

<b>Blaimayer v Calvert Lancaster Hous. Dev. Fund Co., Inc.</b>
2022 NY Slip Op 34254(U)
December 15, 2022
Supreme Court, New York County
Docket Number: Index No. 157605/2020
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

*Justice*

-----X

INDEX NO. 157605/2020

EDWIN BLAIMAYER,

Plaintiff,

MOTION SEQ. NO. 001

- v -

CALVERT LANCASTER HOUSING DEVELOPMENT FUND  
COMPANY, INC. and CALVERT APARTMENTS LLC,**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 41, 42, 43, 44, 45, 46

were read on this motion to/for

SUMMARY JUDGMENT

In this personal injury action, plaintiff Edwin Blaimayer moves, pursuant to CPLR 3212, for partial summary judgment on liability as against defendant Calvert Lancaster Housing Development Fund Company, LLC (“CLHC”). CLHC and defendant Calvert Apartments LLC (“Calvert Apartments”) oppose the motion. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND**

This case arises from an incident on June 4, 2020 in which plaintiff was allegedly injured when he tripped and fell on a defective sidewalk located adjacent to 164 East 122<sup>nd</sup> Street in Manhattan (“the building” or “the premises”). Doc. 1. Plaintiff commenced the captioned action by filing a summons and complaint against CLHC and Calvert Apartments on September 18, 2020, alleging that said defendants were negligent in their ownership, operation, control, maintenance, and repair of the premises. Doc. 1. Defendants joined issue by their answer filed December 3,

2020, in which they denied all substantive allegations of wrongdoing and asserted various affirmative defenses. Doc. 5.

On or about December 4, 2020, plaintiff served defendants with a notice to admit demanding that CLHC admit that it owned the premises. Doc. 6. It is undisputed that CLHC did not respond to the same.

At his deposition, plaintiff testified that he was injured when he tripped and fell on a raised portion of the sidewalk adjoining the premises. Doc. 24 at 30. Prior to his fall, plaintiff never had any problem with the sidewalk or complained to anyone about it. Doc. 24 at 79-80. During his examination before trial, plaintiff identified photographs, taken a week or two after the incident, which depicted him standing next to the sidewalk defect. Doc. 24 at 42. He identified the area of the sidewalk depicted in the photographs as where he fell and represented that the pictures fairly and accurately represented the condition of the sidewalk at the time of the occurrence. Doc. 24 at 42-49.

Craig Harty, director of maintenance operations for Hope Community Management (“HCM”), appeared for deposition on behalf of defendants. Doc. 26 at 12-13. Harty testified that HCM, a nonprofit corporation, managed 73 low income properties, including Calvert Apartments, which it had managed for approximately 10 years. Doc. 26 at 10-11. Harty did not know whether HCM had a contract with CLHC or Calvert Apartments. Doc. 26 at 39.

According to Harty, “two assistant facilities people” employed by HCM made “rounds of buildings periodically.” Doc. 26 at 14-15.<sup>1</sup> No logbooks or inspection records were generated as a result of these “rounds”, which included inspections of the exterior of the properties. Doc. 26 at

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<sup>1</sup> Harty said that the facilities people walked the buildings “weekly” but then explained that HCM “didn’t get to all buildings weekly” and that the frequency of the inspections “depend[ed on] what’s going on [during a] particular week.” Doc. 26 at 16.

17-18. HCM repaired sidewalk cracks in-house but if a problem was seen with a sidewalk slab or flag, it would have hired a contractor to repair it. Doc. 26 at 19-23. The building did not have a superintendent but it had a porter. Doc. 26 at 31. The porter was not required to conduct sidewalk inspections and Harty could not recall receiving any complaints about the sidewalks from the porter. Doc. 26 at 33. Nor was he aware of any complaints made about the sidewalk to HCM or of any prior accidents caused by the sidewalk. Doc. 26 at 36.

Harty admitted that photographs he was shown at his deposition reflected that there was a differential in the height of the sidewalk slabs. Doc. 26 at 48. He also admitted that a height differential between sidewalk slabs in excess of one inch would be a cause for him to order a sidewalk repair. Doc. 26 at 54-58. However, his testimony regarding his knowledge of any problem with the sidewalk was inconsistent. Specifically, he initially testified that he did not notice that the slab was raised prior to June 4, 2020 (Doc. 26 at 45), but then testified that one of the photographs he was shown at his deposition portrayed the uneven sidewalk and that the sidewalk was in that condition prior to June 4, 2020 (Doc. 26 at 47).

Plaintiff filed a note of issue and certificate of readiness on May 18, 2022. Doc. 18.

Plaintiff now moves, pursuant to CPLR 3212, for partial summary judgment on liability as against CLHC. Docs. 19-29. In support of the motion, plaintiff's counsel argues that plaintiff is entitled to summary judgment on liability since CLHC, as owner of the premises, was required by section 2-09.f.1 of the New York City Department of Transportation Highway Rules ("the DOT Rules") and section 7-210 of the Administrative Code of the City of New York ("the Admin. Code") to maintain the sidewalk adjoining the premises. Doc. 20. Counsel further asserts that section 2-09.5.iv of the DOT Rules and section 19-152 of the Admin. Code both define a tripping hazard to exist where the vertical differential between sidewalk flags is greater than or equal to

one-half of an inch. Doc. 20. Additionally, counsel maintains that CLHC had notice of the alleged condition since October 2017, more than 2 ½ years prior to the accident, because a Google street view photograph taken at that time depicts the condition. Doc. 20 at par. 12.

