SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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DILIA COLLAZO,

Plaintiff,

- v -

CALVERT LANCASTER HOUSING DEVELOPMENT FUND COMPANY, INC.,CALVERT APARTMENTS LLC,HOPE COMMUNITY, INC.,172 EAST 122ND ST. LLC,BATIA REALTY CORP., THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK DEPARTMENT OF PARKS AND RECREATION

Defendants.

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INDEX NO. 154093/2022

MOTION DATE 05/07/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

In the underlying action, plaintiff DILIA COLLAZO claims that on February 17, 2021, she was lawfully traversing the public thoroughfare and/or sidewalk located on the southern side of East 122nd Street, between Lexington Avenue and Third Avenue, in the City, County and State of New York, when she was injured because she was caused to trip, fall and be violently precipitated to the ground.

Pending now before the court is a motion where defendants Calvert Lancaster Housing Development Fund Company, Inc., Calvert Apartments LLC, and Hope Community, Inc. (collectively, the "Calvert defendants") seek an order, pursuant to Civil Practice Law and Rules 3212, dismissing plaintiff's complaint and all cross-claims as against the moving parties.

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

The following is undisputed: Plaintiff fell on the sidewalk located on the southern side of East 122nd Street, between Lexington Avenue and Third Avenue. Adjacent to the subject sidewalk are four properties: 180 East 122nd Street, 172 East 122nd Street, 170 East 122nd Street and 164 East 122nd Street. For ease of reading, these will be referred to, respectively, as "180," "172," "170" and "164."

The Calvert defendants argue that they own the properties at 180 and 164, but not the properties located at 172 and 170. They argue that 172 is owned by defendant 172 EAST 122ND ST. LLC., and that 170 is owned by defendant BATIA REALTY CORP. The Calvert defendants argue that the location of plaintiff's accident, as described by plaintiff and indicated in the photographs exchanged by plaintiff identifying the specific location of the accident, clearly show that plaintiff fell on the sidewalk adjacent to either 170 or 172. The Calvert defendants argue that they do not own, operate, maintain, control or otherwise have any association with the premises upon which plaintiff's accident occurred, and hence had no legal duty to maintain the property in a safe condition and cannot be held liable for any alleged dangerous condition.

In support of these arguments, the Calvert defendants submit two exhibits. The first is photographs of the accident location (NYSCEF Doc. No. 44), and the second is a sworn Affidavit by Walter Roberts (NYSCEF Doc. No. 43), which states, in part:

> 1. I am employed by HOPE COMMUNITY, INC. as Executive Director and have held that position since January 2010.
>
> 2. HOPE COMMUNITY, INC. is the managing agent for CALVERT LANCASTER HOUSING DEVELOPMENT FUND COMPANY, INC. and CALVERT APARTMENTS LLC.
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> 3. As part of my responsibilities, I am familiar with the properties owned, maintained, leased, managed or operated by CALVERT LANCASTER HOUSING DEVELOPMENT FUND COMPANY, INC., CALVERT APARTMENTS LLC, and HOPE COMMUNITY, INC.
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> […]
>
> 5. Defendant, CALVERT LANCASTER HOUSING DEVELOPMENT FUND COMPANY, INC. is the owner of 180 East 122nd Street, New York, NY.
>
> 6. Defendant, CALVERT APARTMENTS LLC. is the owner of 164 East 122"d Street, New York, NY.
>
> 7. Defendants, CALVERT LANCASTER HOUSING DEVELOPMENT FUND COMPANY, INC., CALVERT APARTMENTS LLC, and HOPE COMMUNITY, INC. do not own, operate, lease or maintain the properties located at 170 and 172 East 122nd Street, New York, N.Y.
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> 8. I reviewed the photographs plaintiff provided which identifies the exact location of her accident. (Photographs annexed hereto as Exhibit "A")
>
> 9. In photograph one, a portion of 180 East 122nd Street is depicted. Also depicted is a parking area enclosed by a fence that is situated next to the property located at 180 East 122nd Street, New York, NY. (Exhibit "A")
>
> 10. The fenced in parking area adjacent to 180 East 122nd Street is not part of the property designated as 180 East 122nd Street, New York, NY nor is it part of the property designated as 164 East 122nd Street, New York, NY.
>
> 11. The fenced in parking area adjacent to 180 East 122nd Street is not owned, operated, leased or maintained by defendants, CALVERT LANCASTER HOUSING DEVELOPMENT FUND COMPANY, INC., CALVERT APARTMENTS LLC, and HOPE COMMUNITY, INC HOPE COMMUNITY, INC.

