SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ANNA GIBSON,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, 780 RIVERSIDE OWNER LLC, YMY MANAGEMENT CORP

Defendants.

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INDEX NO. 150116/2020

MOTION DATE 10/06/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39

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

In this action, plaintiff alleges that she sustained serious personal injuries when she fell on March 7, 2019 on the sidewalk in front of 780 Riverside Drive, New York New York.

Plaintiff initially filed two separate actions. The first action was against The City Of New York, New York City Department Of Parks And Recreation, and the New York City Department Of Transportation (collectively, the "City entities"), and the second action was against 780 Riverside Owner LLC (the "Owner"), which owned the building in front of which plaintiff fell, and YMY Management Corp, the property manager for the building. On September 9, 2020, the court (Hon. Laurence L. Love) issued an order consolidating the two actions.

Pending now before the court is a motion filed by plaintiff seeking an order, pursuant to CPLR 3212(b), granting partial summary judgment in plaintiff's favor against the Owner. Upon the foregoing documents, this motion is DENIED as premature.

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]).

Instant Filings

Plaintiff argues that the condition that caused her to trip and fall was a "raised sidewalk flag" that presented a tripping hazard for pedestrians. Plaintiff argues that at the time of her fall, the sidewalk flag was "three to four inches" higher than the surrounding sidewalk surface.

Plaintiff argues that as the owner of the abutting property, the Owner had a non-delegable statutory duty under Section 7-210 of the Administrative Code of the City of New York to inspect, maintain and repair the sidewalk. Plaintiff does not argue strict liability, but instead seeks a finding that the Owner was, as a matter of law, negligent in allowing the sidewalk abutting its building to become and remain a danger to the community.

Plaintiff's counsel admits that this action is in the discovery stage, but nevertheless argues that:

> For this motion, examinations before trial are not necessary because all evidence relating to inspection and care of the sidewalk is within the sole knowledge of the defendant, 780 Riverside. There is no disputable fact that the raised sidewalk flag which caused the plaintiff to trip and fall was on the sidewalk abutting the defendant's building that the defendant had the statutory duty to repair. Therefore, CPLR 3212(f) does not provide a viable argument that discovery is not complete in opposition. All facts essential to justify opposition that the defendant cannot now state are available to the defendant.

Affirmation in Support of Motion, NYSCEF No. 20.

In opposition, the Owner argues, first, that the motion is patently premature, since the Owner has not yet deposed plaintiff or any of the other defendants, and that the Owner is entitled to explore various liability issues before making dispositive motions. The Owner argues that they served a notice more than two years ago, on August 5, 2019, to depose plaintiff, and plaintiff never appeared for that deposition. The Owner contends that it had to file a discovery motion (Motion Sequence No. 002 under Index No. 155079/2019) just to obtain basic discovery from plaintiff, and plaintiff still did not appear for any deposition.

The Owner argues, second, that plaintiff's motion relies heavily on plaintiff's EBT transcript, but such transcript cannot be used against the Owner because the Owner was neither invited to, nor notified of, plaintiff's EBT before it occurred.

Third, the Owner argues that even assuming, *arguendo*, that this motion was not premature, and plaintiff was able to use the transcript of her EBT, that plaintiff nevertheless has not established all the necessary elements to her claim. Specifically, the Owner argues that plaintiff's medical records contradict her claim regarding how the accident occurred, and the defendant City of New York may have made special use of the sidewalk and caused the defect.

Finally, the Owner argues that despite plaintiff's claims that the Owner is wholly responsible for the alleged sidewalk condition, plaintiff commenced an action against the City entities. Owner further argue that rather than discontinuing the action against the City entities, plaintiff "doubled down" on her claim against the City entities by consolidating that action with the one against the Owner.

Conclusions of Law

Here, as the Owner correctly argues, plaintiff is alleging a trip and fall accident to which she is the only witness. The Owner has not yet deposed plaintiff or had the opportunity to explore liability issues relevant to her alleged accident, including where it happened, whether it happened, how and why it happened. Additionally, the Owner has not had the chance to depose the City entities, or explore whether any of them may have made special use of the sidewalk or caused the defect. Importantly, plaintiff's 50-h hearing was held in the first action (Index Number 150116/2020) on August 22, 2019, and at the time, the City entities were the only named defendants in the action. The Owner was neither invited to, nor notified of, plaintiff's EBT before it occurred. Indeed, the Owner was not brought into the first action until more than a year later, by the consolidation order of the court dated September 9, 2020. Therefore, the contents of the transcript cannot be used against the Owner. *See also* Belziti v. Langford, 105 A.D.3d 649 (Sup. Ct. App. Div, 1st Dept. 2013) ("Green's motion for summary judgment was properly denied as premature, since limited discovery has taken place and Green himself has not yet been deposed in this matter"); Weinstein v. WB/Stellar IP Owner, LLC, 125 A.D.3d 526 (Sup. Ct. App. Div, 1st Dept. 2015) ("Plaintiff opposed the motion on the ground that it was premature since 'facts essential to justify opposition may exist but cannot then be stated' […] Stellar's motion should

have been denied as premature, since plaintiff had no opportunity to depose Stellar, codefendant Friends, or nonparty EDC concerning, among other things, the project and maintenance of the extended sidewalk area following its completion").

Finally, plaintiff's theory of the case is unclear. If plaintiff is sure that the Owner is 100% liable for the accident, then plaintiff cannot proceed in good faith as against the City entities. In contrast, if plaintiff believes that the City entities may be partially liable, then the Owner is entitled to explore such theory through depositions and further discovery.

Accordingly, it is hereby:

ORDERED that this motion is DENIED as premature.

11/10/2021
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