SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- x

NURYS SALCEDO,

Plaintiff,

- against -

AVI MANSHER AND RENE OREA,

Defendants.

- x

Index No.: 714387/2016

Motion Date: 10/11/18

Motion Nos.: 30 & 31

Motion Seqs.: 1 & 2

The following electronically filed documents read on this motion by defendant RENEE OREA (**seq. no. 1**) for an Order pursuant to CPLR 3212, granting summary judgment in favor of defendant Orea and dismissing the complaint and all cross-claims against defendant Orea; and on this motion by defendant AVI MANSHER (**seq. no. 2**) for same:

	Papers Numbered:
Notice of Motion(**seq. no. 1**)-Affirmation-Exhibits...	EF 10 - 19
Notice of Motion(**seq. no. 2**)-Affirmation-Exhibits...	EF 20 - 33
Mansher's Affirmation in Opposition-Exhibits.....	EF 36
Orea's Affirmation in Reply to Mansher's Opp.....	EF 37 - 38
Plaintiff's Global Affirmation in Opp.-Exhibits.....	EF 39 - 62
Mansher's Affirmation in Reply.....	EF 63
Orea's Affirmation in Reply to Plaintiff's Opp.....	EF 64 - 65

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on November 14, 2014 when she tripped and fell on a raised sidewalk flag located between the properties located at 105-15 37th and 105-17 37th Avenue, Corona New York.

Plaintiff commenced this action by filing a summons and complaint on December 2, 2016. Defendant Mansher joined issue by service of an answer with cross-claims dated February 8, 2017. Defendant Orea served an answer with cross-claims dated

February 17, 2017 and an amended answer with cross-claims dated February 24, 2017. Both defendants now move for summary judgment.

Plaintiff appeared for an examination before trial on October 30, 2017 and testified that on November 14, 2014, between 11:30 a.m. and 12:00 p.m., she was returning home from church, walking on the sidewalk on 37th Avenue towards 106th Street. She had only walked about one block before the incident occurred. The weather was clear and the pavement was dry. She had walked the subject sidewalk area between twenty and forty times in the two years prior to the date of the incident. She never made any complaints to anyone about the condition of the sidewalk area. She does not know of anyone who had made any complaints about, or who had an incident on, the sidewalk prior to her fall. She was walking with the houses to her left and the street to her right. She was within arms-reach of a fence. Her left foot came into contact with something that caused her to fall forward. In the ten feet prior to the contact, she did not observe any raised portions of sidewalk in front of her. After the incident, she noticed that the sidewalk was too high. She had never seen this raised portion of the sidewalk before the incident. At her deposition, she was shown photographs and indicated the area where she fell.

Defendant Orea appeared for an examination before trial on November 21, 2017 and testified that he owned and resided at 105-15 37th Avenue, Corona, New York (hereinafter the Orea property). He became the owner in 1998, and owned and resided at the Orea property for 18 years. The Orea property is a two-story single-family home with a basement. He lives there with his wife and three children. He does not rent out any portion of the house to anyone outside of his family. He never repaired the sidewalk in front of the Orea property. At his deposition, he was shown photographs. He testified that the photographs depict the sidewalk, fence, and both his and his neighbor's properties.

Defendant Mansher appeared for an examination before trial on March 19, 2018 and testified that he is the owner of the property located at 105-17 37th Avenue, Corona, New York (hereinafter the Mansher property). The Mansher property is a three-family home that he rents to families. He has never lived there. He manages the Mansher property and visits it about every other week. When he visits the Mansher property,

he looks at the sidewalk and the building. He has never received any notices from the City of New York regarding the condition of the sidewalk in front of the Mansher property. At his deposition, he was shown photographs. He testified that the photographs depict the Mansher property, which has the white fence in front. He testified that the area of elevation which plaintiff had marked with an "X" is not in his area of sidewalk maintenance responsibility, but is the responsibility of his neighbor.

In support of his motion, Mansher submits an affidavit and land survey from Christopher Henn, a New York State Licensed Land Surveyor. Mr. Henn inspected the Orea property and the Mansher property on April 19, 2017. Using standard surveying principles, he generated a survey and marked the property line between the two properties. Based upon his review of the file and the photographs, he concludes that the location at which plaintiff fell is adjacent to the Orea property.

Mansher also submits an affidavit and inspection report from Robert Fuchs, P.E., Chief Mechanical Engineer and Certified Safety Professional at Paul J. Anegelides, P.E., P.C. Prior to rendering his report, Mr. Fuchs inspected the subject site on April 12, 2018 and reviewed plaintiff's deposition testimony, the color photographs marked at plaintiff's deposition, and Mr. Henn's Litigation Survey. Mr. Fuchs found that the location where plaintiff tripped and fell is approximately 3 and ½ inches west of the property line between the Orea property and the Mansher property. Mr. Fuchs concludes that the location at which plaintiff fell is adjacent to the Orea property. Mr Fuchs also affirms that in the area where plaintiff fell, the adjoining sidewalk flags were uneven, thereby creating a 1 and 3/8 inch abrupt difference in elevation. The difference in elevation was caused due to past settlement of the adjoining flag to the left into the underlying supporting soil. The settled flag is located in front of the Orea property and abuts three other flags, all of which had been replaced. The settlement indicates that the underlying soil was not properly compacted prior to the installation of the sidewalk flags. Based on such, Mr. Fuchs concludes that the incident occurred on the sidewalk adjacent to the Orea property and that the defect occurred as a result of past settlement of the flag located adjacent to the Orea property due to the underlying soil not being properly compacted prior to the flag installation.

Based on the submitted evidence, Mansher contends that summary judgment is warranted as the defect that caused plaintiff's incident was not located on the sidewalk adjacent to his property and as his maintenance of the sidewalk adjacent to his own property did not cause or contribute to plaintiff's incident.

Plaintiff opposes Mansher's motion on the grounds that Mansher did not establish that the defect did not abut his property. Plaintiff also contends that Mansher failed to establish that the sidewalk abutting his property was not raised or settled.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

Generally, an abutting landowner will not be liable to a plaintiff who trips and falls on a public sidewalk unless the landowner has created the defective condition or caused the defect to occur because of some special use, or when a statute places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty (see Biondi v County of Nassau, 49 AD3d 580 [2d Dept. 2008]; Gross v Kam She Ng, 269 AD2d 424 [2d Dept. 2000]; Solarte v DiPalmero, 262 AD2d 477 [2d Dept. 1999]). Pursuant to Administrative Code of the City of New York § 7-210, owners of real property abutting any sidewalk must maintain the sidewalk in a reasonably safe condition.

Here, Mr. Henn's survey established that the location where plaintiff fell is in front of the Orea property. Mr. Fuchs' affidavit established that the elevation difference between the flags abutting the two properties occurred as a result of past settlement of the sidewalk flag located in front of the Orea property due to the underlying soil not being properly compacted prior to the flag installation. Based on such, Mansher established both that the defect was not abutting his property and that the maintenance of his own sidewalk was not a proximate cause of plaintiff's injuries (see Sangaray v West River Associates, LLC, 26 NY3d 793 [2016]).

In opposition to Mansher's motion, plaintiff failed to present any evidence to rebut Mr. Henn's survey demonstrating that the subject defect was in front of the Orea property. Plaintiff merely submits an attorney affirmation along with deeds and a New York City Tax Map to purportedly show that the subject sidewalk joint is located on both the Orea property and the Mansher property. Plaintiff's counsel's argument is not evidence as it is not supported by an expert or a survey, and thus, is insufficient to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]; Goodman v 78 West 47th Street Corp., 253 AD2d 384 [1st Dept. 1998]).

Regarding Orea's summary judgment motion, the Administrative Code of the City of New York § 7-210, is not applicable to "one, two- or three-family residential real property that is (1), in whole or in part, owner occupied and (ii) used exclusively for residential purposes" (see Administrative Code of the City of New York § 7-210[b]).

Orea made a prima facie showing that he was exempt from liability under Administrative Code of the City of New York § 7-210 as he testified that he lives at the Orea property with his family and does not collect rent from anyone outside of his family. Additionally, Orea testified that he never repaired the sidewalk in front of the Orea property. Thus, Orea established that he did not create the defective condition.

The opposing parties failed to raise a triable issue of fact as to whether the Orea property was used exclusively for residential purposes. Plaintiff submits copies of the New York City Building Department records which purportedly demonstrate that the Orea property is not a single-family home, but a two-family home. However, the records are not certified, and thus, are inadmissible and will not be considered by the Court (see CPLR 4518[c]; Stock v Otis El. Co. 52 AD3d 816 [2d Dept. 2008]). In any event, the exemption applies to all one-, two-, or three-family residential property. Moreover, no evidence has been submitted demonstrating that Orea created the defective condition or caused such condition through some special use of the sidewalk (See Blum v City of New York, 267 AD2d 341 [2d Dept. 1999]).

Accordingly, and for the above stated reasons, it is hereby

ORDERED, that the summary judgment motion by defendant RENEE OREA (**seq. no. 1**) is granted, the complaint and any and all cross-claims are dismissed as against defendant RENEE OREA, and the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED, that the summary judgment motion by defendant AVI MANSHER (**seq. no. 2**) is granted, the complaint and any and all cross-claims are dismissed as against defendant AVI MANSHER, and the Clerk of the Court shall enter judgment accordingly.

Dated: October 26, 2018
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.