At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of May, 2020[1]

HONORABLE FRANCOIS A. RIVERA

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LEAH BRACHFIELD

Plaintiff,

DECISION & ORDER
Index No. 520955/17

- against -

MOSHE STERNLICHT and MINA STERNLICHT

Defendants

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of defendants Moshe Sternlicht and Mina Sternlicht (hereinafter defendants or the Sternlichts) filed on January 6, 2020, under motion sequence four, for an order pursuant to CPLR 2004, extending the defendants' time to move for summary judgment; and then granting summary judgment dismissing plaintiff Leah Brachfield's (hereinafter plaintiff or Brachfield) complaint pursuant to CPLR 3212. The motion is opposed by the plaintiff.

-Defendants' Notice of Motion
-Affirmation in Support
-Exhibits A-N
-Plaintiff's Notice of Cross Motion
-Affirmation in Support of Plaintiff's Cross Motion
and in Opposition to the Defendants' Motion
-Exhibits A-E
-Affidavits of the Plaintiff
-Defendants' Affirmation in Opposition to the Plaintiff's Cross Motion
and in Reply and in Further Support of Defendants' motion
-Exhibits A-D

[1]This is also the date the instant decision and order was electronically filed with the NYSCEF system.

-Affirmation in Reply
-Three Exhibits
-Defendants' Affirmation in Sur-reply

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of cross motion of the plaintiff filed on January 29, 2020, under motion sequence five, for an order finding that the home owners exception to New York City Administrative Code § 7-210 (b) does not apply; and granting summary judgment in favor of the plaintiff on liability pursuant to CPLR 3212. The motion is opposed by the defendants.

-Plaintiff's Notice of Cross Motion
-Affirmation in Support of Plaintiff's Cross Motion
and in Opposition to the Defendants' Motion
-Exhibits A-E
-Affidavits of the Plaintiff
-Defendants' Affirmation in Opposition to the Cross Motion
and in Reply and in Further Support of Defendants' Motion
-Exhibits A-D
-Affirmation in Reply
-Three Exhibits
-Defendants' affirmation in sur-reply

BACKGROUND

On October 30, 2017, plaintiff commenced the instant action for damages for personal injuries by electronically filing a summons and verified complaint with the Kings County Clerk's Office (hereinafter KCCO). On February 16, 2018, the Sternlichts joined issue by electronically filing a verified answer with the KCCO. On March 6, 2019, plaintiff filed a note of issue.

The verified complaint and verified bill of particulars have alleged the following salient facts. On November 13, 2014, Brachfield tripped and fell due to a dangerous and defective condition on the sidewalk adjoining a residential property (hereinafter the subject accident). The Sternlichts own the adjoining residential property located at 1740

46th Street, Brooklyn, New York (hereinafter the subject property). The Sternlichts allegedly caused the dangerous and defective condition by performing an improper repair of the sidewalk and by failing to maintain the sidewalk in a reasonably safe condition.

On April 22, 2019, plaintiff filed a cross motion under sequence number two (hereinafter plaintiff's prior motion) seeking, among other things, an order granting summary judgment in plaintiff's favor on the issue of liability pursuant to CPLR 3212; striking the defendants' answer pursuant to CPLR 3126; and setting the matter down for an immediate trial date on the issue of damages.

On May 3, 2019, the defendants filed a motion under sequence number three (hereinafter defendants' prior motion), seeking an order granting summary judgment on the issue of liability in the defendants' favor and dismissing the plaintiff's complaint.

By decision and order issued on June 28, 2019 (hereinafter the June 28, 2019 order), the Court denied plaintiff's prior motion under motion sequence number two for failure to make a prima facie showing of entitlement. In particular, the Court found that the plaintiff's motion papers did not set forth the exact location of the defect which allegedly caused the plaintiff's accident. The Court reserved decision on the defendants' prior motion. The Court also directed the parties to proceed with a discovery schedule set forth within the order and to complete all discovery by October 25, 2019.

By decision and order issued on August 26, 2019 (hereinafter the August 26, 2019 order), the Court denied defendants' prior motion for summary judgment under motion sequence number three without prejudice as premature. The defendants were granted

leave to move for summary judgment after the completion of discovery so long as their motion for summary judgment was filed on or before January 6, 2020.

