At an IAS Term, Part 99, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of November, 2024.

P R E S E N T:

HON. RICHARD J. MONTELIONE,
Justice.

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MONIQUE RICHARDS,

Plaintiff,

-against- Index No.: 506841/2021

RANDAZZO ENTERPRISES, LLC AND THE BROOKLYN UNION GAS COMPANY D/B/A NATIONAL GRID NY, MS#1, #2, & #3

Defendants.

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The following e-filed papers read herein:	NYSEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	25-26, 40, 44-45, 59-60, 70
Opposing Affidavits (Affirmations)	71, 77-78
Affidavits/ Affirmations in Reply	79, 81

Upon the foregoing papers in this negligence action, plaintiff, Monique Richards, moves (in motion [mot.] sequence [seq.] one), pursuant to CPLR 3212, for partial summary judgment against defendants, The Brooklyn Union Gas Company d/b/a National Grid NY (BUG) and Randazzo Enterprises, LLC (Randazzo Enterprises).

BUG (in mot. seq. two) cross-moves, pursuant to CPLR 3212, for summary judgment to dismiss plaintiff's complaint and Randazzo Enterprises's crossclaim.

Randazzo Enterprises (in mot. seq. three) cross-moves, pursuant to CPLR 3212, for summary judgment to dismiss plaintiff's complaint and BUG's crossclaim.

Facts and Procedural History

The facts, supported by the evidence submitted, are as follows:

On April 28, 2020, at approximately 12:00 pm, plaintiff was walking along the sidewalk when she tripped and fell over a depressed gas cap in front of 269 Schenectady Avenue in Brooklyn (269 Schenectady), suffering multiple injuries. BUG, a utility company, owned the gas cap and Randazzo Enterprises owned 269 Schenectady which is adjacent to the sidewalk where the cap is located. Per photographs taken by plaintiff's investigator, Dennis Lalena, the depression was approximately nine inches wide by 1½ inches deep (NYSCEF Doc No. 36 at 9-10). The depression existed for quite some time as evidenced by Google Street View images dated May 2018 and June 2011 (NYSCEF Doc No. 31 at 4-5).

At her deposition, plaintiff stated that on the day of the accident, it was sunny outside and the sidewalk was dry (NYSCEF Doc No. 32 at 14-15, 71). Further, there no other pedestrians, debris, or construction obstructing her view of the sidewalk (NYSCEF Doc No. 32 at 20-21, 78), however, she admitted, she was not "look[ing] at the sidewalk" while she was walking (NYSCEF Doc No. 32 at 78).

BUG produced Walter Stone, a consultant who did record searches for the litigation (NYSCEF Doc No. 38 at 9, 11, 50). Stone, when looking at a picture of the gas cap that caused plaintiff's fall, stated that that it was one of BUG's gas caps and that there were no other companies that serviced 269 Schenectady (NYSCEF Doc No. 38 at 50).

Stone explained that "[i]t look[ed] like concrete was poured around [the gas cap] and then [someone] removed portions of the concrete to keep it -- to get some access to it. So it doesn't look like the cover sunk" (NYSCEF Doc No. 38 at 43).

Randazzo Enterprises produced Joseph Randazzo ("Mr. Randazzo"), whose father and uncle are the only members of the LLC (NYSCEF Doc No. 67 at 11). Mr. Randazzo is the property manager for several properties owned by defendant Randazzo Enterprises (NYSCEF Doc No. 54, Transcript13:4). He testified that Randazzo Enterprises did not do any work on the gas cap (NYSCEF Doc No. 67 at 28). No party produced any property records regarding sidewalk permits for repairs or installations regarding the subject sidewalk.

Plaintiff brought the instant action by filing a summons and complaint (NYSCEF Doc No. 1), alleging negligence against both defendants. Their respective answers (NYSCEF Doc No. 7 [BUG]; NYSCEF Doc No. 8 [Randazzo Enterprises]) were similar in that, while denying plaintiff's allegations, they also alleged a crossclaim for indemnification against the other codefendant, arguing that plaintiff's injuries stemmed from the other's negligence.

