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8/3/10

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

PRESENT: CYNTHIA S. KERN J.S.C. Justice — PART 52

INDEX NO. 102654/08

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

STAHLMAN, L

-v-

HOUSE OF THE REDEEMER

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 and this action is hereby transferred to a non-City part.

FILED
AUG 03 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/29/10

CYNTHIA S. KERN 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

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

----------x

STARR SHULMAN,

Plaintiff,

Index No. 102694/08

-against-

HOUSE OF THE REDEEMER, THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Defendants.

----------x

HON. CYNTHIA 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
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she struck her leg on an allegedly defective tree guard. Defendant the City of New York now moves to vacate Item #1 of this court's order regarding discovery dated May 19, 2010 or, in the alternative, extending its time to respond to that order. It also moves for summary judgment dismissing the complaint. For the reasons set forth more fully below, defendant's motion for summary judgment is granted.

The relevant facts are as follows. On November 20, 2007, at approximately 10:00 pm, plaintiff was walking from 7 East 95th Street toward a street light when she struck her leg on an

allegedly defective tree guard. She claims that not only was the tree guard defective but that there was insufficient lighting at the site. She claims that the lack of lighting resulted in her not seeing the tree guard.

Defendant City is entitled to summary judgment because it had no prior written notice of the defect as required by 7-201 of the Administrative Code. That section provides:

> 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 acknowledgment 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.

In *Vucetovic,* the Court of Appeals held that a tree well is not part of the sidewalk for purposes of liability under § 7-210 of the Administrative Code, which states that the abutting property owner rather than the City is responsible for the maintenance of sidewalks. However, the Court of Appeals did not address the issue of whether prior written notice is required to maintain an action against the City for failing to maintain a tree well. Administrative Code § 7-201(c)(2), which is the section of the code containing the written notice requirement, specifically states that prior written notice is required for defects on a sidewalk or "encumbrances thereon or attachments thereto." This language is much broader than the language in § 7-210 as it is not limited solely to sidewalks. Based on the broader language of § 7-201(c)(2), another court has specifically found that written notice is required for injuries that occur in tree wells and that *Vucetovic* did not

overrule previous holdings requiring prior written notice in tree well accident cases. *See Tucker v City of New York,* Index No. 101463/04 (Sup. Ct. New York County, 2009). This court agrees with the foregoing analysis and finds that prior written notice is required when the plaintiff's injuries occur in a tree well. In the instant case, the City makes out its prima facie case that it did not receive prior written notice of the defective condition and plaintiff does not submit any evidence to the contrary.

However, the City can still be held liable for injuries resulting from a defective 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.

In the instant case, 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. She does not present any evidence that the City installed or repaired the subject tree guard and thereby immediately created the alleged hazard. *See Yarborough*, 10 N.Y.3d 726. The City submitted the deposition testimony of William Steyer, a supervisor with the Department of Parks and Recreation, who stated that the City does not install tree guards of the type at issue. Plaintiff submitted no

evidence to the contrary. Accordingly, defendant City is entitled to summary judgment dismissing the complaint against it.

In addition, the City is entitled to summary judgment as it had no obligation to install or maintain street lighting near the tree guard. A municipality is generally only required to install or maintain streetlights "only in certain situations where it is necessary to keep the street safe, i.e., where there is a defect or some unusual condition rendering the street unsafe to the traveling public." *Thompson v City of New York*, 78 N.Y.2d 682, 684 (1991). Plaintiff fails to establish, as required by *Thompson*, that the alleged defect was such as to require the City to install lighting at the site.

Accordingly, the City's motion for summary judgment is granted, rendering the need for further discovery moot. Plaintiff's complaint is dismissed as against the City only. This constitutes the decision and order of the court.

Dated: 7/29/10

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.

FILED
AUG 03 2010
COUNTY CLERK'S OFFICE
NEW YORK