In support of the motion, plaintiff submits the affidavit of his expert professional engineer, Adam Cassel, P.E. of Paul J. Angelides, P.E. Forensic Architecture/Engineering and Investigation. Cassel states, based on his site inspection of July 21, 2020 as well as his review of photographs, deposition transcripts and pleadings, that it is his opinion, to a reasonable degree of engineering certainty, that: 1) the sidewalk was uneven along a transverse joint; 2) the height differential between the two slabs varied from a maximum 2¾ inches at the north end, which is closest to a nearby tree pit, and decreases to ¾ inches high at the south end; and 3) the height differential constituted a tripping hazard and substantial defect insofar as it exceeded the maximum ½ inch difference in elevation prescribed by §2-09(f)(5)(iv) of the DOT Rules and §19-152 of the Admin. Code. Cassel further represents, in essence, that CLHC had constructive notice of the damage done to the sidewalk by the tree roots since this condition developed over at least 2 ½ years, as demonstrated by the Google street view photograph taken in October 2017. Doc. 27 at par. 10.

In opposition, CLHC and Calvert Apartments argue that the motion must be denied because CLHC had no notice of the sidewalk defect. Doc. 41 at pars. 24-34. Specifically, they assert that plaintiff's argument regarding the existence of the condition in 2017 is speculative since the Google street view photograph does not indicate that a defect existed or, if it did, how large it was. Doc. 41 at pars. 29-32. They further contend that plaintiff cannot be granted summary judgment because there is a question of fact regarding whether his negligence caused or contributed to his injuries. Doc. 41 at pars. 35-40.

In reply, plaintiff maintains that CLHC had constructive notice of the dangerous condition insofar as the condition existed for such a long time prior to the incident that it should have had notice of the same. Doc. 44 at par. 4. Plaintiff further asserts that his expert, Cassel, attests to the fact that CLHC had constructive notice of the condition since the tree roots clearly broke the sidewalk over a period of time. Doc. 44 at par. 6. Additionally, plaintiff asks this Court to take judicial notice that the tree roots gradually damaged the sidewalk. Doc. 44 at par. 9.

### LEGAL CONCLUSIONS

It is well settled that a party moving for summary judgment pursuant to CPLR 3212 “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Summary judgment is a drastic remedy” (*Gonzalez v American Oil Co.*, 42 AD3d 253, 254 [1<sup>st</sup> Dept 2007]) and the “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). The failure of a party to meet this burden “requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (*Alvarez*, 68 NY2d at 324).

This Court finds that plaintiff has failed to meet its prima facie burden. The Admin. Code requires owners of real property abutting any public sidewalk to maintain that sidewalk in a reasonably safe condition (*Vargas v Weishaus*, 199 AD3d 620, 623-624 [1<sup>st</sup> Dept 2021] citing Admin. Code § 7-210; *Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 173-174 [2019]; *Tropper v Henry St. Settlement*, 190 AD3d 623 [1<sup>st</sup> Dept 2021]). By failing to respond to plaintiff’s notice to admit, CLHC is deemed to have admitted that it owned the premises (See CPLR 3123[a]). Although its duty as owner is nondelegable, the statute does not impose strict liability and, thus, plaintiff is still required to prove the elements of its negligence claim in order to hold

CLHC liable (*See Vargas*, 199 AD3d at 624 [citations omitted]). In order to establish a negligence claim against CLHC, plaintiff “must demonstrate that [CLHC] either created the condition that caused his accident, or that [CLHC] had actual or constructive notice of the hazardous condition before the accident and failed to correct it” (*Gonzalez v American Oil Co.*, 42 AD3d at 254 citing *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

In attempting to establish that CLHC had constructive notice, plaintiff’s expert, Casell, relies on the Google street view photograph which, he claims, was taken in October 2017. Doc. 27 at 5. CLHC correctly asserts that the photograph is inadmissible since there has been no evidence adduced that it accurately depicts the sidewalk as of the time of the accident (*Stadler v Lord & Taylor LLC*, 165 AD3d 500, 86 N.Y.S.3d 30 [1st Dept 2018] citing *Melendez v New York City Tr. Auth.*, 196 AD2d 460, 461 [1<sup>st</sup> Dept 1993]); *St-Cyr v NY City Tr. Auth.*, 2019 NY Slip Op 33846[U], \*4 [Sup Ct, NY County 2019] [Sokoloff, J.]).<sup>2</sup> Additionally, neither plaintiff’s counsel nor Casell explains how they know when the photograph was taken.

Even assuming, arguendo, that plaintiff could establish that the grainy Google street view photograph was created sometime in October 2017, it is clear from looking at the picture that it was taken at a considerable distance from the alleged height differential, thereby rendering it virtually impossible for anyone to conclude that a defect, significant or otherwise, existed at the subject location at that time (*cf.*, *Tropper v Henry St. Settlement*, 190 AD3d at 624-625 [1st Dept 2021] [summary judgment dismissing complaint reversed where plaintiff made prima facie showing, inter alia, that defendant had constructive notice of the allegedly dangerous condition]). Therefore, the motion is denied and a review of the opposing papers is unnecessary.

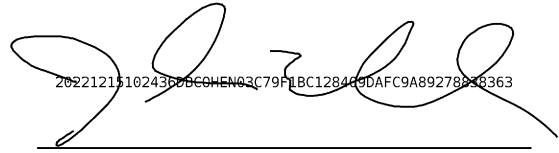
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<sup>2</sup> As noted previously, although Harty testified regarding the condition of the sidewalk at or about the time of the accident, his testimony was inconsistent.

The remainder of the parties' contentions are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the motion by plaintiff Edwin Blaimayer seeking partial summary judgment on liability pursuant to CPLR 3212 as to defendant Calvert Lancaster Housing Development Fund Company, LLC is denied.

  
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DAVID B. COHEN, J.S.C.

12/15/2022  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: