# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. DAKOTA D. RAMSEUR **PART 5**

*Justice*

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LILIA STREINGER,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY and CITY OF NEW YORK,

Defendants.

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**INDEX NO.** 152486/2017

**MOTION DATE** 3/3/20

**MOTION SEQ. NO.** 005

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion to/for DISMISSAL.

Plaintiff commenced this personal injury action against Defendants New York City Housing Authority (NYCHA) and the City of the New York (the "City"), alleging that she was injured in a trip-and-fall on a sidewalk at 530 West 55th Street in Manhattan on September 20, 2016. The City moves, pursuant to CPLR 3211(a)(7), to dismiss the Complaint and all cross-claims against the City, arguing in sum and substance that the City cannot be liable for Plaintiff's injuries because the location of the defect was entirely on NYCHA's property.[1] NYCHA opposes, and Plaintiff joins that opposition.[2] Having considered the papers, the Court denies the motion.

## BACKGROUND FACTS AND PROCEDURAL HISTORY

On September 20, 2016, Plaintiff fell on a sidewalk defect located at 530 West 55th Street in New York, New York, which—with the exception discussed below—is NYCHA's property (*NYSCEF 113* [NYCHA/Bass Affirm] ¶ 2, citing *NYSCEF 99* [*City Exh E/Pl Bill of Particulars*] ¶ 2). Relying, among other things, on the affidavit of Topographical Bureau Associate Hector Rivera (*NYSCEF 109* [*City Exh O/Rivera Aff*]), the City argues that it cannot be liable for Plaintiff's injuries because the defect is located "completely within [NYCHA's] property line"—that is, "within a five-inch setback between the property line and the physical building at 530 West 55th Street," and thus on property owned exclusively by NYCHA, a distinct entity (*id.* at ¶ 7; *NYSCEF 93* [*City/Weisberg Affirm*] ¶ 21, citing Public Housing Law ¶ 401). Rivera, whose

[1] While the City moves under CPLR 3211, NYCHA correctly responds utilizing CPLR 3212 and cases citing the latter because the City does not ask the Court to determine that Plaintiff's Complaint has stated (or could ever state) a cause of action against the City; rather, the City asks the Court to consider whether the evidence submitted demonstrates that the City is not liable based on—as the City alleges—the actual location of the subject defect. Given the narrow issue here, the distinction between CPLR 3211 and 3212 analysis is ultimately irrelevant.

[2] Because Plaintiff's opposition echoes NYCHA's, the Court refers only to the latter.

training "included being trained by...borough engineers...to read, analyze and facilitate changes to City maps," based his conclusion on: (1) 1975 architectural drawings; (2) a site visit; (3) a master City database which coordinates map and building data between borough presidents' offices and City agencies ("Pluto"); (4) a 1975 Building Location Plan; and (5) photographs (*NYSCEF 109* at ¶¶ 2-8).

NYCHA argues in opposition that: (1) Rivera's affidavit is insufficient because it does not attach all of the documents purportedly relied upon; and (2) that the documents which *are* attached to the affidavit are insufficient because, among other reasons, they lack a formal survey confirming and/or depicting the property lines as they actually exist, not as they appear in the architectural plans. In reply, the City: (1) contends that the documents not attached to Rivera's affidavit were immaterial to the subject property; and (2) acknowledges that "case law confirms NYCHA's position with respect to surveys and an affidavit from the surveyor," but argues that the City has "submitted the functional equivalent of a property survey to prove the location of NYCHA's property lines" (*NYSCEF 119* [City/Weisberg Affirm] ¶ 7, *et seq.*).

## DISCUSSION

Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact (*Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its prima facie showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]).

The parties do not dispute that the City would not be liable if the defect were, in fact, on NYCHA's property—nor could they reasonably do so (*Chernoguz v Mirrer Yeshiva Cent. Inst.*, 121 AD3d 737, 738 [2d Dept 2014] ["As a general rule, liability for a dangerous or defective condition on real property must be predicted upon ownership, occupancy, control, or special use of that property"]). Rather, the issue here is much narrower: whether the City's submission, including Rivera's affidavit, satisfies the City's *prima facie* burden of proving the defect's precise physical location as it actually existed on the date of Plaintiff's fall. Because doing so requires a survey, and because our legislature has explicitly defined a "survey," the City's submission, including Rivera's affidavit, is insufficient.

As NYCHA argues in opposition, courts finding that parties have met their *prima facie* burdens have uniformly relied upon the affidavit of a land surveyor and an actual survey (*see e.g. 70 Pinehurst Ave. LLC v RPN Mgt. Co., Inc.*, 123 AD3d 621, 621-22 [1st Dept 2014] [affidavit of a land surveyor who "*inspected and measured the property subsequent to the collapse of the retaining wall...*"] [emphasis added]; *Ruggiero v City School Dist. of New Rochelle*, 109 AD3d 894, 895 [2d Dept 2013] [school district established entitlement to summary judgment through

