SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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DONNA M. ALONZIA,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Defendants.

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INDEX NO. 452590/2014

MOTION DATE 09/14/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

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

In the underlying action, plaintiff alleges that on February 4, 2013, she tripped and fell in the crosswalk on 115th Street and Fifth Avenue, in the City, County, and State of New York due to a cracked portion of the crosswalk. (Photos of the alleged defect can be found at NYSCEF Doc. No. 32).

Pending before the court is a motion where defendants THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION (collectively, the "City") seek an order, pursuant to Civil Practice Law and Rules 3212, granting summary judgment to the City on the grounds that, pursuant to 7-201 of the Administrative Code of the City of New York, the City did not receive prior written notice of the defect that caused plaintiff's accident.

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]).

City's *Prima Facie* Case

Section 7-201 [c][2] of the Administrative Code of the City of New York (also known as the "Pothole Law") provides, in relevant part:

> No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Further, pursuant to the New York Court of Appeals in Katz v City of New York, 87 NY2d 241 (N.Y. Ct. of Appeals 1995:

> As recognized by plaintiff, prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City [emphasis added] […]. The failure to demonstrate prior written notice leaves plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying a defective sidewalk. Because this prior written notice provision is a limited waiver of sovereign immunity, in derogation of common law, it is strictly construed.

Here, it is undisputed that the City did not receive prior written notice of the subject defect. Accordingly, the City has set forth a *prima facie* case for summary judgment (*see* Dunn v City of New York, 206 AD3d 403 [1st Dept 2022] ["The City established its *prima facie* entitlement to summary judgment by submitting proof establishing that it did not have notice of the allegedly defective condition"]).

Once a municipality establishes that it lacked prior written notice, the burden shifts to the plaintiff to demonstrate that the municipality affirmatively created the defect. *See, e.g.* Yarborough v City of New York, 10 NY3d 726 (Ct. of Appeals 2008), "Where the City establishes that it lacked prior written notice […], ***the burden shifts*** to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality"; Dunn, *(supra)* "The City established its *prima facie* entitlement to summary judgment […]. As a result, ***the burden shifted*** to plaintiff to establish one of the exceptions to the notice requirement – here, that the City affirmatively created the defect through an act of negligence or did roadwork that would have resulted in an immediately apparent dangerous condition") [emphasis added].

Plaintiff's Burden

Plaintiff argues that despite the lack of prior written notice, summary judgment must still be denied because there are genuine issues of material fact as to whether the City caused or created the subject condition that allegedly caused plaintiff's accident. Specifically, plaintiff argues that the Department of Transportation ("DOT") records, produced by the City, show that the City

actively engaged in work in and around the subject area by conducting inspections and repairs in the two years before plaintiff fell on February 4, 2013.

For instance, plaintiff argues that NYSCEF Doc. No. 33, Bates p. 96 shows that on June 8, 2011, the City received a 311 call about a "sink hole" on the street, at East 115th Street and 5th Avenue, that "needs to be filled." Internal Agency Notes dated eight days later, on June 16, 2011, state:

> 1" x1" cave in in driving lane 1'5" in the parking lane in front of a catch basin specific location east 115th street between 5th avenue & Madison ave ewc of 5th avenue & 3ft nse of east 115th street ***corrective action request issued to d.e.p.*** [emphasis added]

When these records were shown to DOT witness Stacey Williams (transcript at NYSCEF Doc. No. 37), Ms. Williams was unable to confirm that the Department of Environmental Protection ("D.E.P.") had actually performed any such corrective action. Specifically, Ms. Williams testified as follows:

> p. 18, line 15 – 20, line 6
> Q. What were the complaints found?
> A. The first complaint was received by 311 on June 8th 2011 regarding the intersection on Fifth Avenue and East 115th Street. The description is a cave in. The complaint details reads: The caller states that there is a sinkhole in the street and it needs to be filled.
> Q. What was the date?
> A. June 8th 2011.
> Q. Is there an indication there as to how the complaint was handled?
> A. The resolution description reads: The Department of Transportation inspected and has requested that the Department of Environmental Protection address the issue. The condition will be reinspected in 60 days.
> Q. What is the date of that inspection?
> A. The initial inspection?
> Q. Yes.
> A. The internal agency's note reads: June 16th 2011.
> Q. Was a follow-up done?
> A. I don't know.
> Q. So there is no record in there that showed that they did go to the location?
> A. I don't know. This is the first complaint.
> Q. I didn't say that they didn't do it. You're saying "you don't know" because it's not showing on the search?
> A. Correct, yes.
> Q. If you know, is there a record kept of follow-ups on complaints or repairs or resolution?

A. There is a record kept but it would be within the inspection records.
Q. For that location, was there any other inspection record that indicated that sinkhole situation had been resolved?
A. I don't know.
Q. You do not have it with you?
A. I have inspection records but we haven't looked at it yet so, I don't know.

Plaintiff also argues that NYSCEF Doc. No. 33, Bates p. 99 shows another citizen complaint dated August 22, 2011 described as a "street cave-in," at the same intersection, with a length of 2 inches and a width of 5 inches. This complaint was initially "REFERRED TO MAINTENANCE," and, on the following day on August 23, 2011, it was "REFERRED TO DEP." However, DOT witness Ms. Williams was again unable to confirm that the DEP had actually repaired the cave-in. Specifically, Ms. Williams testified as follows:

p. 31
A. On Page 99, is a maintenance and repair order rather the first page is a maintenance and repair order. The defect type is indicated as a street cave in. The report is dated August 22nd 2011. The source of this is a complaint made by a citizen and it's at the intersection.
Q. Is the intersection of East 115th Street and Fifth Avenue?
A. Correct.
Q. Do you have anymore details as to where on the intersection, like North, East, South, West or anything like that?
A. No.
Q. What is the resolution?
A. The second page, Page 100, indicates that a crew responded to the location on August 23rd 2011 and it was referred to the New York City Department of Environmental Protection as well.
Q. You said a crew was dispatched to the location. Was that a work crew or something else?
A. It is the Department of Transportation Roadway Repair Maintenance Unit.
Q. You said it was referred to the Department of Environmental Protection, correct?
A. Yes.
Q. Does that mean that they did or did not do any repair of the work?
A. I don't know.

Finally, plaintiff argues that NYSCEF Doc. No. 40, p. 4, shows that on February 3, 2012, the City received a complaint call about a "1x1x6" cave in around catch basin repair," and that the Comments regarding this complaint state: "saw Repairs were made with hot patch around catch basin."

In reply, the City argues that the records in NYSCEF Doc. No. 40 show that the complaint was "RESOLVED BY INSPECTION," and argues that "Nowhere in these documents does it reveal that the City, through the Department of Environmental Protection, actively engaged in work in and around the subject area prior to the Plaintiff's fall."

As noted above, summary judgment cannot be granted if there exist material issues of fact which require a trial of the action. Here, the court founds that plaintiff has met her burden in showing that the City may have affirmatively created the defect through an act of negligence, or did roadwork that resulted in the subject defect being created. Specifically, plaintiff showed that the City referred at least two complaints to the DEP regarding a "sink hole" or "street cave in" at the subject intersection. However, there are no records to show that the DEP performed the necessary repairs, or that the City's workers did not worsen the defect(s) that were the subjects of the complaint. Importantly, the City's reply addressed the complaints highlighted by plaintiff in NYSCEF Doc. No. 40, but not the complaints highlighted by plaintiff in NYSCEF Doc. No. 33. Accordingly, the court finds that the City did not eliminate questions of fact as to whether it created the defect.

Conclusion

For the reasons stated above, it is hereby:

ORDERED that the City's motion is DENIED.

6/28/2024
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**