MOTION PAPERS

The defendants' motion papers consist of a notice of motion, an affirmation of counsel and fourteen annexed exhibits labeled A to N. Exhibit A is copy of the plaintiff's summons and verified complaint. Exhibit B is a copy of the defendants' verified answer. Exhibit C is a copy of plaintiff's verified bill of particulars. Exhibit D is a copy of the June 28, 2019 order. Exhibit E is a copy of the August 26, 2019 order. Exhibit F is a cover letter dated December 13, 2019 from defendants' counsel to plaintiff's counsel asking for the plaintiff to sign the enclosed copy of the plaintiff's deposition conducted on November 21, 2019. Exhibit G is described as a photograph presented to the plaintiff at her deposition in which she marked the defect which allegedly caused the subject accident. Exhibit H is described as an ambulance call report. Exhibit I is a cover letter dated January 2, 2020, from plaintiff's counsel to the defendants' counsel asking for Moshe Sternlicht to sign a copy of his enclosed deposition conducted on December 4, 2019. Exhibit J is a cover letter dated January 2, 2020, from plaintiff's counsel to the defendants' counsel asking for Mina Sternlicht to sign a copy of her enclosed deposition conducted on December 4, 2019. Exhibit K is an affidavit of Moshe Sternlicht. Exhibit L is an affidavit of the Sternlichts' daughter, Bluma Bar Horins. Exhibit M is described as the certificate of occupancy from the New York City Buildings Information System website for the subject property. Exhibit N is described as a current computer print-out of the New York City Department of Buildings pertaining to the subject property.

The plaintiff's cross motion consists of the notice of cross motion, an affirmation of counsel, two affidavits of the plaintiff and five annexed exhibits labeled A to E. Exhibit A is a copy of photograph which plaintiff identified at her deposition as depicting the defect which caused the subject accident. Exhibit B is described as a deed to the subject property. Exhibit C is described as the deed to a house which the defendants' own and reside in which is not the subject property. Exhibit D is an affidavit from a nonparty pertaining to a different cause of action and concerning the subject property. Exhibit E is plaintiff's supplemental verified bill of particulars. The plaintiff's cross motion also serves as opposition to the defendants motion.

Defendants submitted an affirmation of their counsel and four annexed exhibits labeled A to D in opposition to plaintiff's cross motion and in reply and in further support of their motion. Exhibit A is an affidavit of the plaintiff and several photographs. Exhibit B is a copy of the June 28, 2019 order. Exhibit C is a copy of the August 26, 2019 order. Exhibit D is described as an excerpt from plaintiff's prior cross motion filed on April 22, 2019 and includes an unmarked photograph.

Plaintiffs have replied to defendants' opposition papers with an affirmation of counsel and three annexed and unlabeled discovery orders. Included is a preliminary conference order dated April 4, 2018, a central compliance order dated November 7, 2018; and a final conference order dated February 27, 2019.

The defendants submitted an affirmation of counsel as a surreply to plaintiff's reply papers.

LAW AND APPLICATION

Extension Pursuant to CPLR 2004

The August 26, 2019 order denied defendants' prior motion without prejudice as premature and granted the defendants leave to move for summary judgment after the completion of discovery so long as their motion for summary judgment was filed on or before January 6, 2020.

On January 6, 2020, the Sternlichts filed the instant, timely motion seeking an order pursuant to CPLR 2004, extending their time to move for summary judgment and then granting summary judgment dismissing the complaint pursuant to CPLR 3212.

The Sternlichts' motion papers included and relied on the deposition transcripts of all parties. The plaintiff was deposed on November 21, 2019 and the defendants were each separately deposed on December 4, 2019. All these depositions occurred less than sixty days prior to January 6, 2020, the date the instant motion was filed.

Sternlichts' counsel explained that the deposition transcripts were annexed unsigned because the sixty-day period set forth in CPLR 3116 for execution and return of those transcripts had not yet expired on the January 6, 2020 deadline for their motion to be timely filed. The defendants were only seeking an extension pursuant to CPLR 2004 in the event the Court were to find that the unsigned transcripts rendered the motion insufficient. In which case, they intended to use the extended time to get the transcripts properly executed and annexed to their motion.