Plaintiff now moves for partial summary judgment on the issue of liability against both BUG and Randazzo Enterprises. She contends that BUG had a duty to keep the gas cap flush with the sidewalk under the Rules of City of New York Department of Transportation (34 RCNY) § 2-07 (b), and she can prove said violation as a matter of law under 34 RCNY 2-09 (f) (5) (iv). Her alternative argument, against Randazzo Enterprises, posits that it had a nondelegable duty to maintain the sidewalk abutting 269

Schenectady, pursuant to Administrative Code of City of New York § 7-210. BUG cross-moved for summary judgment to dismiss the complaint, arguing that the depression was de minimis and not actionable. Randazzo Enterprises also cross-moved for summary judgment to dismiss the complaint and argued, inter alia, that it did not owe a duty to plaintiff because § 2-07 (b) placed the duty solely on BUG. Although both cross-motions also sought dismissal of the respective crossclaim against each, neither defendant addressed the merits of their request in their papers.

Discussion

Standard of Review

On a motion for summary judgment, the court looks at the evidence in the light most favorable to the nonmoving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The initial burden lies with the moving party to show that there is no dispute of material fact and that he or she is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to meet this burden ends the court's analysis, i.e., the moving party is not entitled to summary judgment (*see Vega*, 18 NY3d 4 at 503). Thus if, and only if, the moving party meets its burden does the burden shift to the nonmoving party to show a dispute of material fact (*see id.*). "Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues (*Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 574 [2d Dept 2004] [internal quotation marks omitted]).

Plaintiff's motion against BUG and BUG's cross-motion

Plaintiff alleges that she tripped over a gas cap and under 34 RCNY § 2-07(b) "...owners of covers or gratings on a street are responsible for monitoring the condition of those covers and gratings and the area extending 12 inches outward from the perimeter of the hardware, and for ensuring that the hardware is flush with the surrounding street surface" (*see Torres v Sander's Furniture, Inc.*, 134 AD3d 803, 804 [2d Dept 2015]; *cf. Hickman v Medina*, 114 AD3d 907, 908 [2d Dept 2014]). However, at least one Court found that gas caps are not covered under this regulation. (*Torres*, 134 AD3d at 804; *but see Rojas v Con Edison*, 34 Misc 3d 69, 71 [App Term 2011] [holding that § 207 did not cover gas caps, therefore the landowner had a duty under § 7-210]). There is no question of fact that BUG owned the gas cap (NYSCEF Doc No. 38 at 50). BUG was responsible for ensuring that the gas cap did not constitute a dangerous condition (*see e.g. Kowalczyk v Time Warner Entertainment Co., L.P.*, 121 AD3d 630, 630-631 [1st Dept 2014]; *cf. Fajardo v City of New York*, 197 AD3d 456, 459 [2d Dept 2021]).

Although the statue requires "that the hardware is flush with the surrounding street surface" (*Torres*, 134 AD3d at 804), precedent demonstrates that courts have not interpreted the word "flush" in a technical or literal way and no liability attaches when the defect is trivial (*see Schiller v St. Francis Hosp., Roslyn, NY*, 108 AD3d 758, 759 [2d Dept 2013]; *see e.g. Hawkins v Carter Community Hous. Dev. Fund Corp.*, 40 AD3d 812, 813 [2d Dept 2007]; *Nathan v City of New Rochelle*, 282 AD2d 585, 585 [2d Dept 2001]). "In determining whether a defect is trivial, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect

along with the time, place and circumstance of the injury" (*Schiller*, 108 AD3d at 759 [internal quotation marks omitted]). This means that "there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable . . . , and therefore that granting summary judgment to a defendant based exclusively on the dimension[s] of the . . . defect is unacceptable" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015] [internal quotation marks and citation omitted]). Whether a defect constitutes a dangerous condition is typically a question of fact that belongs to the jury (*see Witkowski v Island Trees Pub. Lib.*, 125 AD3d 768, 769 [2d Dept 2015]; *Schiller*, 108 AD3d at 759).

