SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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CYNDI COYNE,

Plaintiff,

- v -

THE CITY OF NEW YORK, NANCY B. HOFFMAN, NANCY B. HOFFMAN, S. DONADIC, INC, S.A. GAVISH, INC.

Defendants.

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INDEX NO. 151375/2020

MOTION DATE 03/02/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 62, 63, 64, 65

were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff alleges that she sustained personal injuries on July 24, 2019, when she tripped and fell due to a raised sidewalk in front of 72 Bank Street, New York, New York (the "subject premises").

Pending now before this court is a motion filed by defendants Nancy B. Hoffman and Nancy B. Hoffman AS TRUSTEE OF THE ESTATE OF ELLIOT L. HOFFMAN (collectively, the "Owner") seeking an order, pursuant to Civil Practice Law and Rules 3212, seeking summary judgment and a dismissal of plaintiff's complaint and any and all cross-claims.

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]).

Arguments Made by the Parties

It is undisputed that the Owner is the owner of the subject premises, and that the premises abuts the sidewalk where plaintiff fell. In its motion, the Owner argues that the subject premises is a two-family home[1], and hence, pursuant to Section 7-210 of the New York City Administrative Code (the "Administrative Code"), the owner is not responsible for the sidewalk abutting the subject premises.

Opposition papers were filed by plaintiff and by defendant The City of New York (the "City"). Neither opposing party disputes the Owner's contention that the subject premises is a two-family home, or the Owner's central argument that under the New York City Administrative Code, the owner of the subject premises would ordinarily not be responsible for the sidewalk abutting the subject premises. However, both opposing parties argue that the Owner has not settled questions of fact as to whether she may have actually caused or created the subject defect on the sidewalk.

Specifically, plaintiff argues that the sidewalk in front of the subject premises is constructed with unique materials made up of small squares of blue stone, which were installed by the Owner. Plaintiff argues that some time after the installation, root systems from an adjacent tree pushed up portions of the blue stone sidewalk, and that the Owner attempted to repair the raised section by adding earth. Plaintiff argues that in this circumstance, the Owner may have had

[1] The Attorney Affirmation filed in support (NYSCEF Doc. No. 33) states that the subject property is a single-family home, but the Owner's deposition (transcript at NYSCEF Doc. No. 41) makes clear that the subject property is a two-family home.

a continuing duty for the sidewalk abutting the premises, despite Administrative Code 7-210; and that there remain questions of fact as to whether installing a unique blue stone sidewalk is a "special use," and whether the Owner's attempted repair of the sidewalk by placing "earth" under the blue stone created the defective condition or worsened the condition of the sidewalk.

The City argues that an exception to Administrative Code 7-210 is when a party "causes and creates" a defect. The City argues that the Owner testified that she hired Iota Construction to install the blue stone on the sidewalk, but was unable to testify with any specificity about when any installations or repairs actually occurred. The City argues that the Owner stated multiple times at her deposition that she thinks she has records that would indicate when the blue stone was installed and repaired, but these records have never been produced to the City or other parties, even though demand was made for them. There is no evidence of when the work was performed, whether the blue stone was installed correctly and/or if there was ever an inspection done after its installation. Therefore, the City argues, there is an issue of fact of how the defect was created.

The City also argues that the Owner testified that she performed repairs to the subject location after contractors working next door allegedly caused a raised sidewalk flag. The Owner testified that "we tried to fix it [the sidewalk flag] a little," and that a man was hired to "put earth down" so that it would "be more balanced until such time as it could be professionally repaired." Therefore, the City argues, there is a question of fact as to whether the subsequent repairs to the sidewalk caused and/or created the alleged defect.

In Reply, the Owner argues that the sidewalk installation occurred years before plaintiff's accident, and hence any defect on the sidewalk does not meet the legal standard of being the "immediate result" of the Owner's installation. The Owner also argues that the Owner made no "special use" of the subject sidewalk.

Conclusions of Law

As noted above, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact, and summary judgment will only be granted if there are no material, triable issues of fact. Here, it is undisputed that the Owner arranged for the installation of the blue stone on the sidewalk where plaintiff fell, and it is also undisputed that later, when the Owner observed that the tree roots had pushed up some of the blue stone, the Owner hired a man to "put earth [..] so that it would be more balanced" (transcript at NYSCEF Doc. 41, page 34). This court finds that there remain material questions of fact as to whether the Owner caused or created the defect, or worsened any existing defect with her attempted repair.