Although each deposition transcript was unsigned, everyone one of them was certified by the court reporter who transcribed the deposition. Consequently, although unsigned, they were all admissible (*Tsai Chung Chao v Chao,* 161 AD3d 564, 564 [2nd Dept 2018] citing, *Franco v Rolling Frito–Lay Sales, Ltd.*, 103 AD3d 543 [1st Dept. 2013]; CPLR 3116 [a]). Furthermore, the unsigned deposition transcripts of the Sternlichts were also independently admissible pursuant to CPLR 3116 (a) because by submitting their own depositions to their motion, they adopted them as accurate (*E.W. v City of New York*, 179 AD3d 747, 747–48 [2nd Dept 2020] citing, *David v Chong Sun Lee*, 106 AD3d 1044, 1045 [2nd Dept 2013]). Accordingly, there is no reason to grant the Sternlichts an extension to supplement their motion papers.

Dismissal of the Complaint Pursuant to CPLR 3212

The Sternlichts seek dismissal of the complaint on two separate grounds. First, they claim that the plaintiff was unable to identify the location of the defect which caused the subject accident. Second they claim that the subject property is exempt from tort liability pursuant to the New York City Administrative Code §7-210 (b)(i) and (ii).

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]). A moving party must address the specific factual allegations set forth in the

complaint and the bill of particulars (*Parrilla v Saphire*,149 AD3d 856 [2nd Dept 2017], citing, *Terranova v Finklea*, 45 AD3d 572 [2nd Dept 2007]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b) a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Boyd v Rome Realty Leasing Limited Partnership*, 21 AD3d 920 [2nd Dept 2005]).

The Sternlichts contend that the plaintiff's deposition testimony was inconsistent in the description and in the location of the defect that caused the subject accident. A plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation (*see Kozik v Sherland & Farrington, Inc.*, 173 AD3d 994, 995 [2nd Dept 2019], citing, *Rivera v J. Nazzaro Partnership, L.P.*, 122 AD3d 826, 827 [2nd Dept 2014]).

A fair reading of the plaintiff's deposition, however, establishes that she alternately referred to what she tripped and fell on as crack or a hole in the sidewalk. She

also pointed out the defect in a photograph presented to her at the deposition. Viewing all the evidence in the light most favorable to the plaintiff, as the opponent of the motion for summary judgment, and resolving all reasonable inferences in her favor, the Sternlichts did not demonstrate that the plaintiff could not identify the location of the defect that caused her fall (*see Boyd*, 21 AD3d 920).

The Sternlichts contend that the subject property is exempt from liability pursuant to the residential homeowner's exemption set forth in the New York City Administrative Code §7-210. Administrative Code of the City of New York § 7–210, which became effective September 14, 2003, shifted 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 is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes (Administrative Code § 7–210 [b]; *Zorin v City of New York*, 137 AD3d 1116, 1118 [2nd Dept 2016]. This exemption recognizes the inappropriateness of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair (*Meyer v City of New York*, 114 AD3d 734 [2nd Dept 2014]; citing, *Howard v City of New York*, 95 AD3d 1277 [2nd Dept 2012]).

The deposition testimony of the Sternlichts, their respective affidavits, and the affidavits of their daughter and son-in-law, Bluma Bar-Horin and Jacob Bar-Horin, consistently averred the following facts. The Sternlichts purchased the subject property in 1999, retained ownership and gave their daughter Bluma Bar-Horin and her husband exclusive use of the residence as a gift. Their daughter and son-in-law accepted the gift,

took residence and remained there throughout, including the date of the subject accident. The Sternlichts have never resided in the subject property. The subject property was at all times, including the date of the subject accident, occupied solely as a single-family residence by the Sternlichts' daughter and son-in-law. The Sternlichts contend that these facts bring the subject property within the owner occupied residence exemption of Administrative Code § 7–210 [b] (i) and (ii). In further support, the Sternlichts cite, inter alia, *Lai-Hor Ng Yiu v. Crevatas*, 33 Misc3d 267 [S. Ct. Kings Co. 2011] and *Tatis v McNamara*, 2012 NY Slip Op 31966(U), [S. Ct., Queens County 2012] in support their contention.