"evidence that the site of the plaintiff's accident was outside the School District's property line [including] *survey of its property depicting the property lines*, the plaintiff's deposition testimony identifying where the pothole was located in the road, a photograph marked by the plaintiff as depicting the area in the road where the defect which caused her to fall was located, and the deposition testimony of its own director of facilities that the School District did not maintain the City's roadways] [emphasis added], *see movant's affirmation* 2010 WL 6102256 at ¶ 11 [Sup Ct, NY County] [..."*As explained in the Affidavit of William Free, Surveyor for the School District*, surveys and maps were created which delineate the property line of the School District and the property line of the City which abuts the property of the School District. ..."] [emphasis added]); *Smith v 985 Amsterdam Ave. Hous. Dev. Fund Corp.*, 82 AD3d 426 [1st Dept 2011] [defendant met burden through "[t]he survey and the affidavit of the surveyor [which] both identify the raised portion of the concrete slab upon which plaintiff claimed to have tripped as being on the property adjacent to defendant's property."]; *Grullon v City of New York*, 297 AD2d 261, 263 [1st Dept 2002] [holding that defendant NYCHA's submissions, including competent expert evidence in the form of an affidavit and boundary survey by a licensed land surveyor, were sufficient to make a prima facie showing that NYCHA did not own or control the subject stairway, and that NYCTA employee's affidavit, based on review of NYCTA's internal records and inspection of the accident site, nor the record "identifies, or even hints at, any evidentiary basis for [the affiant's] purported belief in NYCHA's ownership of the stairway"]; *cf Seaman v Three Vil. Garden Club, Inc.*, 67 AD3d 889, 890 [2d Dept 2009] [denying summary judgment where survey was not in admissible form and unaccompanied by an affidavit from the surveyor]). Even where other submissions were considered, the submissions were still surveys—albeit unaccompanied by an affidavit—and were submitted in opposition to a motion for summary judgment, not as evidence to satisfy a *prima facie* burden (*see e.g. 70 Pinehurst Ave. LLC*, 123 AD3d at 621-22 [finding that two surveys were sufficient to raise a question as to the location of a wall because "...otherwise inadmissible evidence may be considered to *defeat* an application for summary judgment."] [emphasis in original]).

Notably, the City has not, even in reply, provided any cases utilizing the type of evidence submitted here—the affidavit of a topographical associate relying upon architectural drawings. Rather, the City argues that its submission satisfies "the spirit of the rule the Appellate Divisions intended to implement"—*i.e.* for summary judgment purposes, requiring a surveyor to conduct or interpret a survey to prove the location of property lines *as they actually exist*. Specifically, the City, relying upon a dictionary definition of "survey," argues that Rivera's affidavit interpreting NYCHA's architectural drawings, is the "functional equivalent" of a formal survey (*see NYSCEF 119* [City/Weisberg Reply Affirm ¶¶ 9-10, citing https://www.lexico.com/definition/survey [emphasis added] ["examin[ing] and record[ing] the areas and features of (an area of land) *so as to construct a map, plan, or description*"]). However, the City effectively reverses that definition by examining preexisting architectural drawings, as opposed to measuring the property to generate a representation of the property as it actually exists, or to accurately compare it to the preexisting plans.

Moreover, the New York Legislature has already defined "land surveying" in Education Law § 7203, which deals with the precise measurement of boundaries; more specifically, as

> practicing that branch of the engineering profession and applied mathematics which includes the measuring and plotting of the dimensions and areas of any portion of the earth, including all naturally placed and man- or machine-made structures and objects thereon, the lengths and directions of boundary lines, the contour of the surface and the application of rules and regulations in accordance with local requirements incidental to subdivisions for the correct determination, description, conveying and recording thereof or for the establishment or reestablishment thereof.

As the Fourth Department stated recently, "...as a general rule, a land surveyor is limited to the measuring and plotting of real property and its boundaries, structures thereon, etc., and may not design or evaluate utilities, structures, buildings, machines, equipment, processes, works, or projects," such practice being the privilege of engineers and, to a limited extent, architects (*Matter of Glogowski v County of Orleans*, 148 AD3d 1551, 1552 [4th Dept 2017], citing Education Law §§ 7201, 7301; *see also Samonek v Pratt*, 112 AD3d 1044, 1045 [3d Dept 2013] [holding that land surveyor's survey "defines the disputed area, which should be capable of measurement by the parties]). Indeed, as NYCHA argues, the architectural drawings relied upon by the City's affiant bear explicit disclaimers reading:

> These drawings have been conformed to reflect deviations from the Contract Documents during the construction period to the extent to which the Architect has been made aware of such deviations by others. The Architect, not having administered this project during the construction period cannot be responsible for discrepancies between these drawings and actual conditions (*NYSCEF 114* [*NYCHA Exh A*]).

Although the City dismisses these disclaimers as mere boilerplate, there is an important reason for the boilerplate: to warn those reviewing the document that "discrepancies between these drawings and actual conditions" may exist—discrepancies which could be revealed by a surveyor utilizing specialized tools to formally survey the property.

To the extent that the City alternatively argues that it did, in fact, provide two surveys—the October 10, 1975 Site Grading and Drainage Plan and Site Location Plan (*NYSCEF 109* [*City/Weisberg Reply Affirm* ¶ 11]), the Court rejects this argument given the disclaimer above that the documents do not reflect actual conditions at the location. To the extent that the City argues that NYCHA produced the two documents in response to a demand for surveys, ergo they are surveys, this is not only conclusory, but factually and legally unsupported. Moreover, accepting this argument would effectively penalize NYCHA for including, out of an abundance of caution, documents which could reasonably have been considered responsive to the City's post-EBT demands. Given that the City failed to attach surveys, and the Court's holding above that Rivera is not a surveyor, the City has not satisfied its *prima facie* burden.

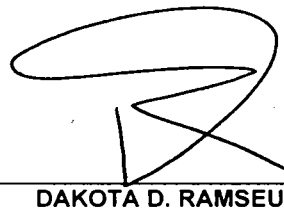
## CONCLUSION AND ORDER

For the above reasons, it is

ORDERED that the City's motion to dismiss (005) is DENIED; and it is further

ORDERED that NYCHA shall, by April 6, 2020, e-file and serve upon all parties a copy of this order with notice of entry.

This constitutes the decision and order of the court.



3/10/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

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