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

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

Index Number : 401001/2008
MURRAY, PATSY
VS.
EMPIRE CITY SUBWAY
SEQUENCE NUMBER : 003
DISMISS
CAL #86

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. 8

this motion to/for dism/SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 11/29/10
NOV 29 2010

BARBARA JAFFE 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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PATSY MURRAY,

Plaintiff,

-against-

EMPIRE CITY SUBWAY COMPANY, SERVICE PLUS PLUMBING AND HEATING COMPANY and THE CITY OF NEW YORK,

Defendants.

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Index No. 401001/08

Argued: 10/19/10
Motion Seq. No.: 003
Calendar No.: 86

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Frank A. Ross, Esq.
Dinkes & Schwintzer, P.C.
112 Madison Avenue
New York, NY 10016
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For defendant City:
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Michael A. Cardozo
Corporation Counsel
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By notice of motion dated May 5, 2010, defendant City moves pursuant to CPLR 3211 for an order dismissing the complaining, or pursuant to CPLR 3212 for an order summarily dismissing the complaint. For the reasons that follow, the motion is denied.

I. FACTS

Plaintiff alleges that she fell on a defective portion of the street by the southwest corner of Broadway at West 225th Street in the Bronx. (Affirmation of Jessica Wisniewski, ACC, dated May 8, 2008 [Wisniewski Aff.], Exhs. A, B, D). At a 50-h hearing held on March 28, 2006, plaintiff described the defect as a lumpy pothole, four to five feet in length and width, which she he had noticed at least two weeks before falling on it. (Wisniewski Aff., Exh. D at 18-19).

Abraham Lopez, a record searcher for the New York City Department of Transportation

(DOT), testified at a deposition held on July 22, 2009 as to the results of a records search conducted by another DOT employee for Broadway between West 225th and West 228th Streets, covering the two years preceding plaintiff's accident. (*Id.*, Wisnewski Aff., Exh. G). The search yielded ten permits, three corrective action reports (CARs), two notices of violation (NOVs), and one repair order issued on December 21, 2005, for a pothole in front of 5202 Broadway; there was no contract information, in-house surfacing records, complaints or gang sheets for roadway defects or gang sheets for milling resurfacing records. (*Id.* at 7-8, 23). According to Lopez, CARs and NOVs are issued by the DOT's Highway Inspection Quality Assurance Unit (HIQA). (*Id.* at 8, 26). He was unable to explain the NOVs beyond indicating that they were issued to New York City Water Main Works and Service Plus Plumbing and Heating Company. (*Id.* at 10, 11). He was also unable to explain the CARs, or "CASH" documents. (*Id.* at 12-15).

Plaintiff timely served a notice of claim on City on February 17, 2006 (*id.*, Exh. A), and, on April 2, 2006, commenced this action by serving a summons and complaint (*id.*, Exh. B). By order dated February 3, 2010, the action against Empire City Subway Company was dismissed on default. Plaintiff filed his note of issue and certificate of readiness on March 29, 2010.

II. CONTENTIONS

Relying on the pleadings, plaintiff's 50-h hearing and deposition testimony, the search results, and Lopez's deposition, City contends that it cannot be held liable for plaintiff's injuries absent prior written notice of the condition and an allegation of prior written notice in plaintiff's notice of claim, and denies that it either caused or created the condition. (Wisniewski Aff.).

In opposition, plaintiff asserts that she properly alleged written notice in her notice of claim and that issues of fact as to whether City had written notice are evidenced by a DEP

violation issued on January 3, 2006 to Service Plus Plumbing and Heating Company, several pothole notices received by DOT in 2005, and permits for roadway openings at the accident location. (Affirmation of Frank A. Ross, Esq., dated Aug 30, 2010, Exh. B; Wisniewski Aff., Exh. F).

III. ANALYSIS

It is well-settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853). Accordingly, it is City's burden, as movant, to demonstrate its entitlement to judgment, and negate, *prima facie*, an essential element of plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). If shown, the burden shifts to plaintiff to establish that there exists a triable issue of fact.

Pursuant to Administrative Code § 7-201 "no civil action shall be maintained against the city" arising from a dangerous condition unless plaintiff can demonstrate that City had written notice of the dangerous condition. The "written acknowledgment" requirement may be satisfied by an internal document from an agency other than the DOT where it shows that the "responsible agency . . . had knowledge of the condition and the danger it presented." (*Bruni v City of New York*, 2 NY3d 319, 326-327 [2004]).

Although a plaintiff must plead and prove at trial that the municipal defendant had written notice pursuant to Administrative Code § 7-201, there is no requirement that the plaintiff plead written notice with the specificity demanded by defendant. Rather, by alleging in her notice of claim that "upon information and belief, actual notice was filed with the Department of the Transportation of the City of New York" and specifying the location, plaintiff has sufficiently pleaded her cause of action and provided defendant with sufficient information to defend. (*See eg Lopez v New York City Hous. Auth.*, 16 AD3d 164 [1st Dept 2005] [allegations sufficiently related to notice of claim and did not constitute new causes of action]). *Semprini v Village of Southampton*, 48 AD2d 543 (2d Dept 2008), is not to the contrary and is distinguishable, as there, the court held that a notice of claim must include allegations that the municipal defendant had caused or created a defective condition or enjoyed a special use, which constitute distinct theories of liability not at issue here. (*Cf Hebel v City of New York*, 2009 NY Slip Op 32505[U] [Sup Ct, New York County] [plaintiffs need not plead prior written notice]). Moreover, defendant is not prejudiced as its investigation of the accident would not have been any different if plaintiff had pleaded prior written notice, (*Cf Goodwin*, 42 AD3d 63, 68 [1st Dept 2007] [no prejudice where there is no evidence that public authority attempted to conduct an investigation]; *Miles v City of New York*, 173 AD2d 298, 300 [1st Dept 1991] [no indication that investigation was "stymied by a lack of specifics"]),

As defendant has not submitted evidence based on sufficient personal knowledge of the documents supporting its motion, and as many of the documents are indecipherable or illegible, defendant has failed to establish an absence of written notice (*see Cabrera v City of New York*, 21 AD3d 1047, 1048 [2d Dept 2005] [summary judgment denied where City testimony regarding

its records raised issue of fact as to whether it caused or created defect]), and consequently has not satisfied its burden of establishing entitlement to summary judgment.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is denied.

This constitutes the decision and order of the court.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: November 29, 2010
New York, New York

NOV 29 2010

FILED
DEC 03 2010
NEW YORK
COUNTY CLERK'S OFFICE