While based on the particular circumstances of each case, there are commonalities on what constitutes a trivial defect. Defects that have been held as trivial involved small depressions of less than an inch that would have been apparent to an attentive pedestrian (*see e.g. Hutchinson*, 26 NY3d at 80 [¼-inch protrusion that was in a well-lit area in the middle of the sidewalk, making it easily identifiable]; *Rivera v City of New York*, 181 AD3d 479, 480 [1st Dept 2020] [water cap was ¼–½-inch below the sidewalk and plaintiff never alleged poor lighting]; *Melia v 50 Ct. St. Assoc.*, 153 AD3d 703, 703 [2d Dept 2017] [one-inch gap]; *Palladino v City of New York*, 127 AD3d 708, 710 [2d Dept 2015] [½-inch depression]; *Schiller*, 108 AD3d at 759-760 [½-inch gap, clear weather, and no other pedestrians]; *Milewski v Washington Mut., Inc.*, 88 AD3d 853, 854 , 856 [2d Dept 2011] [between a one and two-inch height differential and plaintiff had an unobstructed view of the defect]; *Losito v JP Morgan Chase & Co.*, 72 AD3d 1033, 1034 [2d Dept 2010] [sunny day and the plaintiff had a clear view of the defect]; *Murray v City*

of New York, 15 AD3d 636, 636 [2d Dept 2005] [½-inch height differential and the accident occurred "in broad daylight"]).

Despite the preceding, "even a physically small defect may be actionable, such as where there is a jagged edge, a rough, irregular surface, the presence of other defects in the vicinity, or poor lighting, or if the defect is located where people are naturally distracted from looking down at their feet" (*Poliziani v Culinary Inst. of Am.*, 167 AD3d 790, 791 [2d Dept 2018]; *cf. Chirumbolo v 78 Exch. St., LLC*, 137 AD3d 1358, 1359 [3d Dept 2016] [summary judgment for defendant where, inter alia, "[p]hotographs of the portion of the sidewalk at issue demonstrate that it is relatively smooth"]). Thus, in short, not every case is black and white, and granting summary judgment to either party would be premature when the facts are not as clearcut (*see e.g. Delaney v Town Sports Intl.*, 88 AD3d 635, 636 [2d Dept 2011] [1½-inch gap]; *Tese-Milner v 30 E. 85th St. Co.*, 60 AD3d 458, 458 [1st Dept 2009] [depression spanned more than seven inches by four inches and was more than ¾ inches deep, had uneven surface, and the expert called it unsafe]; *Mishaan v Tobias*, 32 AD3d 1000, 1001 [2d Dept 2006] [one-inch height differential and the sidewalk was cracked and broken]; *Tineo v Parkchester S. Condominium*, 304 AD2d 383, 383 [1st Dept 2003] [two-inch by two-inch by ¾-inch depression]; *McKenzie v Crossroads Arena, LLC*, 291 AD2d 860, 861 [4th Dept 2002], *lv dismissed* 98 NY2d 647 [2002] [abrupt height difference between concrete slab and the area was poorly lit]; *Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 165 [1st Dept 2000] [two-inch by two-inch by ¼-inch deep depression, plaintiff's expert stated that the defect

was a tripping hazard, and the defect was hard to see as it was in a heavily trafficked area]).

Addressing BUG's motion for summary judgment to dismiss the complaint, such relief must be denied. Even assuming that defendant met its burden by showing that nothing obstructed the depression, it was a clear day outside, and there were no other pedestrians around (*see e.g. Hutchinson*, 26 NY3d at 80; *Schiller*, 108 AD3d at 759-760; *Murray*, 15 AD3d at 636), all facts that the plaintiff concedes, the plaintiff raised an issue of fact, to wit, that Lalena's photographs show that the defect at issue was approximately nine inches wide and 1½ inches deep (NYSCEF Doc No. 36 at 9-10). Although the court is mindful that "there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Hutchinson*, 26 NY3d at 77 [internal quotation marks and citation omitted]), a defect of this size far exceeds what has been held to be trivial (*see e.g. id.* at 80; *Rivera*, 181 AD3d at 480; *Melia*, 153 AD3d at 703; *Palladino*, 127 AD3d at 710).

Moreover, the photographs show the defect as having a rough and uneven surface (*Tese-Milner*, 60 AD3d at 458-459). While its surface may not be "a jagged edge" (*Poliziani*, 167 AD3d at 791), neither is it "relatively smooth" (*Chirumbolo*, 137 AD3d at 1359) such that it clearly falls into one of the aforementioned cases. Accordingly, BUG is not entitled to judgment, as a matter of law, at this juncture.

Addressing plaintiff's motion for summary judgment, the court finds that she has failed to meet her initial burden and is likewise not entitled to summary judgment. Although the point heading of plaintiff's memorandum of law states that BUG violated §

2-07 (b), she argues only that "[BUG] should be found to have a duty to maintain the area of the sidewalk where plaintiff tripped in a reasonably safe condition" (NYSCEF Doc No. 40 at 4). As explained above, plaintiff is correct as to BUG's duty, however, neither of the cases she cites, *Flynn v City of New York* (84 AD3d 1018 [2d Dept 2011], *lv denied* 17 NY3d 709 [2011]) and *Lewis v City of New York* (89 AD3d 410 [1st Dept 2011]), held that the respective plaintiffs were entitled to summary judgment, and are distinguishable. In fact, in neither case did the respective plaintiffs *move* for summary judgment. *Flynn* held that a defendant property owner was entitled to summary judgment when a firefighter fell over a gate box containing a fire hydrant's valve because the City of New York had the responsibility maintain the valve, i.e., only the City could be liable (*see* 84 AD3d at 1019-1020). Meanwhile, *Lewis* held that a defendant property owner was entitled to summary judgment when the plaintiff tripped on the sidewalk adjacent to a metal grate that the utility company owned (89 AD3d at 410). Just like *Flynn*, *Lewis* explained that, as the owner of the grate, "only [the utility company], and not [the landowner], *may* be liable for plaintiff's injuries (*see id.* at 411 [emphasis added]).

Later in her memorandum, plaintiff asserts that 34 RCNY 2-09 (f) (5) (iv) defines what a substantial defect is as a matter of law, and that the defect here qualifies as such. The subsection does state what is considered to be a substantial defect, however, plaintiff's reliance on this section is misplaced. The section cited applies to sidewalk flags, not gas valve covers, and is therefore inapplicable to the matter at bar.

Since plaintiff failed to meet her initial burden of demonstrating entitlement to judgment as a matter of law (*Alvarez* at 324), the burden never shifted to defendants to

raise an issue of fact which would otherwise require a trial (*see Zuckerman v City of New York,* 49 NY2d 557 [1980]). Accordingly, that branch of plaintiff's motion, seeking summary judgment as against BUG is denied without regard to the sufficiency of the defendant's opposition papers (*see Vega* at 503; *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]; *Stukas v Streiter,* 83 AD3d 18 [2011]; *Tinsley v Bah,* 50 AD3d 1019 [2008]; *Joseph v Hampton,* 48 AD3d 638 [2008]).

Plaintiff's motion against Randazzo Enterprises and Randazzo Enterprises' Cross-Motion

4 RCNY 2-07 (b) reflects the following:

> (b) *Maintenance requirements.* (1) The owners of covers or gratings on a street are responsible for monitoring the condition of the covers, gratings and concrete pads installed around such covers or gratings and the area extending twelve inches outward from the edge of the cover, grating, or concrete pad, if such pad is installed.

The New York City Administrative Code § 7-210 "...generally imposes liability for injuries resulting from negligent sidewalk maintenance on the abutting property owners" (*Flynn,* 84 AD3d at 1019). However, *4 RCNY 2-07(b) may displace the abutting property owner's responsibility under § 7-210* when the defect is within 12 inches of the cover (*see e.g. Roman v Bob's Discount Furniture of NY, LLC,* 116 AD3d 940, 941 [2d Dept 2014] [*emphasis added*]; *cf. Shehata v City of New York,* 128 AD3d 944, 945-946 [2d Dept 2015]).

