At an IAS Term, Part 25 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of July, 2007.

P R E S E N T:

HON. SYLVIA O. HINDS-RADIX,

Justice.

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MARGARET SHERRY FIELD,

Index No. 36272/04

Plaintiff,

- against -

THE CITY OF NEW YORK et al,

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3-4
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Chera Realty & Development Corp. of Brooklyn moves for an order, pursuant to CPLR 2221, granting leave to renew and reargue a prior order of this court dated August 14, 2006, granting the summary judgment motion of defendant the City of New York (the City) and dismissing the complaint as asserted against it and, upon renewal and reargument, denying the City's motion.

Defendant Jessica Development, Corp. cross-moves[1] for an order pursuant to CPLR 2221, granting leave to renew and reargue the court's August 14, 2006 order and, upon renewal and reargument, denying the City's motion. The motion and cross motion will be consolidated for the purposes of brevity.

Plaintiff Margaret Sherry Field allegedly tripped and fell on the sidewalk adjacent to the premises located at 417-21 Fulton Street in Brooklyn, New York. The subject premises are located in the Fulton Mall Business Improvement District. Thereafter, plaintiff commenced the instant action against the collective defendants. A review of the record indicates that in the notice of claim, plaintiff claims that she fell on the "sidewalk/walkway" in front of the premises. In the complaint, plaintiff alleges that she tripped and fell on the sidewalk adjacent to the subject premises. The City then moved for summary judgment dismissing the complaint as asserted against it on the ground that, pursuant to § 7-210 of the Administrative Code, "it may not be held liable for personal injuries proximately caused by the failure to maintain a sidewalk in a reasonably safe condition unless the sidewalk abuts real property used exclusively for residential purposes by three or fewer families." By decision and order dated August 14, 2006, this court granted the City's motion dismissing the complaint as asserted against it. Thereafter, the instant motion and cross motion for renewal and reargument ensued. Jessica Development also filed an appeal of the

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[1] Jessica Development Corp. adopts the arguments of Chera Realty & Development Corp. in support of its cross-motion.

August 14, 2006 decision and order of this court with the Appellate Division, Second Judicial Department.

CPLR 2221 (f) requires that "a combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought."

As an initial matter, the court will address the City's contention that Jessica Development's cross motion to reargue is untimely. The City claims that the time to move for leave to reargue expired on October 5, 2006, following its August 31, 2006 mailing of the order and notice of entry of the prior decision. In response, Jessica Development asserts that its motion to reargue is timely as it has filed a timely appeal of the underlying motion which has not been perfected as yet. Ordinarily, a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry" (CPLR 2221 [d] [3]). Here, Jessica Development has submitted a copy of the notice of its appeal of the August 14, 2006 decision granting summary judgment to the City. As of the date of Jessica Development's motion for reargument its appeal was still pending and unperfected (*Itzkowitz v King Kullen Grocery Co., Inc.*, 22 AD3d 636, 638 [2005]). Accordingly, in its discretionary power, the court will entertain Jessica Development's motion for leave to reargue.

Motion and Cross Motion to Reargue

In support of the motion and cross motion, defendants contend that the City's prior motion for summary judgment should have been denied as premature because "further discovery was necessary to determine the rights and responsibilities of the parties" under the

contract between the City and the Fulton Mall Improvement Association (FMIA). Said contract established the creation of the Fulton Mall Business Improvement District where plaintiff's accident occurred. Defendants argue that this concern was raised in their opposition papers to the underlying motion. Defendants further argue that the City's submission of the contract for the first time in its reply papers was improper as they did not have an opportunity to address the City's contentions with respect to the contract. As such, defendants maintain that this led to the court's misinterpretation of the contract and the applicable law in rendering its determination.

Specifically, defendants assert that the court failed to consider the effect of § 7-210 of the Administrative Code on the subject contract which was entered into prior to the date of its enactment. Defendants claim that the language of § 7-210 of the Administrative Code makes no reference to the creation of special districts such as the Fulton Mall Business Improvement District. Defendants also argue that the language of the contract must be interpreted "as of the date it was authored and last amended prior to the accident" and therefore the City, not the adjacent commercial property owners, was responsible for maintaining the subject sidewalk under the common law.

