SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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IVERY COLLIER,

Plaintiff,

- v -

THE CITY OF NEW YORK, 2247-2253 ACP OWNER LLC, JUST LORRAINE'S PLACE, LLC

Defendants.

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INDEX NO. 158607/2017

MOTION DATE 02/25/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff alleges that she fell on October 4, 2016, at approximately 11:30 a.m., as she was exiting a restaurant called "Just Lorraine's Place," due to an uneven cement ramp on the sidewalk located in front of 2247 Adam Clayton Powell Jr. Blvd (the "Premises"), in the County, City, and State of New York. Plaintiff commenced this action against defendants 2247-2253 ACP Owner LLC and Just Lorraine's Place, which collectively, plaintiff alleges generally own and/or operate the Premises. Plaintiff also commenced this action against defendant The City of New York (the "City").

Pending now before the court is a motion filed by the City seeking an order, pursuant to CPLR 3212, granting summary judgment in favor of the City, dismissing the Complaint and all cross-claims against the City.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

City's *prima facie* case

The City argues that it does not own the Premises; that the Premises is not exempt from the liability shifting provision of Section 7-210 of the Administrative Code of the City of New York; and that the City did not cause and create the condition that allegedly caused plaintiff's accident.

In support of its argument that it does not own the Premises, the City submitted the sworn Affidavit of David Atik, (NYSCEF Document # 44), who is employed by the City's Finance Department, and who conducted searches of the City's Property Tax System database with respect to the Premises. Mr. Atik avers that on October 4, 2016, the City of New York was not the owner of the Premises, and that the Premises was classified as Building Class C7 (walk-ups, over six families with stores), and not as a one-, two-, or three- family solely residential property.

In support of its argument that the City did not cause and create the condition that allegedly caused plaintiff's accident, the City submitted the sworn Affidavit of Henry Williams, (NYSCEF Document # 42), a paralegal at the City's Department of Transportation, who avers that he personally conducted a search for two years prior to and including plaintiff's alleged date of incident for permits, applications for permits, OCMC files, CARs, NOVs, NICAs, inspections,

maintenance and repair orders, sidewalk violations, contracts, complaints, and Big Apple Maps for the sidewalk located at Adam Clayton Powell, Jr. Boulevard (a/k/a Seventh Avenue) between West 132nd Street and West 133rd Street (on the side of 2247 Adam Clayton Powell, Jr. Boulevard) in the County, City, and State of New York. The City argues that the result of this search shows that the City did not cause or create the alleged condition.

Section 7-210 of the Administrative Code of the City of New York, states that "the owner of real property abutting any sidewalk, including, but not limited to; the intersection quadrant for corner property shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." *N.Y. Admin. Code, N.Y.C., N.Y.* §7-210 (2003).

The section further indicates that "[t]his subdivision shall not apply to one, two, or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes." *Id.* Also, "[n]otwithstanding any other provision of law, the City shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two-or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition." *Id.*

Based on the totality of evidence presented by the City, this court finds that the City satisfied its *prima facie* burden for summary judgment. The burden now shifts to the opposing party to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact.

Opposition

Neither defendant 2247-2253 ACP OWNER LLC nor defendant JUST LORRAINE'S PLACE, LLC opposed the City's motion. The only opposition was filed by plaintiff, who argues that this motion is premature, as the City has not yet been deposed. Further, plaintiff argues that photographs and the Big Apple Map movant exchanged "show a sidewalk construction defect that existed prior to 2003 sufficient to support a reasonable inference that the defect was caused when the City of New York constructed the sidewalk long ago." Plaintiff argues:

> The City of New York caused the condition when it built the sidewalk long ago as the photographs support the reasonable inference that the ramp is part of the sidewalk and was built with the sidewalk when the sidewalk was constructed long before September 14, 2003 as defendant does not exchange any sidewalk construction records at all and indeed certainly none before September 14, 2003.

The court finds this argument to be unavailing. First, there is no indication that co-defendants, who, generally, own and operate the Premises, oppose the City's central argument that the City is not responsible for the sidewalk at the Premises. Second, with respect to the argument about the Big Apple Maps, the exhibit submitted by plaintiff (titled "Big Apple Map Blowup in NYC Case Scheduling Order Response," NYSCEF Document # 58) is grainy, illegible, and does not include a map key to explain what any of the symbols on the map mean.[1] As noted above, it is plaintiff's burden to produce evidentiary proof *in admissible form* sufficient to establish the existence of material issues of fact. The copy that plaintiff submitted does not meet this burden, and is insufficient to defeat the City's *prima facie* showing. Plaintiff provides no other evidentiary proof to support his argument that the City caused or created the alleged defect at issue.

[1]Further, the City argued in its Reply that, assuming *arguendo* that the "I -" on the BAM submitted by plaintiff represents a cement ramp, the location of "I -" on the map is not in the same location as the cement ramp at issue here. The City argues that the "I – on plaintiff's map is between and in front of *2247 and 2245* Adam Clayton Powell Jr. Blvd., whereas the cement ramp at issue in this case is located between *2247 and 2249* Adam Clayton Powell Jr. Blvd.

Finally, with respect to plaintiff's argument that the City's motion is premature, this argument to be unavailing. First, a preliminary conference was held and a Case Scheduling Order was issued (NYSCEF Document #17). Second, documentary evidence has already been exchanged, pursuant to the discovery orders, about which plaintiff fails to assert any challenges or to contradict. Third, the City searched for, and produced, records relating to the alleged defect. Fourth, plaintiff's 50-h hearing was already held. Finally, despite claiming that the City's motion is premature, plaintiff fails to identify any key fact or offer any evidentiary basis to suggest that discovery may lead to relevant evidence, or that any fact essential to opposing the motion was exclusively within the knowledge and control of the City. *See* DaSilva v. Haks Engineers, Architects & Land Surveyors, P.C., 125 A.D.3d 480 (Sup. Ct. App. Div. 1st Dept. 2015) ("Contrary to plaintiff's contention, defendants' motions were not premature although discovery was incomplete. A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.) *and* A & W Egg Co. v. Tufo's Wholesale Dairy, Inc., 169 A.D.3d 616 (Sup. Ct. App. Div. 1st Dept. 2019) ("Since defendant could have opposed the motion based on its own documents, and pointed to no facts essential to its opposition that are in plaintiff's control, the motion was not prematurely decided before discovery").

For all of the aforementioned reasons, it is hereby:

ORDERED that the City's motion (Motion Sequence #001) is GRANTED; and it is further

ORDERED that the complaint and any cross-claims against the City are dismissed, with prejudice; and it is further

ORDERED that the caption of this action is amended accordingly (to remove the City of New York as a named defendant); and it is further

ORDERED that this action is randomly reassigned to a General IAS part; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This is the Decision and Order of this court.

4/13/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:	X	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE