[* 1]

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

CYNTHIA S. KERN J.S.C.

Index Number : 108607/2004

PART 52

LIEBERMAN, YONA

vs

CITY OF NEW YORK

Sequence Number : 002

DISMISS

INDEX NO. 108607/04

MOTION DATE

MOTION SEQ. NO. 002

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	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision

FILED
JUL 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/23/10

CYNTHIA S. KERN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

----------x

YONA LIEBERMAN,

Plaintiff,

Index No. 108607/04

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	
Affirmations in Opposition to the Cross-Motion.....	
Replying Affidavits.....	2
Exhibits.....	3

Plaintiff commenced the instant action to recover damages for personal injuries that she allegedly sustained when she tripped and fell on a metal sheet opening with a missing cover while crossing West 31st Street outside the crosswalk between 7th and 8th Avenues on March 22, 2003. Defendant City of New York (the "City") now moves for summary judgment dismissing the complaint on the ground that it did not have prior written notice of the condition as required by Administrative Code §7-201 and did not cause or create the alleged defective condition. For the reasons set forth below, the City's motion is granted.

As an initial matter, the City is required to have prior written notice of defective conditions in streets pursuant to the prior written notice provisions of § 7-201(c)(2) of the Administrative Code of the City of New York. That section provides as follows:

> 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 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 acknowledgement from the city of the defective, unsafe, dangerous 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 reasonably safe.

Pursuant to § 7-201, a plaintiff is required to both plead prior notice and to prove that the City had prior written notice of the defective condition. Failure to plead compliance with the prior written notice statute requires dismissal of an action against the City. *See Baez v. City of New York,* 236 A.D.2d 305 (1st Dept 1997). Plaintiffs must prove that the City had prior written notice of the specific defect alleged in the complaint. Simply alleging that a roadway is generally neglected or unsafe is not sufficient. *See Belmonte v. Metropolitan Life Ins. Co.,* 304 A.D.2d 471, 474 (1st Dept 2003).

Even if the City did not have prior written notice of a defective condition, it can still be held liable for injuries resulting from a condition that it created through an affirmative act of negligence or if the roadway was used for a "special use" which conferred a special benefit upon the City. *See Oboler v. City of New York,* 8 N.Y.3d 888, 889 (2007). If plaintiff claims that the

City caused or created the condition, plaintiff must show that the City created the defect through an affirmative act of negligence "that immediately result[ed] in the existence of a dangerous condition." *Yarborough v. City of New York*, 10 N.Y.3d 726 (2008) (citations omitted); *see also Bielecki v. City of New York*, 14 A.D.3d 301 (1st Dept 2005). In *Yarborough*, the Court of Appeals held that the City should be granted summary judgment because plaintiff failed to establish that the City had negligently performed a pothole repair which immediately resulted in a dangerous condition. *See* 10 N.Y.3d 726.

The City makes out its prima facie case that it did not receive prior written notice of the defective condition. The City submitted the deposition testimony of Fatima Brantley, who testified that a two year search for records maintained by the Department of Transportation for the subject location that included permits, applications, correction action reports, notices of violation, inspects, contract information, in-house resurfacing records, maintenance and repair records, complaints, gang sheets and the Big Apple Map yielded 71 permits, one corrective action report, three notices of violation, three inspections, four maintenance and repair records and two complaints. However, none of the permits, corrective action reports or notices of violation were issued to the City or City contractors. Moreover, none of the corrective action reports, notices of violation or complaints refer to a missing cap on a water valve or any condition that resembles the subject condition, which is a metal sheet opening with a missing cover. Therefore, the City has established that it did not have prior written notice of the alleged defect.

There is no exception to the prior written notice requirement in the instant case. The prior written notice requirement is construed strictly and courts have found a narrow exception

only in unusual circumstances, such as when the subject location was inspected almost daily for the very danger that caused the plaintiff's injury. *See Holt v. Tioga County,* 95 A.D.2d 934, 935 (3rd Dept 1983); *see also Blake v. City of Albany,* 63 A.D.2d 1075, 1076 (3rd Dept 1978), affd. 48 N.Y.2d 875 (1979). There are no such special circumstance in the instant case.

Moreover, plaintiff fails to raise an issue of triable fact as to whether the roadway was used by the City for a "special use." The special use exception to the prior written notice requirement allows for municipal liability despite lack of prior written notice when a structure in the street is constructed to confer a special benefit on the locality rather than for normal public use. *See Amabile v. City of Buffalo,* 93 N.Y.2d 471, 474 (1999); *see also Poirier v. City of Schenectady,* 85 N.Y.2d 310, 315 (1995). Plaintiff argues that the missing cover constitutes a "special use" because it may have provided the Department of Environmental Protection ("DEP") with access to shutoff valves to stop leaks within nearby buildings. However, plaintiff offers no explanation of why the ability to stop leaks in nearby buildings might confer a special benefit to the City. Furthermore, there is no evidence suggesting that the manhole was solely used for stopping leaks in neighboring buildings and in fact work records submitted by the City show that the manhole was used for the benefit of the public because one of the work orders reports work related to nearby fire hydrants.

Furthermore, plaintiff fails to raise an issue of triable fact as to whether the City caused or created the condition through an act of affirmative negligence. There is no evidence that the City did any work on the road that immediately created the alleged hazard. DEP records for the two years prior to plaintiff's accident show that the City replaced the manhole cover, cleaned the catch basin for the sewer and performed work relating to nearby fire hydrants, none of which

would create the alleged defect that caused plaintiff's accident, and plaintiff does not argue otherwise. *See Yarborough*, 10 N.Y.3d 726.

Accordingly, defendant City's motion for summary judgment is granted and plaintiff's complaint is dismissed. This constitutes the decision and order of the court.

Dated: 7/23/10

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.