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

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

Index Number : 102086/2004
DIAZ, YOLANDA
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
EXTEND TIME

INDEX NO. 102086/04
MOTION DATE
MOTION SEQ. NO. 02
MOTION CAL. NO.

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

APR 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/13/11

CYNTHIA S. KERN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

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YOLANDA DIAZ,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

----------x

Index No. 102086/04

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

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell in a crosswalk near 29 Avenue A (near East 2nd Street) on December 1, 2002. Plaintiff now moves for an order extending her time to file the Note of Issue. Defendant the City of New York (the "City") cross-moves for summary judgment dismissing plaintiff's complaint. For the reasons set forth below, plaintiff's motion is denied and the City's cross-motion is granted.

The relevant facts are as follows. On December 1, 2002 at approximately 5:30 p.m., plaintiff allegedly sustained personal injuries when she tripped and fell in the crosswalk near 29

Avenue A (near East 2nd Street). Specifically, plaintiff alleged in her Notice of Claim that she tripped and fell due to the broken/misleveled/depressed/improper, grade/slope, cracked/chipped, and otherwise defective condition(s) of the roadway/crosswalk area. On November 17, 2009, plaintiff moved this court to strike the City's Answer for failure to provide outstanding discovery. In response to plaintiff's motion, the City cross-moved to dismiss plaintiff's complaint. In a decision dated May 3, 2010, this court denied plaintiff's motion to strike the City's Answer and denied the City's motion to dismiss plaintiff's complaint with leave to renew upon completion of discovery.

On June 14, 2010, plaintiff filed and served a Notice of Appeal, taken from each and every part of this court's May 3, 2010 Decision and Order. At a Compliance Conference held on September 22, 2010, plaintiff and the City entered into a Stipulation which directed plaintiff to file the Note of Issue on or before November 22, 2010. Additionally, the Stipulation provided that "all discovery is complete except to the extent appealed by Plaintiff in the appeal that is currently pending." Plaintiff now argues that because her Appeal of this court's decision is currently pending, an order must be granted extending her time to file the Note of Issue. The City cross-moves for summary judgment dismissing plaintiff's complaint on the ground that it did not have prior written notice of the alleged condition.

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 Admin. Code § 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).

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 has alleged that it conducted numerous searches which included searches for applications, permits, cutforms, complaints/repair orders, violations, contracts, and milling/resurfacing documents for the location of the roadway at 29 Avenue A for two years prior to the date of plaintiff's accident. The City claims that the results of this search showed six City-issued permits, three of which were issued to North East

Contracting Corp. and three issued to Consolidated Edison. However, it is well-settled that permits issued by the City do not constitute prior written notice of a defect. *Meltzer v. City of New York*, 156 A.D.2d 124 (1st Dept 1989); *see also Levbarg v. City of New York*, 282 A.D.2d 239, 242 (1st Dept 2001). Additionally, the Big Apple Map indicates alleged defects in the area where the accident occurred but does not contain markings in the subject crosswalk, specifically the northwest corner of Avenue A and East 2nd Street. Notice of a nearby defect is insufficient to constitute prior written notice of the subject defect. *Leary v. City of Rochester*, 67 N.Y.2d 866 (1986). The notice must be for the specific defect involved, and not merely a similar condition. *Belmonte v. Metro. Life Ins. Co.*, 304 A.D.2d 471 (1st Dept 2003). In response, plaintiff has failed to raised an issue of fact as to whether the City had prior written notice of the defective condition.

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 action, plaintiff has failed to raise an issue of triable fact as to whether the City caused or created the condition through an act of affirmative negligence. Plaintiff has not presented any evidence that the City did any work on the road that immediately created the alleged hazard. *See Yarborough*, 10 N.Y.3d 726. Plaintiff also fails to submit any evidence that the City employed the roadway for a "special use." To the extent that plaintiff alleges that the crosswalk/roadway was broken and cracked, plaintiff has not provided evidence that the condition of the roadway was the result of any affirmative negligence on the part of the City. There is also no evidence that the roadway deterioration alleged by plaintiff was the result of the City's roadway work "rather than normal pavement deterioration over time." *Cardona v. City of New York*, 305 A.D. 303 (1st Dept 2003).

Finally, to the extent plaintiff argues that discovery is incomplete pending her appeal of this court's May 3, 2010 Decision and Order, that argument is unpersuasive. It is clear that discovery is complete in the instant action, as agreed by both parties, and plaintiff has failed to raise an issue of fact as to whether the City had prior written notice of the defective condition or whether the City caused or created the alleged defective condition. Accordingly, plaintiff's motion to extend her time to file the Note of Issue is denied and the City's cross-motion for summary judgment dismissing the complaint is granted. This constitutes the decision and order of the court.

Dated: 4/13/11

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.