The plaintiff does not dispute any of these facts. In fact, the plaintiff relies on these very facts to oppose the Sternlichts' motion and to support her cross motion. The plaintiff contends that the exemption is applicable to one-, two-, or three-family residential properties that are in whole or in part occupied by the owner and used exclusively for residential purposes. Plaintiff contends that although the Sternlichts own the subject property, they do not reside, and indeed have never resided in the subject property. They further contend that the fact that the subject property is used exclusively as a single family residence by the Sternlicht's daughter and son-in-law does not bring it back within the ambit of the exemption. In sum, the plaintiff contends that the ownership, occupancy and residential use of the property must all be by the owner and not by others, such as the owner's relatives, for the exemption to apply.

Generally, a legislative enactment that is unambiguous and whose purpose is unequivocal should be construed in accordance with the ordinary meaning of its words,

and literal and narrow interpretations that would thwart such purpose should be avoided (*Coogan v City of New York*, 73 AD3d 613, 614 [1st Dept 2010]). Administrative Code § 7–210 (b) is to be strictly construed as a statute creating liability in derogation of the common law (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520–21 [2008]).

On October 17, 2017, the Appellate Division First Department interpreted the meaning of the term "owner occupied" as used in Administrative Code § 7-210 (b)(i) in the matter of *Kalajian v 320 E. 50th St. Realty Co.* (54 AD3d 528, 529 [1st Dept 2017]). In *Kalajian*, the plaintiff in the underlying action alleged that she tripped and fell over a misleveled sidewalk slab between properties owned by Herbst and by appellants. Herbst moved for summary judgment dismissing the complaint and cross-claims as against her on the ground that she was exempt from personal liability for failure to maintain the sidewalk because her property was a "one-, two- or three-family residential real property that was (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

Herbst testified that the New York property was not her primary residence, which was in Israel, and that she also has a property in New Hampshire, which is where her driver's license was issued, and she received most of her mail. Her testimony indicated that she spent about three months in the United States the year the accident occurred and divided that time between New Hampshire and New York.

The Appellate Division interpreted the term "owner occupied" to mean that the owner regularly occupies the property as a residence. Applying that interpretation, the Appellate Division determined that Herbst was not an owner who regularly occupied the

subject property as her residence. Herbst was, therefore, not entitled to the exemption set forth in Administrative Code § 7-210 (b) (i) and (ii) and the order which granted Herbst's motion for summary judgment dismissing the cross claims against her was reversed.

"It is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 72 [b]), and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals" (*D'Alessandro v Carro*,123 AD3d 1, 6 [1st Dept 2014]).

Consequently, this Court may not apply the interpretation of "owner occupied" advanced by the Sternlicht and supported by the holdings in the matter of *Lai-Hor Ng Yiu v Crevatas* (33 Misc3d 267 [S. Ct. Kings Co. 2011]) and *Tatis v McNamara* (2012 NY Slip Op 31966(U), [S. Ct., Queens County 2012]). At this time, the Court is bound to apply the interpretation set forth by the Appellate Division First Department in the *Kalajian* decision.

Although there is no dispute that the subject property is a one-family residential property, or that the Sternlichts own the property, or that the property is used exclusively for residential purposes, the Sternlichts have failed to prove that they occupy the subject property. In this case, as in *Kalajian*, the Sternlichts did not demonstrate prima facie that they regularly occupy the subject property located at 1740 46th Street, Brooklyn, New York as their own residence, so as to be entitled to the benefit of the exemption provided

by Administrative Code §7-210 as a matter of law. Accordingly, the Sternlichts motion to dismiss the complaint is denied.

Plaintiff's Motion for Summary Judgment on Liability

The plaintiff has made a cross motion pursuant to CPLR 3212 for an order: (1) finding that the exception to New York City Administrative Code § 7-210 (b) does not apply to the subject property; and (2) granting summary judgment to plaintiff as to liability; and (3) setting the matter down for an immediate trial on the sole issue of plaintiff's damages.

The first branch of plaintiff's motion has been already addressed herein by the Court's denial of the Sternlichts' motion for summary judgment in their favor. The second branch of plaintiff's motion raises several procedural issues.

