SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **05M**

Justice

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KATHRYN PARKER, RYAN HUNTER

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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INDEX NO. 156628/2021

MOTION DATE 10/18/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 103

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

This is an action to recover for personal injuries allegedly sustained as the result of a trip and fall accident that occurred on January 22, 2021, within the City and County of New York.

With the instant motion, plaintiffs Kathryn Parker ("plaintiff") and Ryan Hunter (collectively "plaintiffs") move, pursuant to CPLR §3212, for partial summary judgment on the issue of liability with respect to defendants City of New York ("the City") and New York City Housing Authority ("NYCHA")(collectively "defendants"). Separately, plaintiffs move, pursuant to CPLR §3126, to strike the City's answer or preclude the City from offering any evidence at trial, based on the City's failure provide discovery. Plaintiffs claim that plaintiffs are entitled to partial summary judgment because NYCHA is the abutting property owner and had notice of the alleged defective condition. As proof of a defective condition, plaintiffs submit the affidavit of an expert who opines that the cause of the accident was an impermissibly sloped sidewalk slab. Plaintiffs' evidence of notice of the condition relies solely on a prior accident at the location.

Defendants oppose plaintiffs' motion for partial summary judgment, and the City opposes the branch of plaintiffs' motion seeking to strike its answer or preclude it from offering any evidence at trial.

DISCUSSION

Partial Summary Judgment as Against the City and NYCHA

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d

883 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 NY2d 525 [1999]).

Summary judgment is a drastic remedy. Therefore, the court's function on a motion for summary judgment is issue finding rather than issue determination (*Stillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]).

When confronted with a summary judgment motion, it is the court's responsibility to search the record for triable issues of fact without determining the strength of either parties' case (*Cross v. Cross*, 112 AD2d 62 [1st Dept 1985]). In doing so, the court must search evidentiary facts sufficient to defeat a motion for summary judgment. The mere existence of a material issue of fact should lead to the denial of the motion (*see Downing v. Schreiver*, 176 AD2d 781 [2d Dept 1991]). It is also firmly acknowledged that matters concerning negligence seldom find facile resolution through summary judgment proceedings (*Ugarizza v. Schmieder*, 46 NY2d 471 [1979]). Indeed, the pivotal inquiry as to whether a defendant's actions constitute negligence is inherently entwined with questions of fact that properly belong within the purview of a jury (*Rivers v. Atomic Exterminating Corp.*, 210 AD2d 134 [1st Dept 1994]).

Here, plaintiffs have failed to establish a prima facie entitlement to partial summary judgment on the issue of liability. While plaintiffs and plaintiffs' expert attribute the accident to a sloped sidewalk, there is no proof that the prior accident involved this condition and occurred under substantially similar circumstances. Plaintiffs' proof of notice, based on the earlier accident, consists entirely of a notice of claim filed with the City of New York in that action, the complaint served on NYCHA, and several photographs exchanged in discovery. However, the notice of claim served on the City does not constitute notice to NYCHA of the alleged defective condition since they are distinct legal entities and notice to one cannot be imputed to the other. The complaint served in the other action likewise fails to show notice since it does not identify any particular condition which caused the accident. For that reason, plaintiffs have similarly failed to establish their prima facie entitlement to summary judgment on liability as to the City since there is no proof at this juncture that the prior accident to which plaintiffs refer involves the specific condition that allegedly caused plaintiff to trip and fall, as is required to establish liability. The unmarked photographs of the sidewalk exchanged in the prior lawsuit also fail to establish notice of the condition. They portray various areas and different conditions on the sidewalk but do not identify a particular defect, much less an impermissibly sloped slab as the cause of the accident, as plaintiffs claim in this case. At best, the evidence submitted by plaintiffs on this motion shows that the City and NYCHA had a general awareness that a dangerous condition might be present on the sidewalk. However, this awareness is legally insufficient to constitute notice of the particular condition – an impermissibly sloped sidewalk slab. Therefore the evidence in this case does not, as plaintiffs contend, warrant a finding on the issue of liability as a matter of law.

In addition, the instant motion for summary judgment is premature (*see* CPLR § 3212[f]; *see also Espinoza v Fowler-Daley Owners, Inc*, 171 AD3d 480 [1st Dept 2019]). Depositions have not been held and dispositive motions are routinely denied where plaintiff has yet to be deposed (*Figueroa v. City of New York*, 126 AD3d 438, 439 [1st Dept 2015]). Likewise, the City's complete records search from the Department of Transportation ("DOT") remain outstanding and may ultimately weigh upon the merits of an application for partial summary judgment. Accordingly, plaintiffs' motion for partial summary judgment is denied in its entirety.