There is no issue of fact that BUG owned the gas cap. (NYSCEF Doc No. 68 at 44, 50). Joseph Randazzo's testimony essentially confirmed this (NYSCEF Doc No. 67 at 28). A reading of 4 RCNY 2-07 (b) would suggest that BUG is responsible for

There is no issue of fact that BUG owned the gas cap. (NYSCEF Doc No. 68 at 44, 50). Joseph Randazzo's testimony essentially confirmed this (NYSCEF Doc No. 67 at 28). A reading of 4 RCNY 2-07 (b) would suggest that BUG is responsible for maintaining the gas cover and 12" around the cover. But at least one case holds that a "gas valve cap...does not fall within the purview of Rules of the City of New York Department of Transportation (34 RCNY) § 2-07[b]). *See Bouratoglou v City of New York*, 51 Misc 3d 135(A), 36 NYS3d 406, 2016 NY Slip Op 50548(U), 2016 WL 1532601 [App Term 2016]. Joseph Randazzo's testimony (NYSCEF Doc No. 67 at 28, 49, 54) is inadequate to establish that Randazzo Enterprises did not create the condition complained of inasmuch as there is no indication that the gas cap was defective and no evidence of when the permits to install the sidewalks were obtained or who last did the work. It is not clear whether the gas cap's depression was a result of a lack of maintenance or whether a cement sidewalk installation did not account for the gas cap being level with the sidewalk, which has nothing to do with a defect of the gas cap (*see e.g. Fajardo*, 197 AD3d at 459; *Flynn*, 84 AD3d at 1019; *Hickman*, 114 AD3d at 908). In other words, it is unclear whether Randazzo created the condition.

Randazzo Enterprises failed to meet its prima facie burden and therefore the burden never shifted to plaintiff or BUG. (*See Vega*, 18 NY3d 4 at 503). In response, plaintiff argues only that New York City Administrative Code § 7-210 places a nondelegable duty on landowners, like Randazzo Enterprises, to maintain the sidewalk abutting its property (NYSCEF Doc No. 78 at 4-6). To the extent that plaintiff contends that Randazzo Enterprises had notice of the defect (NYSCEF Doc No. 78 at 6-7), such a

contention is insufficient. Even assuming Randazzo Enterprises had notice, there must also be a duty. Plaintiff must first establish that Randazzo Enterprises owed plaintiff a duty before attempting to establish that Randazzo Enterprises had notice (*see O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 106 [1st Dept 1996]; *see e.g. Adiutori v Rabovsky Academy of Dance, Inc.*, 149 AD2d 637, 638 [2d Dept 1989]). Notice, standing alone, does not create a duty (*see e.g. Vivas v VNO Bruckner Plaza LLC*, 113 AD3d 401, 402 [1st Dept 2014] ["[a]s [the defendant] had no duty to maintain the sidewalk, there is no need to address the issue of whether it had constructive notice of a dangerous condition"]).

As a result, that branch of Randazzo Enterprises' motion, seeking summary judgment dismissing plaintiff's complaint, is denied.

Branches of Defendants' Cross-Motions to Dismiss Cross-Claims

Although both BUG and Randazzo Enterprise sought summary judgment, dismissing the respective crossclaim against each, as mentioned above, neither address the merits of their request within their papers. As a result, neither is entitled to such relief and those branches are denied (*see generally Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2d Dept 2019])

Accordingly, it is hereby

ORDERED that plaintiff, MONIQUE RICHARDS' motion for partial summary judgment on the issue of liability against both defendant, RANDAZZO ENTERPRISES,

LLC and defendant, THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY (mot. seq. one), is DENIED as there are issues of fact; and it is further

ORDERED that defendant, THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY's motion for summary judgment dismissing both the plaintiff's complaint and defendant, RANDAZZO ENTERPRISES' crossclaim against it (mot. seq. two) is DENIED; and it is further

ORDERED that defendant, RANDAZZO ENTERPRISES, LLC's motion for summary judgment dismissing both the plaintiff's complaint and defendant, THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY's crossclaim against it (mot. seq. three) is DENIED; and it is further

ORDERED, that branch seeking dismissal of defendant, THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY's crossclaim against defendant, RANDAZZO ENTERPRISES, is DENIED.

The court, having considered the parties' remaining contentions, if any, finds them unavailing. All relief not specifically addressed herein has been considered and is DENIED.

This constitutes the decision and order of the Court.

ENTER,

HON. RICHARD J. MONTELIONE
J.S.C.