At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of July, 2023.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

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DAISY EWENS,

Plaintiff,

-against-

NAV 115-1701 LLC, ANGELA NAVARRA, ROSA NAVARRA, MARIA B. GALEANO, and AVENUES MENTAL HEALTH COUNSELING, PLLC,

Defendants.

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Index No. 508648/19

DECISION AND ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	85, 106
Opposing Affidavits (Affirmations)	134, 137, 140, 145
Affidavits/Affirmations in Reply	152, 153, 154, 156
Other Papers: Affirmations in Support	87, 108

Upon the foregoing papers, defendants NAV 115-1701 LLC, Angela Navarra ("Angela") and Rosa Navara ("Rosa") (collectively, "NAV") move (Seq. 05) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Daisy Ewens ("plaintiff"). Defendant Avenues Mental Health Counselling, PLLC ("Avenues") also moves (Seq. 06) for an order, pursuant to CPLR 3212, granting

summary judgment dismissing plaintiff's complaint. Plaintiff opposes both motions as does defendant Maria B. Galeano ("Galeano").

BACKGROUND

Plaintiff commenced this action to recover damages for personal injuries sustained on October 11, 2018 when she tripped and fell over a portion of the sidewalk abutting the properties at 115 and 117 Irving Avenue in Brooklyn. 115 Irving Avenue is owned by defendant NAV 115-1701 LLC, of which Rosa is a member. Angela is the property manager of 115 Irving Avenue. Avenues occupies the ground floor commercial space in 115 Irving Avenue pursuant to a lease. Galeano is the owner of 117 Irving Avenue.

According to her examination before trial (EBT) testimony, plaintiff was traversing the sidewalk which abutted the properties at 115 and 117 Irving Avenue when she tripped over an opening in a flagstone. Plaintiff testified that the height difference between the parts of the flagstone along the opening was approximately two inches. While photographs and a survey conducted on behalf of NAV indicate that the opening was on that part of the sidewalk abutting 117 Irving Avenue, not 115 Irving Avenue, the photographs also show that the particular flagstone in which the opening existed is adjacent to both properties. In addition to the EBT of plaintiff, EBTs were taken of Angela and Rosa on behalf of NAV, Alexandra Roldan on behalf of Avenues, and Galeano. A note of issue was filed on October 24, 2022. Subsequently, NAV and Avenues each brought the instant motions for summary judgment dismissing the complaint.

In support of their motion for summary judgment, NAV cites to portions of the EBT testimony of all parties, a survey and photographic evidence. At her EBT, plaintiff testified that she never observed the defect prior to her fall (Plaintiff EBT, NYSCEF Doc. No. 95, at 30)[1]; that she never observed any work being done on the sidewalk (*id.*, at 33); that prior to her fall she was looking straight ahead (*id.*, at 29); and that she had never spoken to the property owners of 115 or 117 Irving Avenue (*id.*, at 45). Galeano testified that she never received complaints regarding the condition of the sidewalk, nor any notifications of any sidewalk violations from the City of New York (Galeano EBT, NYSCEF Doc. No. 97 at 31, 50, 51), and that she never observed any defective concrete on the sidewalk in front of 115 or 117 Irving Avenue (*id.* at 26-27).

Roldan testified that with respect to sidewalk maintenance obligations in its lease, Avenues was only in charge of snow removal (Roldan EBT, NYSCEF Doc. No. 98 at 13) and that to her knowledge, no one associated with 115 Irving Avenue has ever been served with any tickets or violations in relation to the condition of the sidewalk (*id.* at 42). Rosa testified that she assists her mother, Angela, the property manager at 115 Irving Avenue, in drafting leases (Rosa EBT, NYSCEF Doc. No. 99 at 15); that no complaints had been made to her regarding the sidewalk (*id.*,at 18); and that she was not aware if 115 Irving Avenue has ever received any summons or violation from the City of New York with regard to the condition of the sidewalk (*id.*).

In addition to the foregoing EBT testimony, NAV cites to the survey, photographic evidence and those portions of the parties' EBT testimony demonstrating

[1] Page references are to pages of the NYSCEF document, not pages of the transcript.

that the defect was located in that part of the sidewalk abutting 117 Irving Avenue. The primary thrust of NAV's argument in support of summary judgment is that because the defect was not created by NAV and was not located on the portion of the sidewalk which abuts 115 Irving Avenue, NAV cannot be held liable for the defect.

DISCUSSION

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "'should only be employed when there is no doubt as to the absence of triable issues'" (*Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695, 696 [2d Dept 2015], quoting *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018]). The function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (see *Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]; *Dorival v DePass*, 74 AD3d 729, 730 [2d Dept 2010]; *Rudnitsky v Robbins*, 191 AD2d 488, 489 [2d Dept 1993]). Thus, summary judgment "should only be granted where there are no material and triable issues of fact," and "the papers should be scrutinized carefully in the light most favorable to the party opposing the motion" (*Gitlin v Chirinkin*, 98 AD3d 561, 561-562 [2d Dept 2012] [internal quotation marks omitted]; *Ptasznik v Schultz*, 223 AD2d 695, 696 [2d Dept 1996]).

Administrative Code of the City of New York § 7-210 shifts tort liability for injuries arising from a defective sidewalk condition from the City to certain abutting property owners. This statute provides, in relevant part:

> § 7-210. Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.
>
> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, 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. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags . . .

"[A] defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (*Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013]; *Madden v 3240 Henry Hudson Parkway, LLC*, 192 AD3d 1095, 1095-1096 [2d Dept 2021]). A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it reasonably could have been discovered and corrected (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Shehata v City of New York*, 128 AD3d 944, 945 [2d Dept 2015]). "To meet its [prima facie] burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell"

(*Pryzywalny v New York City Tr. Auth.*, 69 AD3d 598, 599 [2d Dept 2010][internal quotation marks omitted]; *Trinidad v Catsimatidis*, 190 AD3d 444, 444 [1st Dept 2021]).

NAV's Summary Judgment Motion

While the proof in the record demonstrates that the section of the sidewalk containing the defect did not abut NAV's property at 115 Irving Avenue, the proof also shows that the sidewalk flag containing the defect, consisting of a height differential between portions of the flagstone over which plaintiff allegedly tripped, extended onto NAV's side of the property line. To meet its prima facie burden, NAV is "required to do more than simply demonstrate that the alleged defect was on another landowner's property" (*Sangaray v West Riv. Assoc.*, LLC, 26 NY3d 793, 799 [2016]). It is required to make a prima facie showing that it maintained the portion of the sidewalk abutting its own property in a reasonably safe condition, or that any failure to do so was not a proximate cause of the plaintiff's injuries (*see id.* at 799-800; *Kuritsky v Meshenberg*, 211 AD3d 834, 836 [2d Dept 2022]). As previously noted, plaintiff described the defect as a raised portion of the flagstone with a differential height of two inches. Additionally, the photographic evidence suggests an uneven seam or joint.

NAV has not submitted proof to establish as a matter of law that this height differential was not caused or contributed to by a failure of NAV to properly maintain the section of the flagstone abutting 115 Irving Avenue (*Zborovskaya v STP Roosevelt, LLC*, 175 AD3d 1594, 1595 [2d Dept 2019]). Further, NAV failed to meet its initial burden of demonstrating that the defect did not exist for a sufficient length of time to permit discovery and correction (*see Shehata*, 128 AD3d at 946). The EBT testimony relied on

by NAV consists only of generalized denials of notice of the defect, and NAV has not presented evidence regarding when the section of the sidewalk in question, including the subject flagstone traversing the property line, was last inspected (*Kontorinakis v 27-10 30th Realty, LLC*, 172 AD3d 835, 836-837 [2d Dept 2019]).

As NAV has not met its initial burden to establish entitlement to judgment as a matter of law, its motion for summary judgment is denied.

Avenue's Summary Judgment Motion

Turning to the motion of Avenues, "a lessee of property which abuts a public sidewalk owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty" (*Martin v Rizzatti*, 142 AD3d 591, 592-593 [2d Dept 2016]; *Hsu v City of New York*, 145 AD3d 759, 760 [2d Dept 2016]). Additionally, "[a]s a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party" (*Hsu*, 145 AD3d at 760; *Martin*, 142 AD3d at 593). Only "where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk, [may] the tenant ... be liable to a third party" (*Hsu*, 145 AD3d at 760 [internal quotation marks omitted]; *Paperman v 2281 86th St. Corp.*, 142 AD3d 540, 541 [2d Dept 2016]).

While the subject lease was not filed as an exhibit in this action, the testimony of Rosa and Roldan demonstrates that Avenues' contractual responsibility for the sidewalk outside of 115 Irving Avenue was limited to snow removal. While plaintiff argues in opposition that there is an issue of fact as to whether Avenues fulfilled an obligation to maintain and repair the sidewalk, she offers no proof that the subject lease contained any comprehensive and exclusive maintenance obligation to subject Avenues to liability for defects in the sidewalk abutting its commercial space. As a result, Avenue's motion for summary judgment is granted.

The remaining contentions of the parties have been considered by the Court and are without merit.

CONCLUSION

Accordingly, it is hereby

ORDERED that NAV's motion for summary judgment (Seq. 05) is denied; and it is further

ORDERED that Avenues' motion for summary judgment (Seq. 06) is granted; and it is further

ORDERED that the complaint is hereby dismissed as to Avenues.

The foregoing constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. WAVNY TOUSSAINT
J. S. C.

KINGS COUNTY CLERK
FILED
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