Motion to Strike City's Answer or Preclude City from Offering Evidence at Trial

Next, in turning to plaintiff's motion to preclude, this court recognizes that CPLR §3101(a)(1) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" in this statute "must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity'" (*Matter of Kapon v. Koch*, 23 NY3d 32, 38 [2014], *quoting Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). At the same time, a party is "not entitled to unlimited, uncontrolled, unfettered disclosure" (*Geffner v. Mercy Med. Ctr.*, 83 AD3d 998, 998 [2d Dept 2011]; *see Quinones v. 9 E. 69th St., LLC*, 132 AD3d 750, 750 [2d Dept 2015]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims"(*Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]; *see Quinones*, 132 AD3d at 750, *supra*). CPLR §3126 authorizes the imposition of disclosure sanctions, including the striking of a pleading, for a party's failure to comply with court-ordered discovery, especially where there is a clear showing that plaintiff's conduct is willful, contumacious or manifests bad faith (*see Irizarry v Ashar Realty Corp.*, 14 AD3d 323 [1st Dept 2005]; *Katz v Dream Trans, Inc.*, 11 AD3d 412 [1st Dept 2004]; *Frye v City of New York,* 228 AD2d 182 [1st Dept 1996]).

Here, the City opposes the portion of the instant motion that seeks to strike the City's answer by arguing that plaintiffs have failed to make diligent good-faith efforts to resolve their discovery disputes. Most tellingly, the City purports that plaintiffs never made a single telephone call to the Office of the Corporation Counsel to speak to the assigned attorney and attempt to resolve the requested discovery. Moreover, the City argues that since the Case Scheduling Order ("CSO") was issued on or about April 5, 2023, there have been two compliance conferences held in this matter on or about August 1, 2023, and a second recently held on November 14, 2023. Notably, the City underscores that the November 14, 2023 conference stipulation extended the City's deadline to provide responses that are the gravamen of plaintiffs' motion to strike the City's answer, and, as such, plaintiffs' motion is moot and should be withdrawn. The City further submits that it has not acted willfully, contumaciously, or in bad faith at any point during discovery related to the instant action, has substantially complied with the CSO, and any additional responses are not yet due in accordance with the November 14, 2023 conference stipulation. Accordingly, the City submits that plaintiffs' motion should be denied in its entirety as it is in violation of the Part 5 Rules and Uniform Rule § 202.7.

The court notes here that subsequent to the filing of the instant motion, this court conferenced this case with counsel and issued an order (NYSCEF Doc. 109) directing that NYCHA and the City provide responses to outstanding discovery or face possible sanctions for non-compliance. While the issue of DOT records was not specifically addressed, the court directed defendants to provide responses to plaintiffs' request for documentation material and relevant to the prosecution of this action. It is axiomatic that the City should provide additional responses in advance of the deposition scheduled to be held on Friday July 12, 2024. And while the City's non-disclosure to date falls short of demonstrating willful and contumacious conduct, the court implores the City to take its discovery obligations seriously, and provide responses in a timely manner. Accordingly, plaintiffs' motion is granted only to the extent that the City is directed to provide the outstanding DOT records delineated in Section 7(d) of the Case Scheduling Order no later than May 24, 2024. If the City cannot provide the DOT records by that date, the City shall provide an affidavit by a person with knowledge documenting all efforts that were made to obtain the records. The City's failure to do so may result in this court entertaining applications to strike the City's answer or preclude the City from offering any evidence at trial.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment is denied in its entirety; and it is further

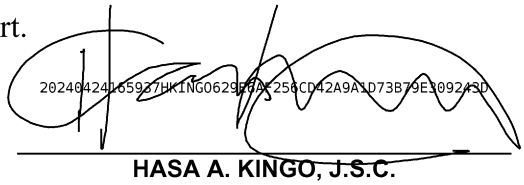
ORDERED that plaintiffs' discovery motion is granted only to the extent that the City is directed to provide the outstanding DOT records delineated in Section 7(d) of the Case Scheduling Order no later than May 24, 2024; and it is further

ORDERED that if the City cannot provide the DOT records by that date, the City shall provide an affidavit by a person with knowledge documenting all efforts that were made to obtain the records; and it is further

ORDERED that the City's failure to do so may result in this court entertaining applications to strike the City's answer or preclude the City from offering any evidence at trial; and it is further

ORDERED that the oral argument scheduled for April 30, 2024 is vacated, however, the parties are directed to appear for a compliance conference in the DCM part of the courthouse located at 80 Centre Street, first floor, on Tuesday June 4, 2024 at 2:00 PM.

This constitutes the decision and order of the court.



4/24/2024
DATE

HASA A. KINGO, J.S.C.

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