NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

LUIS CORVACHO,

Plaintiff,

- against-

MARJORIE ALACQUA and MARY TOM,

Defendants.

Index No. 703720/18

Motion Date December 17, 2019

Motion Cal. No. 10

Motion Seq. No. 1

The following papers numbered E24 to E35 and E37 to E41 read on this motion by defendants for summary judgment dismissing plaintiff's complaint, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	E24 - E35
Affirmation in Opposition - Exhibits.....	E37 - E40
Reply Affirmation.....	E41

Upon the foregoing papers, it is ordered that defendants' motion is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on December 25, 2016, as a result of a trip and fall due to a raised portion of the public sidewalk abutting defendants' premises, located at 32-32 85th Street, in County of Queens, City and State of New York. Defendants move for summary judgment and dismissal of plaintiff's complaint on the grounds that defendants did not create the defective condition; that they did not cause the defective condition to arise by virtue of their special use of the sidewalk abutting their property; and that they were not under a statutory duty to repair or maintain that sidewalk.

On a motion for summary judgment, the proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985]). Once the proponent has made this showing, however, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist requiring a trial (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]).

"An abutting landowner will not be liable to a pedestrian injured on a public sidewalk unless that landowner created the defective condition complained of, caused the defect to occur because of some special use, or a local ordinance or statute casts a duty upon the landowner to maintain and repair the sidewalk and imposes liability for injuries resulting from a breach of that duty" (*Pinn v Baker's Variety*, 32 AD3d 463 [2d Dept 2006]). Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a public sidewalk is liable for damages resulting from his or her failure to maintain the sidewalk in a reasonably safe condition except in the case of one, two, or three-family residential real property that is in whole or in part owner occupied and is used exclusively for residential purposes (*see generally Bisono v Quinn*, 125 AD3d 704 [2d Dept 2015]).

It is undisputed that defendants along with their brother, Nelson Han own the property located at 32-32 85th Street, that the property is a one-family dwelling, and that on the date of the accident, Han resided at the property. Therefore, defendants have established that they cannot be held liable pursuant to § 7-210 of the Administrative Code (*Saunders v Tarsia*, 124 AD3d 620 [2d Dept 2015]; *Lai-Hor Ng Yiu v Crevatas*, 103 AD3d 691 [2d Dept 2013]). Defendants have likewise established that they did not create the defective condition complained of by submitting deposition testimony and sworn affidavits that they did not make any repairs or alterations to the sidewalk at any time prior to plaintiff's accident (*Capobianco v Mari*, 267 AD2d 191 [2d Dept 1999]; *see Alekperova v Yuger*, 29 AD3d 610 [2d Dept 2006]). Consequently, whether or not defendants had notice of the alleged defective condition is irrelevant.

It is further undisputed that the defect to the sidewalk was caused by the roots of a tree. The photographs submitted reflect a raised and cracked sidewalk stemming from a tree. An abutting landowner is not responsible for damage caused to a sidewalk by the roots of a tree (*Missirlakis v McCarthy*, 145 AD3d 772 [2d Dept 2016] [quotation marks omitted]). Therefore, defendants have established a *prima facie* showing of entitlement to summary judgment.

In opposition, plaintiff has failed to raise a triable issue of fact. Contrary to plaintiff's contention, "neither Administrative Code of the City of New York § 19–152 nor 34 RCNY 2–09(f) expressly imposes liability for injuries resulting from a breach of the duty to maintain the public sidewalk" (*id.*).

Accordingly, defendants' motion for summary judgment, is granted and plaintiff's complaint is hereby dismissed.

Dated: July 13, 2020

DARRELL L. GAVRIN, J.S.C.

FILED
7/16/2020
10:03 AM
COUNTY CLERK
QUEENS COUNTY