Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No. 714226/2018
GALINA ALTER,

Plaintiff,

Motion
Date: January 22, 2020

-against-

Motion Cal. No.: 2

LEAO A. PEREIRA and MARIA RUTH PEREIRA,

Motion Sequence No.:1

Defendant(s).
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The following e-file papers numbered 7, 18-21 and 26 submitted and considered on this motion by defendants LEAO A. PEREIRA and MARIA RUTH PEREIRA (collectively referred to as "Defendants") seeking an Order pursuant to Civil Practice Law & Rules (hereinafter referred to as "CPLR") 3212 finding they are not liable to plaintiff GALINA ALTER (hereinafter referred to as "Plaintiff").

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	EF 7
Affirmation in Support-Affidavits-Exhibits.....	EF 18-21
Reply Affirmation-Affidavits-Exhibits.....	EF 26

Facts and Procedural History

This is a premises liability action. Plaintiff is seeking to recover damages for personal injuries which she allegedly sustained on April 27, 2016 while traversing the sidewalk in front of the premises located at 110-19 63rd Drive, Forest Hills, County of Queens, State of New York (hereinafter referred to as "Premises"). Plaintiff claims she tripped on a "a known dangerous and trap-like condition" abutting the Premises.

Law and Application

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering admissible evidence to eliminate any material issues of fact from the case. (*Winegrad v New York Univeristy Medical Center*, 64

NY2d 851 [1985].) Summary judgment eliminates cases from the Court's trial calendar which can be properly resolved by the Court as a matter of law (*Andre v Pomeroy*, 35 NY2d 361 [1974]). As summary judgment is a drastic remedy, it should not be granted where there is doubt about the existence of any issues (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

"To hold an abutting landowner liable to a pedestrian injured by a defect in a public sidewalk, the landowner must have either created the defect, caused it to occur by special use, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk" (*Ludmila Popowa v Neck Road One Realty, LLC, Apellant, et al.* 41 AD3d 455 [2d Dept 2007]). In *Popowa*, the defendant successfully demonstrated entitlement to judgment as a matter of law by establishing it neither created nor caused the defect on the sidewalk through special use (*id* at 456). Furthermore, the defendant established it had no statutory obligation to maintain the sidewalk in a reasonably safe condition (*id*). The court held no triable issues of fact were raised in opposition and granted summary judgment to the defendant (*id*) (*see also Abraham Stubenhaus v City of New York et al.*, 170 AD3d 1064 [2d Dept 2019]).

> The New York City Administrative Code § 7-210 states as follows [emphasis added]:
> Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.
> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. **This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.**
> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two-or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.
> d. Nothing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action or proceeding against the city is commenced, including any provisions requiring prior notice to the city of

defective conditions.

Here, Defendants provided affidavits to the Court. Defendants state that they have owned the Premises since November of 1983, that the Premises is a one-family dwelling and an attached row house comprised of four other homes. That since November of 1983 the Premises has been owner occupied. Defendants contend there is a rise in the sidewalk allegedly caused by a tree's roots that is located in the grass between the roadway and the sidewalk. Defendants alleged they had no notice prior to the present incident that anyone tripped or fell on the sidewalk. Both Defendants stated "I never at anytime repaired, worked on, or altered the sidewalk in front of my home prior to the incident on April 27, 2016".

In opposition, Plaintiff alleges Defendant's have not satisfied the burden of proving that they did not create the condition. Plaintiff seeks denial of this motion pursuant to CPLR 3212 (f). Plaintiff alleges depositions have not been held and therefore, potential Post-EBT discovery demands have yet to be served causing this motion to be premature. Plaintiff attached a demand for discovery dated December 4, 2018 where Plaintiff sought from Defendants"copies of all repair records" and "copies of permits" for the Premises. In response, Defendants stated that they were not in possession of said documents. Plaintiff alleges Defendant's failed to provide an "affidavit of search", and that such documents would be in the exclusive control of the Defendants.

In *Scott Gillinder v Dierderik G. Hemmes et al.* (298 AD2d 493 [2d Dept 2002]) defendant Hemmes failed to stop at a stop sign and proceeded through an intersection where his car was involved in a collision with defendant Scherman. After the collision, Hemmes continued through the intersection and struck plaintiff's vehicle which was allegedly stopped at a stop sign (*id*). Scherman moved for summary judgment alleging Hemmes was negligent per se by failing to yield Scherman the right of way (*id* at 494). The court stated "[b]efore a party can defeat a motion for summary judgment claiming ignorance of facts due to unconducted discovery, he must show that he has made reasonable attempts to discover these facts and that the facts sought would give rise to a triable issue" (*id*). The court held the parties opposing the motion failed to make the required showing, "[t]hey merely speculated that Scherman may have been negligent in the operation of his vehicle, and this is insufficient to defeat the motion" (*id*). Here, Plaintiff has made attempts to discover documents such as "copies of all repair records" and "copies of permits" for the Premises. In response, Defendants stated that they were not in possession of the same. In their Affidavits Defendants state "I never at anytime repaired, worked on, or altered the sidewalk in front of my home prior to the incident on April 27, 2016". Nonetheless, Plaintiff contends there remains outstanding discovery that may establish that Defendants "created the defect" (*Popowa* at 455). This Court is not convinced by Plaintiff's argument.

Defendants have established prima facie entitlement to judgment as a matter of law and Plaintiff has failed to raise a triable issue of fact. Therefore it is,

ORDERED, that Defendants' motion for summary judgment is granted.

The foregoing constitutes the decision and Order of the Court.

Dated: February 27, 2020

Hon. Chereé A. Buggs, JSC