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

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

Index Number : 116104/2007

ELINSKI, KAREN

vs

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 116104/07

MOTION DATE

MOTION SEQ. NO. 03

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. This action is hereby transferred to a non-city part.

FILED

JAN 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/3/11

CK

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

KAREN ELINSKI,

Plaintiff(s),

-against-

THE CITY OF NEW YORK and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant(s).

----------x

Index No. 116104/07

DECISION/ORDER

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
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell due to an alleged pothole adjacent to an underground street access cover owned and operated by defendant Consolidated Edison of New York, Inc. ("Con Edison") on Third Avenue just south of East 44th Street on August 2, 2007. Defendant the City of New York (the "City") now moves for summary judgment. For the reasons set forth below, the City's motion is granted.

Initially, it is undisputed that the City is required to have prior written notice of the subject condition 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. *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.

In the instant case, the City makes out its prima facie case that it did not receive prior written notice of the defective condition. The City submitted the transcript of the deposition of Leslie Small, a records searcher for the Department of Transportation, who testified to the results of a two year search for records pertaining to Third Avenue between East 43rd Street and East 44th Street. The search included permits, applications, complaints, maintenance and repair records, corrective action requests, notices of violations, gang sheets and contracts. The search returned five permits, three corrective action requests, two maintenance and repair records, two gang sheets for roadway defects and a Big Apple Map. Both maintenance and repair records documented repairs that were performed and closed over a year before plaintiff's accident. The City also submitted the transcript of the deposition of Monifa Bell, a former pothole repairer with the Department of Transportation. Ms. Bell testified that the maintenance crew sheets reflect that two pothole repairs were performed at the subject location over a year before the accident. Ms. Bell also testified that she personally supervised the first repair crew on February 8, 2006 and Mr. Jessie Sherrod supervised the second repair crew on July 18, 2006. There are absolutely no records suggesting that the City had prior written notice of a pothole existing in the location where plaintiff fell on August 2, 2007.

Moreover, plaintiff's argument that the deposition transcripts submitted by the City in support of its motion are not admissible evidence because they are unsigned is without merit

because it is not supported by the CPLR. CPLR 3116(a) provides that if a witness fails to sign a deposition within sixty days of the time it is provided to him or her, it may be used fully as though signed, especially when the transcript is certified as accurate by the court reporter. *Zabari v City of New York,* 242 A.D.2d 15, 17 (1st Dept 1998); *see also White Knight Ltd. v Shea,* 10 A.D. 3d 357 (1st Dept 2004). In the instant case, over sixty days have elapsed since the depositions of the City witnesses and both were certified as accurate by the court reporters.

Furthermore, plaintiff's argument that summary judgment is premature because discovery is incomplete is without merit. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." *Davila v. New York City Transit Auth.*, 66 A.D.3d 952, 953-54 (2nd Dept 2009); *see also Brown v. Bauman*, 42 A.D.3d 390, 392-93 (1st Dept 2007). In the instant case, plaintiff argues that Con Edison was issued three permits to do work at the subject location in the several weeks before her accident and that additional discovery with respect to Con Edison may reveal that as part of its work at the location, Con Edison provided the City with prior written notice of the alleged defect. However, the City has sufficiently made out its prima facie case that it did not have prior written notice by providing all of its own records regarding the subject location. Any evidence in possession of Con Edison that may be uncovered by additional discovery would not constitute prior written notice because § 7-201 requires that prior written notice actually be given to the City. Moreover, plaintiff fails to offer any basis other than speculation for her claim that additional discovery with respect to Con Edison would uncover facts sufficient to deny summary judgment. Discovery is complete as to the City.

Finally, plaintiff has not attempted 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 did any work on the road that immediately created the alleged hazard or any evidence that the City employed the roadway for a "special use." *See Yarborough*, 10 N.Y.3d 726.

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

Dated: 1/3/11

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.

FILED

JAN 06 2011

NEW YORK
COUNTY CLERK'S OFFICE