In opposition, plaintiff argues that the Affidavit should be disregarded because Mr. Roberts failed to reveal any deed, legal description, or land survey he reviewed, and failed to describe any experience he has in determining where the specific property lines extend to and from. Plaintiff argues that movants also failed to submit a legal description, survey, report and/or affidavit of a surveyor, and thus cannot and have not established, as a matter of law, that the area where plaintiff fell was not within their boundaries. Finally, plaintiff argues that the Calvert defendants failed to address whether they affirmatively caused or created the defect that caused plaintiff to trip, or put the subject sidewalk to a "special use" for their own benefit.

In Reply, the Calvert defendants argue that neither defendant 172 EAST 122ND ST. LLC. nor defendant BATIA REALTY CORP. have appeared in the action, and plaintiff failed to timely move for a default judgment against either defaulting party.

Conclusions of Law

It is undisputed that the Calvert defendants own 180 and 164, but not 177 or 170. However, the court finds that the Calvert defendants have failed to meet their burden, as the Affidavit from Mr. Roberts is not sufficient to show that the accident occurred at a location that was not owned by the Calvert defendants. Mr. Roberts states that he is the Executive Director of HOPE COMMUNITY, INC., which is the managing agent for CALVERT LANCASTER HOUSING DEVELOPMENT FUND COMPANY, INC. and CALVERT APARTMENTS LLC, and that as part of his responsibilities, he is “familiar with the properties owned, maintained, leased, managed or operated by” all of the Calvert defendants. However, it is unclear on this record what the “Executive Director” position entails; what it means that HOPE COMMUNITY, INC. is the “managing agent” for the Calvert defendants; or the basis of Mr. Robert’s “familiarity” with the

property lines. As plaintiff properly argues, Mr. Roberts did not state that he reviewed any deed, legal description, or land survey, and failed to describe any experience he has in determining where the specific property lines extend to and from. The moving Calvert defendants also failed to submit a legal description, survey, report and/or affidavit of a surveyor to show that the area where plaintiff fell was not within their boundaries.

See Diaz v Brooks Shopping Centers LLC, 228 AD3d 403 (1st Dept 2024):

> In support of their motion for summary judgment, the Merchant defendants relied on those admissions and submitted evidence, including the affidavit of a corporate officer ***and a property tax record***, which established that, on the date of the accident, they did not own, manage, or control the property. They ***also submitted a management agreement*** between Brooks and Marx Realty, which showed that Marx Realty became the property manager as of January 1, 2020, over two years after the alleged accident […] the property tax record supported the fact that Brooks, not Marx Realty or Merchant, owned the property at the time of the accident [emphasis added];

Grullon v City of New York, 297 AD2d 261 (1st Dept 2002):

> Plaintiffs do not dispute that NYCHA's submissions in support of its summary judgment motion, including competent expert evidence in the form of an affidavit ***and boundary survey by a licensed land surveyor***, made a *prima facie* showing that NYCHA did not own or control the stairway in question, thereby shifting to plaintiffs the burden of coming forward with admissible opposing evidence sufficient to raise a triable issue of fact. Contrary to the view of the motion court, plaintiffs plainly failed to carry this burden. [internal citations omitted; emphasis added].

See also Doros v City of New York, 216 AD2d 196 (1st Dept 1995):

> Here, the affidavit of Haruhito Matsuda, who identified himself as a vice-president of defendant KG Land New York Corp., was insufficient as a matter of law to establish defendants' right to summary judgment dismissing the complaint. The affidavit did not establish the relationship of the defendants to each other or to the property or Mr. Matsuda's relationship to any of the defendants […]. ***Nor did it establish the basis of Mr. Matsuda's averred knowledge*** that none of the defendants had participated in snow removal on the sidewalk abutting the subject premises on the date in question. As such, defendants failed to establish, at the outset, that they were entitled to summary judgment, and their motion should have been denied [emphasis added];

Ulloa v Inc. Vil. of Freeport, 184 AD3d 762 (2d Dept 2020):

> JB moved for summary judgment shortly after issue was joined, and before the other defendants had filed their answers. The motion was supported by the affidavit of JB's owner, Josue Bermudez, who averred, without any supporting documentation, that JB did not own, control, occupy, or maintain the subject property. Bermudez acknowledged, however, that JB had been retained to list the subject property for sale. In opposition, ***the plaintiff argued, inter alia, that the motion papers were***

deficient because JB failed to attach any supporting documentation, including a copy of the agreement it had entered into with the owner of the property […] Under the circumstances presented, we agree with the plaintiff that JB failed to establish its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it. [emphasis added]

Conclusion

For the reasons cited above, it is hereby:

ORDERED that this motion is DENIED.

11/15/2024
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**