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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN A. RAKOWER J.S.C. PART Part 5
Justice

Index Number : 101753/2003

VARGAS, JULIO

VS

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

's motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/30/08

EILEEN A. RAKOWER
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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JULIO VARGAS and CARMEN VARGAS,

Plaintiff,

Index No.
101753/03

Seq No.: 002

- against -

Decision and Order

THE CITY OF NEW YORK and 942 COLUMBUS AVENUE HOUSING DEVELOPMENT FUND CORPORATION,

Defendants.

HON. EILEEN A. RAKOWER

Plaintiffs bring this action for personal injuries allegedly sustained when plaintiff Julio Vargas tripped and fell on the sidewalk in front of the premises known as 942 Columbus Avenue in the County and State of New York on December 1, 2001. Plaintiff Carmen Vargas brings a derivative action. More specifically, plaintiff tripped when his shoe fell into a depression around a "former fuel outlet" that was located on the sidewalk. Defendant the City of New York ("City") moves for summary judgment pursuant to CPLR 3212 based on lack of prior written notice. Both plaintiffs and defendant 942 Columbus Avenue Housing Development Fund Corporation ("Columbus") oppose.

City, in support of its motion, submits the following: (1) the notice of claim; (2) the pleadings; (3) a response sheet and a copy of a "Big Apple Map" annexed to the Response to the Case Scheduling order which was served on July 24, 2006; and the deposition transcript of Cynthia Howard, record searcher for the New York City Department of Transportation Litigation Support Unit. City argues that plaintiffs' action must be dismissed because it did not receive prior written notice of the defect pursuant to§7-201 of the New York City Administrative Code ("§7-201"). City

claims that a search was conducted for permits, repair records, cut forms, contracts and complaints and that the only things found were four permits which do not show that City performed any work in the area. Further, the Big Apple Map does not indicate a defect in the specific location of Mr.Vargas's accident.

Columbus, in opposition, submits:(1) a portion of Mr. Vargas' deposition transcript; (2) a complaint form dated November 6, 1996; (3) a portion of the deposition transcript of Florence Kirwan for Columbus; and a work order for a reconstruction project for the location of West 85th Street to West 110th Street with a start date of October 31, 1994 and a completion date of March 3, 1997. Columbus argues that the complaint and the work order raise questions of fact as to whether the City received prior written notice or whether it created the defect when it replaced the sidewalk. Plaintiffs submit nothing more than an attorney affirmation, which seeks to "incorporate by reference" Columbus' arguments.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

New York City Administrative Code §7-201(c)(2) states, 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. . . sidewalk . . .being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice . . . was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice.

The only recognized exceptions to the notice requirement are (1) where a

special use confers a special benefit upon the municipality or; (2) An act of affirmative negligence by the municipality caused or created the defect. When it is alleged that the municipality caused or created the defect, the exception is "limited to work by the City that *immediately* results in the existence of a dangerous condition." (*Oboler v. City of New York*, 8 N.Y.3d 888[2007]).

City submits evidence that it conducted a search for permits, repair records, cut forms, contracts and complaints for a period of two years prior to Mr. Vargas' accident and that no documents were found that would have put it on notice of the subject defect. Columbus, in opposition, submits evidence that City received a complaint regarding the subject sidewalk on November 6, 1996. It also provides a copy of a work order for replacement of the subject sidewalk, obtained through a FOIL request, that shows such replacement was set to be completed in 1997. Finally, Columbus provides the deposition testimony of its building manager, who states that he recalls that the sidewalk was "dug up and replaced" prior to plaintiff's accident and that the work encompassed the area where the fuel outlet and the alleged depression were located.

The complaint submitted by Columbus was made before the City completed the alleged renovation of the sidewalk, thereby rendering such notice moot. Additionally, that same form evidencing the complaint received November 6, 1996, contains a defect status, indicating "cls - closed work order." Thus, the complaint does not serve as prior written notice of the defect alleged here.

Columbus argues that City created the defect in its replacement of the sidewalk. Columbus does not submit any evidence that tends to show that the replacement of the sidewalk "immediately" resulted in the depression surrounding the fuel outlet. Indeed, City submits a "Big Apple Map," dated prior to plaintiffs accident but after City allegedly replaced the sidewalk, indicating no defect in the exact location where plaintiff fell.

City has shown, prima facie, that it had no notice of the alleged defect. Neither Columbus nor plaintiffs submit evidence in admissible form to raise an issue of fact sufficient to defeat City's motion.

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant the City of New York, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled; and it is further

ORDERED that the remainder of the action shall continue.

DATED: April 30, 2008

EILEEN A. RAKOWER, J.S.C