Additionally, defendants contest the court's finding, in its prior determination, that the contract was "silent with respect to the repair and maintenance of the sidewalks." Instead, defendants argue that the City controls all maintenance operations within the Fulton Mall Special District and assert that the contract "makes no provision for any other party to

maintain any part of the special district." In support of this assertion, defendants point to section 2.02 (f) of the contract which provides that "where necessary, replacement of sidewalk bricks ... all such repair and replacement, including materials used therein, shall be in strict accordance with the plans and specifications for the Mall, as on file in the offices of the City's Department of Transportation provided that the Commissioner of Transportation, upon written request from the Association, may authorize deviation from such plans and specifications where he finds such deviation is appropriate to the Mall and consistent with the Mall Plan." In addition, defendants assert that section 2.07(d) of the contract indicates that the FMIA's work included the replacement of " 'sidewalk bricks' and was required to conform to a 'plan for the Mall' in the possession and control of the Commissioner." As such, defendants claim that additional records exist with respect to the maintenance of the sidewalk according to the plan thus raising an issue of fact preventing an award of summary judgment to the City.

Defendants further claim that the "contract states all material used for the Mall maintenance becomes the property of the City at the moment it is delivered to the work site, even before installation." As such, defendants assert that if the contract provides that "all materials purchased by the Mall for installation become the property of the City, so too are the bricks already in place at the site of the accident." Defendants maintain that " a plain and simple reading" of the contract indicates that the City developed the area through "capital construction" and the reference to " the term replacement of sidewalk bricks is a clear

indication bricks were installed in the original development by the City through their capital construction." Defendants, therefore maintain that "it is necessary to determine if these bricks had been changed prior to the accident and if the area was changed after the City's initial capital construction."

Additionally, defendants contend that the City's submission of the affidavit of Sherry Johnson in its reply papers of the underlying motion was insufficient to establish that the City did not create the alleged defective condition as a search was only conducted for two years prior to the subject accident. In this regard, defendants maintain that the court's reliance upon Ms. Johnson's affidavit in its prior determination was misplaced.

In opposition, the City argues that the motion to reargue should be denied because the court did not overlook or misapprehend any matter of fact or law on the original motion. The City maintains that § 7-210 of the Administrative Code shifts liability for sidewalk defects to owners of abutting premises with certain exceptions for residential owner-occupied properties.

The City points to the provisions of the contract that states that "the City engages Fulton to provide 'Supplemental Services' in return for payment ... such services are not intended to reduce or eliminate the primary obligation of the City or property owners or their tenants..." As such, the City maintains that the contract does not "override any controlling provision of law with respect to legal liability for sidewalk defects" and therefore § 7-210 of the Administrative Code is applicable. In response to defendants' assertions with respect

to the City's ownership of the sidewalk bricks in the Fulton Mall Business Improvement District, the City counters that ownership of the bricks is not a determinative factor in deciding the motion. The City also contends that the subject sidewalk is adjacent to a commercial property and it has no legal liability for personal injury actions arising out of alleged defects in said sidewalk. As such, the City argues that the court did not misapprehend the facts and controlling law and the motion and cross motion to reargue must be denied.

In reply, defendants reassert that the "contract can only be interpreted as of the date it was written and entered, not years later following amendments to a law that did not exist on the date of the agreement." Defendants argue that at the time the contract was drafted and subsequently renewed in 1997, the municipality was responsible for the maintenance of sidewalks and liable for any injuries arising out of any defective condition of said sidewalks. Defendants maintain that "the intent of the parties to a contract must be interpreted as of the date and location of the execution of the contract." As such, defendants argue that this court mistakenly applied the recently enacted § 7-210 of the Administrative Code to the contract.

A motion to reargue is addressed to the sound discretion of the court and will only succeed if it establishes that the court overlooked controlling facts or precedent which were before it on the original motion (*SantaMaria v Schwartz*, 238 AD2d 569, 570 [1997]; *Schneider v Solowey*, 141 AD2d 813 [1988]; *Foley*, 68 AD2d at 564). Reargument is not intended to afford an unsuccessful party successive opportunities to argue issues previously

decided and, accordingly, such a motion may not advance new facts, issues or arguments not previously presented to the court (*Rubinstein*, 225 AD2d at 328-329; *Mayer v National Arts Club*, 192 AD2d 863, 865 [1993]).

