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

PRESENT: BARBARA JAFFE J.S.C. PART 5

Index Number : 113253/2007
BAILEY, ROXANNE
VS
CITY OF NEW YORK
Sequence Number : 003
DISMISS ACTION
CPLR 11

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

FILED
FEB 18 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 2/11/10
FEB 11 2010

BARBARA JAFFE J.S.C.
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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ROXANNE BAILEY,

Plaintiff,

-against-

THE CITY OF NEW YORK, IMICO 86 DEVELOPER LLC, BOVIS LEND LEASE LMB, INC. and EXTELL DEVELOPMENT COMPANY,

Defendants.

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Index No.	113253/07
Motion Date:	10/21/09
Motion Seq. No.:	003
Calendar No.:	11

BARBARA JAFFE, JSC:

By notice of motion dated October 21, 2009, defendant and cross-claim defendant City of New York (City) moves pursuant to CPLR 3211 for an order dismissing the claims and cross-claims against it. Plaintiff opposes the motion. Defendants/cross-claimants Imico 86 Developer LLC and Bovis Lend Lease LMB, Inc. (Bovis) do not oppose. For the reasons that follow, City's motion is denied.

I. FACTUAL BACKGROUND

Plaintiff alleges that on April, 17, 2007, while walking uptown on the east side of Lexington Avenue between 85th and 86th Streets, she tripped and fell on a roadway where the pavement around a manhole had been removed. (Affirmation of Gregory Mouton, Esq., dated Oct. 7, 2009 [Mouton Aff.], Exh. A).

II. PERTINENT PROCEDURAL BACKGROUND

On July 13, 2007, plaintiff timely served City with a notice of claim and on September 20, 2007, she served a summons and complaint on all defendants. On February 7, 2008, plaintiff served a notice for discovery and inspection on City, requesting, *inter alia*, all City records

pertaining to the site of the accident. (Affirmation of Stacey Haskel, dated Dec. 28, 2009, Exh. D).

At an examination before trial conducted on October 30, 2008, Leslie Smalls, a record searcher for the Department of Transportation (DOT) testified that a computerized search of the DOT's Prior Notification Unit and Highways Unit for permits issued during the two years prior to and including the date of plaintiff's fall revealed no permits issued to City pertaining to the site of plaintiff's fall. Although Smalls had the records and referred to them while testifying, she did not conduct the search, did not know who did, and did not know whether any other city agency had performed work at the site. (*Id.*, Exh. D).

III. CITY'S MOTION TO DISMISS

A. Contentions

City argues that plaintiff has failed to state a cause of action because she has not demonstrated that it had prior written notice of any defective condition at the site of her fall, or that it had caused or created the dangerous condition. It relies on the computer-generated DOT records referenced by Smalls which, it contends, reflect that no permits were issued to City or to any of its agencies pertaining to the location for two years prior to and up to the date of the accident. (*Id.*).

In opposition, plaintiff maintains that City's motion must be denied pursuant to CPLR 3211(d) as evidence solely in City's possession (gang sheets, evidence of the performance of a manual search of City's records and of other City departments, and the identity of the individual performing the computerized search) have not been made available to her, and such evidence could demonstrate that City had written notice of a dangerous condition. She also offers evidence provided by Bovis that the DOT had conducted inspections of the location on March 3

and March 22, 2007, which is not reflected in documentation produced by City. (Haskel Aff., Exhs. E, F). In the alternative, plaintiff alleges that no notice was required as City negligently created the dangerous condition by approving a logistics program provided by Bovis which permitted the redirection of pedestrians from the sidewalk to the roadway. (*Id.*, Exh. F).

B. Analysis

On a motion to dismiss, the court must accept the facts alleged as true, accord the plaintiff every possible favorable inference, and determine whether the facts alleged fit within any cognizable legal theory." (*Lawrence v Miller*, 11 NY3d 588, 595 [2008]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). When evidentiary material is submitted in support of the motion, the court's inquiry changes to whether the plaintiff has a cause of action, not whether she has stated one, and "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate." (*Guggenheimer v Ginzburg*, 43 NY2d 368, 274-275 [1977]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000], *citing Blackgold Realty Corp. v Milne,* 119 AD2d 512, 513 [1st Dept 1986], *affd* 69 NY2d 719 [1987]).

Pursuant to New York City Administrative Code § 7-201(c)(2):

> No civil action shall be maintained against the city for . . . injury to person . . . sustained in consequence of any street . . . sidewalk or crosswalk, or any part or portion of any of the foregoing . . . 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 acknowledgment of from the city of the defective, unsafe, 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 reasonable safe.

"[P]rior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City." (*Katz v City of New York*, 87 NY2d 241, 243 [1995].

Whereas plaintiff bears the burden of establishing at trial that City had written notice of the defective condition (*id.*), at the pleading stage she bears no such burden. Rather, movant City bears the burden of establishing an absence of notice. (*See McNeill v City of New York*, 40 AD3d 823 [2d Dept 2007]).

Here, the evidence offered by City in support of its contention that it had no notice of the claimed dangerous condition is Smalls's testimony and the records which, again, were the product of a search performed by an unknown individual. Absent Smalls's personal knowledge of the pertinent facts, given her inability to address whether any other City agency had notice of the condition (*see* Admin Code § 7-201(c)(2) [requiring written notice to "any person or department authorized by the commissioner to receive such notice"]), and my own observation that many of the records submitted are either illegible or otherwise incomprehensible, City has failed to negate "beyond substantial question" the essential facts set forth in the complaint. (*Cf McNeill*, 40 AD3d 823 [denying City's motion to dismiss for lack of written notice where DOT employee's testimony not based on personal knowledge]; *Ospina v City of New York*, 2009 NY Slip Op 30966(U) [Sup Ct, New York County Apr. 29, 2009] [initial insufficiency of City's evidence remedied in reply affidavit of employee who conducted record search]).

Moreover, in relying solely on Smalls's testimony, City also effectively precluded plaintiff from opposing its motion as Smalls could neither identify nor explain repair orders which could prove that the City had written notice of the claimed defect. (*Cf Bisulco by Bisulco*

v New York City, 186 AD2d 84, 84-85 [1st Dept 1992] [it is "particularly inappropriate" for court to search record and grant summary judgment as many underlying facts are within defendant exclusive knowledge and control]). City's failure to provide plaintiff with sufficient discovery also prevented her from establishing that it caused and/or created the dangerous condition. (*See id.* [court should not grant City judgment where evidence as to whether City created or caused dangerous condition not provided to plaintiff]).

IV. CONCLUSION

For all of these reasons, it is hereby

ORDERED, that City's motion to dismiss is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: February 11, 2010

FEB 11 2010

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

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