With respect to the Owner's argument regarding the subject defect not being the "immediate" result of the installation of the blue stone sidewalk, the Owner is correct that "the affirmative negligence exception is limited to work […] that immediately results in the existence of a dangerous condition") Yarborough v City of New York, 10 NY3d 726 (2008). However, because the Owner is the movant here, the burden is on the Owner to provide reliable evidence as to when the blue stone was installed, and when the earth was set down. This court finds that the Owner has not met this burden.

First, the Owner's deposition testimony was vague as to dates. Some portions of the deposition include:

> p. 22 – 23
> Q. When did you first notice that one section of sidewalk was higher than the other in that location where the darker and lighter pieces of slate meet?
> A. I don't remember.
> Q. Do you know how long that condition existed or was in existence prior to July 24, 2019?
> A. No.
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> p. 24
> Q. I want to make sure you understood my question. If I asked you when it was that you first consulted someone in order to repair the raised sidewalk section that we pointed out, what would be the answer?

A. I don't remember exactly when.

p. 24
Q. When was the sidewalk repaired?
A. I can't remember.
Q. If I mention the July 24, 2019, was it after July 24, 2019?
A. Yes.
Q. Was it before the pandemic started or after.
A. I don't remember. I'm very bad with dates.

Second, it is undisputed on this record that plaintiff subsequently served a Demand on Owner (NYSCEF Doc. No. 51) for the documents referenced in Owner's deposition transcript, but Owner failed to respond to the demand. Absent such disclosures, there is no evidence on this record to conclude that the installation of the blue stone sidewalk and the Owner's repair of the sidewalk was remote enough in time so that the work did not "immediately" result in the existence of the subject defect, as there is no reliable source of information regarding the timeline.

Finally, regarding special use, "It is well settled that the owner or lessee of land abutting a public sidewalk owes no duty to the public to keep the sidewalk in a safe condition unless the landowner or lessee creates a defective condition in the sidewalk or uses it for a special purpose" (Gage v City of New York, 203 AD2d 118 [1st Dept 1994]). The Owner argues that the blue stone slabs, which stretch an entire block on the public sidewalk, cannot constitute special use, as they do not benefit the Owner directly. The Owner argues that the City of New York specifically permits the installation of blue stone as acceptable material for sidewalk construction, and that a material that is legal under the City's regulations used as sidewalk material cannot be deemed "special use." The court finds these arguments to be unavailing, as the Owner fails to provide any basis in law to support the argument that use of a permitted material precludes the "special use" of the space.

Moreover, with respect to whether the blue stone slabs were a benefit to Owner directly, the record is devoid of any evidence as to why the blue stone slabs were installed at all. The Owner testified that the blue stone was already on the sidewalk when the Owner purchased the house (deposition transcript p. 20), and that, "The City broke the sidewalk with pods that they used -- I don't remember what they were doing to the fire hydrant something and they mangled the sidewalk which had to be repaired so Iota repaired it" (p. 20). It is unclear why the Owner undertook the repair of the sidewalk, as opposed to having the City effectuate the repair, or why the Owner chose to use blue stone as opposed to another material. On this record, it cannot be said that the Owner has quieted any questions of fact as to whether she made special use of the sidewalk in installing the blue stone. *See also*, Gage, *supra* (denying summary judgment in favor of Owner and finding that: "Here, movant is the owner of a theatre establishment, the lessee of which, with its knowledge and consent, installed terrazzo tile on the sidewalk abutting the entrance of the theatre, underneath the marquee. Plaintiff purportedly tripped and fell in a hole in the terrazzo tile. The IAS Court properly determined that terrazzo sidewalk tile was installed for the special use or benefit of the owner lessor of the abutting premises, which improvement the owner then became obligated to properly maintain and properly").

Conclusion

For all the reasons stated above, it is hereby:

ORDERED that this motion is DENIED.

7/29/2023
DATE

J. MACHELLE SWEETING, J.S.C.

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