing plaster." With regard to the remaining five apartments, the moisture meter read "dry," and water damage was limited to the exterior walls in the form of "cracking, bubbly, blistering and/or crumbling plaster and/or paint; stains."

On June 30, 2011, DHCR granted the tenants' association's PAR by revoking the MCI rent increase pertaining to the entirety of the exterior restoration work. In its "Revocation Order," DHCR explained that its inspections of the building in 2005 "found evidence of water damage in the walls of 10 out of 72 rent regulated apartments (14%), which indicates that the work, which was completed in 1999, was not sufficient to [] keep the premises free from water seepage." DHCR further noted that the "April 2011 inspections yielded "evidence of water damage at the exterior walls" in five apartments; that "severe water damage and

missing plaster was reported" in one apartment. DHCR noted that "[t]he 2011 inspection report further shows that the water damage occurred in the same areas of the apartments where damage was found by the previous inspections of 2005." Based upon this finding, DHCR issued a revised order in which it revoked the MCI increase for all apartments of the building.

On August 26, 2011, the owner commenced this article 78 proceeding, in which it requested judicial review of DHCR's revocation order. The owner argued that the revocation of the MCI increase for all apartments, based upon a finding of leak damage in only a few apartments, was contrary to law and should be annulled. Supreme Court agreed with the owner's arguments, noting that DHCR's longstanding policy of only exempting the particular apartments with a defect from the MCI increase had been affirmed by the courts, and DHCR's attempt to alter this policy during the pendency of an MCI application without setting forth its reasons for doing so was contrary to law. Thus, the court annulled DHCR's revocation order as being arbitrary and capricious.

DHCR then moved to renew based upon the Court of Appeals' determination in *Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal* (18 NY3d 446 [2012]), which was rendered after Supreme Court's decision and order dated December

21, 2011. Supreme Court denied renewal upon a finding that "the issue in *Terrace Ct.* was not the issue before this Court in its December 21, 2011 decision." Supreme Court explained that in *Terrace Ct.*, the Court considered "whether the [DHCR] is authorized to grant a major capital improvement rent increase while at the same time permanently exempting particular apartments from the obligation to pay additional rent when circumstances warrant" (*id.* at 450). Both the tenants' association and DHCR appealed.

We now affirm for the reasons set forth below. It is well settled that "[j]udicial review of administrative determinations is limited to whether the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Matter of City of New York v Plumbers Local Union No. 1 of Brooklyn & Queens*, 204 AD2d 183, 184 [1994], *lv denied* 85 NY2d 803 [1995]; CPLR 7803(3); *see also Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009], citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Further, the Court of Appeals has held that an administrative agency's determination is arbitrary and capricious when it "'neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same

facts'" (*Matter of Lantry v State of New York*, 6 NY3d 49, 58 [2005], quoting *Matter of Charles A. Field Delivery Serv.* [*Roberts*] 66 NY2d 516, 517 [1985]). "[A]n agency that deviates from its established rule must provide an explanation for the modification so that a reviewing court can 'determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision'" (*Terrace Ct,* 18 NY3d at 453).

When a party mounts an attack upon a decision by DHCR as inconsistent with prior determinations, our task is to examine DHCR's precedent in similar situations. In those cases where the DHCR has denied an exterior renovation (waterproofing and pointing) MCI rent increase outright in the first instance, this Court has upheld such determinations where the owner failed to prove that the work was necessary and comprehensive (*see e.g. Matter of Cenpark Realty Co. v New York State Div. of Hous. & Community Renewal*, 257 AD2d 543 [1st Dept 1999]; *Matter of Rudin Management Co. v New York State Div. of Hous. & Community Renewal*, 215 AD2d 243 [1st Dept 1995]). There is, however, no evidence that the DHCR has ever had a specific policy to deny a rent increase outright in the first instance in the type of situation, as here, where defects (water damage) relating to the improvement are found in a relatively small number of the

building's apartments. Nor does DHCR present any evidence of such policy.

