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

PRESENT: EMILY JANE GOODMAN Justice PART 17

Index Number : 111277/2005

DAWSON, JANETTE

VS.

COLUMBUS CONSTRUCTION CORP.

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion decided per attached

FILED
JUN 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/19/08

EMILY JANE GOODMAN

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 : IAS PART 17

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JANETTE DAWSON,

Plaintiff,

-against- Index No. 111277/05

COLUMBUS CONSTRUCTION CORP., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CONSOLIDATED EDISON, INC., EMPIRE CITY SUBWAY COMPANY (LIMITED), and CITY OF NEW YORK,

Defendants.

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EMILY JANE GOODMAN, J.:

Defendants Columbus Construction Corp. (Columbus) and the City of New York (the City) move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint.[1]

This action results from an alleged trip and fall accident. The complaint alleges that on March 28, 2005, plaintiff Janette Dawson (Dawson) was injured when she tripped and fell in a hole in the street at the intersection of East 15th Street and Irving Place, New York, New York.

From March 22, 2005 to March 28, 2005, Columbus had been milling (stripping) the asphalt from the surface of the street, pursuant to a contract with the City, in preparation for the street to be re-paved by the City. Dawson contends that the milling process either caused or uncovered a hole in the street

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[1] Defendants Consolidated Edison Company of New York, Inc., Consolidated Edison, Inc. and Empire City Subway Company (Limited) have been dismissed as defendants either by stipulation or by court order.

that was between six and 12 inches deep and approximately 12 inches wide. According to Dawson, on the day of her accident, it had been raining all day, the street was covered with water, and she did not see the hole, which was filled with water.[2]

Generally on a motion for summary judgment, the burden is on the proponent to show that it is entitled to judgment as a matter of law, tendering sufficient evidence to show that there are no material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Because summary judgment is a drastic remedy, it will not be granted where there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The City moves for summary judgment on the basis of Section 7-201 (c) (2) of the Administrative Code of the City of New York (the Pothole Law), for lack of written notice to the City that the defect in the street existed.[3] *See Katz v City of New York*,

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[2] Plaintiff submits Local Climatological Data for March 2005 from the National Oceanic and Atmospheric Administration to corroborate her testimony that it was raining all day.

[3] Section 7-201 (c) (2) states in pertinent 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

87 NY2d 241 (1995).

Plaintiff contends that written notice is not required in this case, because the City either created the defective condition or took some affirmative steps with respect to the condition without correcting or repairing it. *Messina v City of New York*, 190 AD2d 659 (2d Dept 1993)(prior written notice is not required where municipality was affirmatively negligent); *Kelly v City of New York*, 172 AD2d 350, 352 (1st Dept 1991)(absent prior written notice, "the City is insulated from liability due to nonfeasance ... and may be held responsible only for affirmative acts of negligence"). Plaintiff relies on the testimony of Michael Gallagher, Chief of Operations for Columbus, who testified that, generally, City inspectors would come to milling jobs "to oversee the operation, to make sure that the required depth of milling was done correctly, and to basically just generally watch the project." Deposition of Michael Gallagher, at 23. However, Gallagher was not employed by Columbus at the time of the accident and did not testify concerning whether City inspectors were actually present to oversee the milling operation in question here.

Plaintiff contends that, because Michael Perry, a supervisor

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commissioner to receive such notice ...."

with the New York City Department of Transportation, was present during the milling work, the City should have had knowledge of the defect in the street and that, therefore, the notice requirement was excused. *See Klimek v Town of Ghent, Columbia County*, 114 AD2d 614, 615 (3d Dept 1985)(there may be an exception to the statutory notice requirement where the municipality either has inspected or is performing work at the site shortly before the accident occurred). According to Perry, he was assigned to coordinate milling and paving work within the Borough of Manhattan, schedule the days of the week that the City worked on certain jobs, do "costings", and keep records of how many laborers were working on a specific job, and how many hours they worked. Deposition of Michael Perry, at 13. Perry testified that he was present at the site in question during the milling "to check the crews to see the progress that they are making." *Id.* at 12. Perry also testified that the City hired a company to oversee the work of Columbus, although he did not know the name of the company. *Id.* at 9.

As the Court in *Kelly v City of New York* stated, lack of notice will be excused on the ground of actual notice "only in the narrowest of circumstances, such as where the accident occurred during a construction project at which a municipal inspector was present on a sufficient basis to ensure against precisely the danger that caused the ensuing injury." *Kelly v*

City of New York, 172 AD2d at 352. In *Kelly*, where the City's inspector was only present to assess the quality of the contractor's performance and to ensure the safety of the workplace, not to examine the condition of the sidewalk, the Court concluded that the City could not be found liable absent written statutory notice. Here, as in *Kelly*, there is no indication that Perry, in his role of coordinator, actually supervised the work of Columbus, examined the condition of the street, or ever saw the hole in which plaintiff allegedly fell. Thus, plaintiff has failed to raise a sufficient question of fact as to whether the City was aware of the hole to overcome the statutory notice requirement.

Plaintiff also contends that the City may be held liable for the alleged negligence of Columbus, because Columbus was doing the milling work for the City pursuant to contract. However that sort of general application of respondeat superior would be an exception that would totally swallow the statutory notice requirement. Thus, the motion of the City for summary judgment dismissing the case against it is granted.

Columbus moves to dismiss on the basis that there is no evidence that Columbus carried out its milling work negligently or created the allegedly dangerous condition.

Again plaintiff relies on the testimony of Michael Gallagher, who stated that a hole in the street, such as that

alleged here, could be uncovered as a result of a milling operation. Gallagher Deposition, at 24. Gallagher further testified that when a hole is uncovered, the procedure is to fill it with hot asphalt, and that if their crew missed something, City inspectors would typically identify it and direct the field crew to deal with the area. *Id.* at 25, 42-43. Thus, although it is true that plaintiff provides no specific evidence that Columbus actually created the hole, Gallagher's testimony raises a question of fact as to whether the work of Columbus uncovered an existing hole in the street, and having uncovered it, failed to follow its own procedures of filling the hole with asphalt.

Columbus argues that as a contractor with the City, it did not have a duty of care running to plaintiff. Columbus notes that under the general rule regarding the obligations of contractor to a third party, the actions of the contractor will not give rise to tort liability to third persons unless: "(1)... the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'; (2) ... the plaintiff detrimentally relies on the continued performance of the contracting party's duties; [or] (3) ... the contracting party has entirely displaced the other party's duty to maintain the premises safely." *Espinal v Melville Snow Contr., Inc.*, 98 NY2d 136, 140 (2002)(citations omitted); *see also Church v Callanan Indus., Inc.*, 99 NY2d 104

(2002) (launching an instrument of harm is synonymous with creating or exacerbating a dangerous condition). Plaintiff contends that Columbus either created or exacerbated a dangerous condition by making or uncovering a hole in the street during its milling work. Citing *Pina v New York Paving, Inc.* (266 AD2d 120 [1st Dept 1999]), Columbus specifically argues that a paving contractor has no duty to the general public to make repairs to an existing defect near the area of their work site which had nothing to do with the work the paving company had contracted to do. Here, however, plaintiff alleges that the hole was a direct result of Columbus's work, and pursuant to its own procedure, Columbus should have repaired the defect by filling the hole, but failed to do so. Thus the decision in *Pina* is distinguishable.

Columbus further argues that since plaintiff cannot establish that Columbus created the dangerous condition, she must show that Columbus possessed actual or constructive notice of the specific defect. *Piacquadio v Recine Realty Corp.*, 84 NY2d 967 (1994); *Gordon v American Museum of Natural History*, 67 NY2d 836 (1986). Those cases relate to defects in otherwise well maintained areas, that were not caused by the defendant; here, plaintiff alleges that the work of Columbus created or exposed the dangerous condition.

Finally, based upon the photograph submitted by plaintiff, Columbus argues that the hole in the street in which Dawson

allegedly fell was merely a trivial defect and though the question of "trivial defect" is typically a question for the jury, here, it should be dealt with by the court.

There is no per se rule with respect to the dimensions of a defect that will give rise to liability (*Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165 (1st Dept 2000); *see also Rivera v 2300 X-tra Wholesalers, Inc.*, 239 AD2d 268 (1st Dept 1997). Even a trivial defect may constitute a snare or trap (*Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, *supra; see also Herrera v City of New York*, 262 AD2d 120 (1st Dept 1999). In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" and that question is usually for the jury (*Trincere v County of Suffolk*, 90 NY2d 976, 978 (1997), quoting *Caldwell v Village of Is. Park*, 304 NY 268, 274 (1952). While a gradual, shallow depression is generally regarded as trivial, the presence of an edge which poses a tripping hazard renders the defect nontrivial (*Argenio v Metropolitan Transportation Authority*, 277 AD2d 165, *supra*).

The copies of the photograph of the area of the alleged hole which are contained in the motion papers do not provide a clear depiction of the condition of the street. Plaintiff has testified in her 50-h hearing and her deposition that the hole

was between six and 12 inches deep and 12 inches wide and that when her foot was in the hole, the street was at the level of her ankle. On a motion for summary judgment, the moving party has a greater burden to produce evidentiary facts than the adversary. *Friends of Animals, Inc. v Associated Fur Mfrs.*, Inc., 46 NY2d 1065 (1979). Columbus has not submitted any evidence to counter plaintiff's testimony. Based upon Dawson's testimony, a jury could find that the defect was not trivial.

Accordingly, it is hereby

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

ORDERED that the motion for summary judgment of defendant Columbus Construction Corp. is denied; and it is further

ORDERED that the remainder of the action shall continue as to that defendant.

This Constitutes the Decision and Order of the Court.

Dated: June 19, 2008

ENTER:

J.S.C.
EMILY JANE GOODMAN