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (*see* CPLR 3212[b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a prima facie showing of entitlement to judgment as a matter of law requires denial of the motion, regardless of the sufficiency of the opposing papers (*see* 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" (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing to *Zuckerman*, 49 NY2d at 562). In determining the motion, a court must be mindful that "summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978], quoting *Moskowitz v Garlock*, 23 AD2d 943, 944 [1965]). Moreover, the evidence must be considered in the light most favorable to the party opposing the motion (*see Henderson v City of New York*, 178 AD2d 129, 130 [1991]). Finally, a party seeking summary judgment may

not merely point to gaps in the opponent's proof but rather must adduce affirmative evidence of its entitlement to that relief (*see Torres v Industrial Container*, 305 AD2d 136 [2003]).

As a general rule, a landowner is not liable to a pedestrian injured by a defect in a public sidewalk abutting the landowner's property unless the landowner caused the defective condition through negligent construction or repair, or as a result of some special use, or if a statute imposes the obligation to maintain the sidewalk on the abutting owner (*see Grossman v Amalgamated Housing Corp.*, 298 AD2d 224, 225 [2002]; *Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]; *Bloch v Potter*, 204 AD2d 672, 673 [1994]).

In light of the foregoing, the court denies defendants' motion and cross motion to reargue. Defendants fail to demonstrate how the court either misapprehended the law or overlooked the relevant facts which were before it as part of the motion, it would be inappropriate to grant reargument of those matters (*Loland v City of New York*, 212 AD2d 674 [1995]). The court notes defendants' contention that the City improperly submitted the subject contract for the first time in its reply papers in the prior motion. Nevertheless, the court rejects defendants' assertion that merely because the subject contract was entered into prior to enactment of § 7-210 of the Administrative Code said statute does not apply to the duties of the parties to the contract. It is undisputed that the subject premises is a two-story commercial property. Moreover, only owners of one, two and three family residential properties, that are owner-occupied, are exempt from said provision shifting the obligation

to maintain the sidewalk in a safe condition upon certain landowners. Additionally, Section 2.02 (a) of the subject contract provides that "supplemental services" are "to be provided by FMIA but does not reduce or eliminate the primary obligation of the City or the property owners or their tenants ... to continue to provide basic services including but not limited to litter removal and to keep sidewalks in safe condition." The court was correct in its determination that "[t]he contract is silent with respect to the repair and maintenance of the sidewalks." Furthermore, Ms. Johnson conducted a search of records of the subject location for a two-year period prior to plaintiff's accident which did not indicate that any work was performed at the subject location. "Pursuant to New York City's 'Pothole Law' (Administrative Code of the City of New York 7-201 [c] [2]), prior written notice is a condition precedent to maintaining an action against the City of New York arising from a street defect, and it must be pleaded and proved" (*Sewell v City of New York*, 238 AD2d 331, 331 [1997]; *see also Albright v City of New York*, 25 AD3d 577 [2006]). Such prior notice, however, is not required where it is claimed that the municipality was affirmatively negligent in causing or creating the defective condition (*Messina v City of New York*, 190 AD2d 659, 659 [1993]; *see also Cabrera v City of New York*, 21 AD3d 1047, 1048 [2005]). Maps prepared and filed by the Big Apple Pothole and Sidewalk Protection Corporation which identify the complained of defect are sufficient written notice under the Pothole Law (*see Weinreb v City of New York*, 193 AD2d 596, 598 [1993]; *Acevedo v City of New York*, 128 AD2d 488, 489 [1987]). The affidavit of a representative of the DOT responsible for

supervising searches of records of defective conditions stating that no records were found with regard to the accident site, is also sufficient evidence to establish that no prior notice of the alleged defect was filed with the City (*see Cruz v City of New York*, 218 AD2d 546 [1995]).

New York courts consistently have declined to apply the "affirmative creation" exception to the prior notice rule to cases where a defect is alleged to have developed over time as the result of negligent road work or repairs originally performed by the municipality. In *Bielecki v City of New York* (14 AD3d 301 [2005]), the Appellate Division, First Department held that the "affirmative creation" exception did not apply in a case where the plaintiff's expert "did not opine that the subject defect existed immediately upon the completion of the City's repair work. Rather, he opined that the defect developed over time as the result of water seeping into, and freezing within, the City's allegedly negligent patchwork repair of the pathway" (*id.* at 301-302).