On the contrary, in its order remanding the proceedings to DHCR, Supreme Court cited to an administrative determination, *Matter of Clermont Tenants Assoc.* (DHCR Admin Review Docket No. UA410049RT, at 2 [October 8, 2008]), where a DHCR rent administrator granted a MCI increase for an exterior renovation consisting of pointing and waterproofing, even though a DHCR inspector had found moisture-related damage in 25 apartments out of 400 apartments in the subject building. On their PAR, the tenants argued that the entire MCI application should have been denied, instead of the permanent exemption of the 25 apartments where water damage was observed. DHCR denied the PAR upon a finding that the defects (water damage) related to the improvement in about six percent of the apartments was insufficient to establish that the entire exterior renovation was defective.

We also take judicial notice of *Matter of Tenants of 315 W. 57th St, etc.* (DHCR Admin Review Docket No. ED 410066-RT, at 3 [February 12, 1993]), where a DHCR rent administrator granted a MCI increase for exterior renovation consisting of pointing and waterproofing, even though a DHCR inspector had found "exterior water seepage" in four apartments out of a 275-apartment

building. DHCR denied the PAR filed by the tenants upon a finding that the rent administrator did not err in "exempting these four apartments from the rent increase as opposed to denying the entire application on grounds that the work performed was not building-wide in that it did not inure to the benefit of all tenants." Hence, based on its own prior precedent, the DHCR should have exempted from the MCI rent increases only the relatively small number of apartments affected in this case.

DHCR makes no attempt to harmonize the facts of this case with the prior DHCR decisions. Instead, DHCR argues that when it sought remand, its "clear" intent was to "reexamine the specific facts of this case" to determine whether the exterior renovation work was performed in an "unworkmanlike manner." This argument, however, ignores the language of the request for remand, which states that it seeks "to review its order and evaluate our policy governing the grant of MCI rent increase applications where problematic conditions exist in individual apartments and/or common areas stemming from the MCI in question."

More importantly, DHCR does not argue - let alone establish - that the facts garnered during the second inspection provided a rational basis for overruling its prior decision and ignoring prior precedent. It is undisputed that the original DHCR inspection found defects relating to water seepage in only ten

apartments in a building containing 108 apartments. As indicated, DHCR initially found this insufficient to deny the entire MCI, as the condition was limited to a relatively few apartments and thus did not negate the fact that the work was comprehensive. The second DHCR inspection, which took place six years later, found even less damage relating to water seepage in only six apartments. It defies logic and common sense to: 1) initially find that "a limited number of tenants (in this case, 10 out of a total of 108)" that may be experiencing problems with the work is not sufficient to warrant a denial of the MCI rent increase; and 2) then render an opposite conclusion when conditions actually improve. Agency action must always be rational and decision making that is typified by erratic and unexplained changes in analysis is the antithesis of that standard and undermines the agency's rationale *(see Matter of Charles A. Field Delivery Service,* 66 NY2d at 516-517).

Finally, contrary to DHCR's contention, the Court of Appeals' recent pronouncement in *Terrace Ct.* does not mandate a different result. In *Terrace Ct.*, the owner of a building containing 91 residential apartments, 37 of which were rent-regulated, spent approximately $1.2 million to upgrade the building. The project involved pointing work and the replacement of masonry, lintels and parapets. In September 2005,

approximately 16 months after submission of the MCI application, a DHCR inspector and a Terrace Court employee inspected five allegedly damaged apartments. Each of these residences had walls in various states of disrepair and exhibited staining, discoloration, blistering or cracking. Actual moisture was detected in two of the apartments. The Court of Appeals held that the DHCR not only had the authority to grant an MCI increase while at the same time permanently exempting particular apartments from the obligation to pay additional rent, but that the circumstances of the case warranted such determination (18 NY2d at 450).

In this case, however, the determination to revoke the prior grant of a MCI increase with regard to the unaffected apartments (thereby denying the exterior MCI rent increase in its entirety), was arbitrary and capricious because the DHCR neither indicated a reason for its drastic penalty nor adhered to prior rulings in similar cases where, as in *Terrace Ct.*, only a few units were affected.

Accordingly, the judgment of the Supreme Court, New York County (Eileen A. Rakower, J.), entered January 10, 2012, granting the petition to annul a determination of respondent New York State Division of Housing and Community Renewal, dated June 30, 2011, which reduced a Major Capital Improvement rent increase

that had previously been granted to petitioner building owner and ordered a refund of any excess rent collected from the tenants, and remanding the matter to DHCR for further proceedings, should be affirmed, without costs.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 23, 2013

CLERK