Pursuant to the Uniform Civil Term Rules of the Supreme Court, Kings County, a motion for summary judgment must be made no later than 60 days after the filing of the note of issue, unless leave of the court is obtained on good cause shown (*see Goldin v New York and Presbyt. Hosp.*, 112 AD3d 578, 579 [2nd Dept 2013], citing Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6).

In the instant matter, the note of issue was filed on March 16, 2019, and the plaintiff's cross motion was filed on January 29, 2020, over seven months late. Plaintiff's did not seek leave to make a late summary judgment motion or demonstrate good cause for the delay (*see* CPLR 3212 [a]; *Ade v City of New York*, 164 AD3d 1198, 1200-01 [2nd Dept 2018], citing *Courtview Owners Corp. v Courtview Holding B.V.*, 113 AD3d 722, 723 [2nd Dept 2014]). In the absence of a showing of good cause for the

delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious, non-prejudicial motion for summary judgment (*Bargil Assoc., LLC v Crites*, 173 AD3d 958, 958 [2nd Dept 2019] quoting *Bivona v Bob's Discount Furniture of NY, LLC*, 90 AD3d 796 [2nd Dept 2011]; *see also Brill v City of New* York, 2 NY3d 648, 652 [2004]).

Plaintiff has cited *Wernicki v Knipper* (119 AD3d 775, 776 [2nd Dept 2014]); *Braunstein v Half Hollow Hills Cent. Sch. Dist*. (104 AD3d 893, 894 [2nd Dept 2013]); and *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (71 AD3d 538, 540 [1st Dept 2010]) to support the contention that the untimely cross motion may still be properly considered by the Court.

The aforementioned cases cited by the plaintiff all stand for the proposition that an untimely motion or cross motion for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds (*Munoz v Salcedo*, 170 AD3d 735 [2nd Dept 2019]).

Plaintiff contends that by applying this principle, the Court may consider her untimely cross motion. Plaintiff's contention is correct for part of the cross motion. The branch of the cross motion seeking a finding that the exemption of Administrative Code section 7-210 (b) did not apply to the subject property may be properly considered. This branch was made on nearly identical grounds to the Sternlichts timely motion. It may therefore be considered and indeed has been addressed by the denial of the Sternlichts motion for summary judgment.

However, the branch of her cross motion seeking summary judgment in her favor on the issue of liability was based on common law negligence principles. In particular, the plaintiff claimed that the Sternlichts had constructive notice of the defective condition on the sidewalk adjoining the subject property and were therefore liable for the plaintiff's injuries. The Sternlichts' motion was not based on freedom of liability under common law negligence principles. Rather, the gravamen of their motion was based on the statutory owner occupied residence exemption of New York City Administrative Code § 7-210 (b). Therefore, this branch of plaintiff's untimely cross motion may not be considered.

It is also noted that the plaintiff's instant cross motion for summary judgment was made without seeking leave to reargue or renew pursuant to CPLR 2221. The plaintiff made a prior motion for summary judgment which was denied on the merits by the June 28, 2019 order. As such, it was also an improper successive summary judgment motion.

Based on the foregoing, the plaintiff has failed to demonstrate entitlement to summary judgment in her favor on the issue of liability, regardless of the sufficiency of the Sternlichts' opposition papers (*Kelly v Starr*, 181 AD3d 799 [2nd Dept 2020], citing, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

CONCLUSION

The motion of defendants Moshe Sternlicht and Mina Sternlicht for an order pursuant to CPLR 2004, extending their time to move for summary judgment is denied.

The motion of defendants Moshe Sternlicht and Mina Sternlicht for an order pursuant to CPLR 3212 granting summary judgment in their favor on liability and dismissing the complaint is denied.

The cross motion of plaintiff Leah Brachfield for an order pursuant to CPLR 3212 finding that the exemption of New York City Administrative Code § 7-210 (b) is inapplicable to the subject property has, in effect, been granted by the denial of the defendants' motion for summary judgment.

The cross motion of plaintiff Leah Brachfield for an order granting summary judgment in favor of the plaintiff on liability is denied.

The foregoing constitutes the decision and order of this Court

Enter:

Francis A. Rivera

J.S.C.