Contrary to defendants' contentions that such a search is not admissible evidence that the City did not create the alleged defect, the court finds that the City has established its prima facie case by submitting the affidavit of Ms. Johnson, a record searcher who avers that no complaints were received by the City with regard to the alleged defect. Neither of the defendants has submitted evidence in admissible form here or in the prior motion indicating otherwise. Accordingly, the court denies the motion and cross motion to reargue.

Motion and Cross Motion to Renew

In support of the motion and cross motion to renew, defendants assert that there are issues of fact with respect to the applicability of § 7-210 of the Administrative Code preventing an award of summary judgment of the City. Defendants maintain that the City failed to annex and address the photographs submitted by plaintiff along with her notice of claim for the review of the court. Defendants point out that they were never provided with the photographs at the time of the underlying motion and that plaintiff has not been deposed as yet so as to describe the manner of her accident. Defendants assert that the photographs "depicting a corner showing a brick walkway and a curbstone raised above everything else, in what appears to be a sidewalk/walkway." Defendants point to this court's determination in *Irizarry v The Rose Bloch 107 University Place Partnership*, 12 Misc3d 733 [2006] in which the court held that § 7-210 of the Administrative Code is inapplicable to curbstones and the City is responsible for its maintenance. Based upon the decision in *Irizarry* (12 Misc3d 733) and the recent photographs submitted by plaintiff to Chera, defendants argue that leave to renew should be granted and upon renewal, the City's summary judgment motion should be denied. As such, defendants maintain that the City's motion was premature. Finally, defendants argue that renewal is appropriate where new evidence is submitted in reply.

In opposition, the City maintains that the photographs were available to plaintiff at the time of the original motion. In addition, the City asserts that the photographs do not indicate whether the alleged defect is on the curb or on the sidewalk. The City maintains that

Irizarry (12 Misc3d 733) was decided five months before the court issued its prior determination and, as such, does not constitute new law. Finally, the City argues that both the motion and cross-motion should be denied because all of the relevant facts were before the Court on the prior motion and there are no new facts presented, nor has there been a change in the law.

In reply, defendants assert that renewal is properly granted to give a party an opportunity to address evidence raised for the first time in a reply affirmation and that defendants were unaware of the existence of the contract at the time of the motions. In addition, defendants assert that they were not in possession of plaintiff's photographs which were annexed to the notice of claim at the time of the prior motion. Defendants reject the City's reference to the fact that defendant Fulton Mall did not oppose the City's prior motion for summary judgment. The defendants argue that *Irizarry* (12 Misc3d 733) was only decided on March 21, 2006, after all the parties had already submitted their opposition papers in the original motion on or about February 6, 2006. As such, defendants argue that they did not have the opportunity to rely upon it in their opposition papers.

A renewal application must be supported by new or additional facts which, although in existence at the time of the prior motion, were not reasonably known by the party seeking renewal and, consequently, not made known to the court (*Brooklyn Welding Corp. V Chin*, 236 AD2d 392 [1997]; *Bossio v Fiorillo*, 222 AD2d 476, 477 [1995]). While a motion to renew must generally be based on newly discovered facts, the court has discretion to grant

this relief in the interest of justice, although not all of the requirements for renewal are met (*Brookhaven Memorial Hospital Medical Center*, 240 AD2d 726, 727). "[R]enewal is not a second chance freely given to the parties who have not exercised due diligence in making their first factual presentation" (*Rubinstein v Goldman*, 225 AD2d 328, 329 [1996]; *Foley v Roche*, 68 AD2d 558, 568 [1979]).

Based upon a review of the record submitted by the parties, the court grants defendants' motion and cross motion for leave to renew. The City neglected to append a copy of the photographs of the location of plaintiff's fall to its moving papers in the prior motion. The photographs indicate a raised curb and uneven sidewalk but do not depict any demarcation of exactly where plaintiff fell. However, the court notes that in her notice of claim, complaint and bill of particulars, plaintiff consistently identifies the location of her accident as the sidewalk. Defendants' assertion that plaintiff's accident may have occurred on the sidewalk is purely speculative and insufficient to raise a question of fact to prevent an award of summary judgment despite this court's in *Irizarry* (12 Misc3d 733). Accordingly, the court grants defendants' motion and cross motion to renew and, upon renewal, adheres to its original determination.

Conclusion

Accordingly, the court denies that portion of the motion and cross motion to reargue the August 14, 2006 determination. That branch of the motion and cross motion to renew is granted and, upon renewal, the court adheres to its original determination.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. SYLVIA O. HINDS-RADIX JSC