[* 1]

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

PRESENT: HAROLD BEELER Justice PART 21

Index Number : 108090/2008
EVELYN, YOLANDA
VS.
MANHATTAN & BRONX SURFACE
SEQUENCE NUMBER : 002
DISMISS

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED
DEC 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/23/09

HAROLD BEELER J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

At IAS Part 21 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 23rd of December, 2009.

PRESENT: **HON. HAROLD B. BEELER,**
Justice

YOLANDA EVELYN,

Plaintiff,

-against-

MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY (MABSTOA) and NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

INDEX NO. 108090/08
Motion Sequence 001
DECISION & ORDER

MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY (MABSTOA) and NEW YORK CITY TRANSIT AUTHORITY,

Third Party Plaintiffs,

-against-

THE CITY OF NEW YORK,

Third Party Defendant.

Third Party Index No. 590707/08

The City of New York (City), third party defendant, moves for summary judgment in its favor dismissing the third party complaint against it. There is no opposition.

Plaintiff was allegedly injured on March 15, 2008 when exiting a bus on West 125th Street near Frederick Douglass Boulevard, New York County.

City requires prior written notice of a defective street or sidewalk pursuant to Administrative Code § 7-201 unless there is evidence of its affirmative negligence. At her 50-h statutory hearing, plaintiff claimed she stepped into a "pot hole" and twisted her foot. She described the pot hole as "[l]arge, broken, one of many, multiple cracks, big enough to hold rain." In her verified bill of particulars, she identifies the location as "approximately 32 feet west of the corner of 125th Street and Frederick Douglass Boulevard, 10-1/2 feet south of West 125th Street curb." Defendants and third party plaintiffs Manhattan and Bronx Surface Transit Operating Authority and New York City Transit Authority (Transit) have the burden of proving prior written notice. *Katz v City of New York*, 87 NY2d 241, 243 (1995) ("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").

Nalik Zeigler, a Department of Transportation (DOT) record searcher, testified at an examination before trial that a search for West 125th Street between 8th Ave (Frederick Douglass Boulevard) and St. Nicholas Avenue produced one complaint, 2 City repair orders[1] and 3 work permits for non-City entities. One repair order, dated May 15, 2007, dealt with a pothole in front of 309 West 125th Street; the second, dated June 21, 2006, dealt with a pothole in front of 322 West 125th Street. City attaches photographs of the purported accident scene produced and marked by plaintiff at her examination before trial on May 9, 2008 which show a pothole in front of a Modell's store at 300 West 125th Street, across the street from 309 West 125th Street, a wide, two-way thoroughfare, and further east of 322 West 125th Street.

The work permits were issued respectively to Olsen Creative Landscaping to open a

[1]One repair order was duplicated giving the appearance of three repair orders.

roadway or sidewalk, Consolidated Edison to open a roadway and Crown Contracting NY LTD to store equipment only. Permits issued do not constitute notice. *DeSilva v. City of New York*, 15 A.D.3d 252, 253 (1st Dept 2005) ("The work permits issued by the City to Con Edison and Empire give no indication that the City was aware of the defective condition that allegedly caused plaintiff's fall so as to constitute a 'written acknowledgment' within the meaning of the Pothole Law"). City also attaches a Big Apple map dated October 23, 2003, much too long before the accident to be relevant.

In sum, there is no proof of prior written notice to City of the defective condition. Additionally, there is no evidence of affirmative negligence by City. The appearance of pot holes, cracks, depressions and missing pieces in New York City streets is commonplace, but not necessarily a source of liability. The affirmative negligence exception to the notice requirement is limited to work by the City that immediately results in the existence of a dangerous condition. *Yarborough v City of New York*, 2008 NY Slip Op 1031, 3 (2008) ("Even assuming the City performed the negligent pothole repair, plaintiff's expert found that the deterioration of the asphalt patch – the condition that caused plaintiff's injury – developed over time with environmental wear and tear"); *Torres v City of New York*, 2007 NY Slip Op 3752, 1 (1st Dept 2007) ("according to plaintiff's expert, the complained-of roadway depressions, although traceable to the City's negligence in repairing the roadway, did not appear immediately, but developed gradually as inadequately paved cobblestones became exposed, loose and displaced"); *Bielecki v City of New York*, 14 AD3d 301, 302 (1st Dept 2005) ("Here, 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").

Under these circumstances, City's motion is granted on default and the third party complaint against it is dismissed. The Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court. All other relief not expressly granted is denied.

DATE: **December 23, 2009**

ENTER:

HAROLD B. BEELER, J.S.C.