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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Index Number : 103189/2010
SOLER, WANDA
VS
CITY OF NEW YORK
Sequence Number : 003
SUMMARY JUDGMENT Cal # 108

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

for Summary judgment
No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is

FILED

SEP 28 2011

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: 9/26/11
SEP 26 2011

BJ
BARBARA JAFFE J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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WANDA SOLER,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

----------x

Index No. 103189/10

Argued: 7/12/11
Motion Seq. No.: 003

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Andrea V. Borden, Esq.
Burns & Harris, Esqs.
233 Broadway, Ste. 900
New York, NY 10279
212-393-1000

For defendant:
Suzanne K. Colt, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St.
New York, NY 10007
212-788-0611

By notice of motion dated March 3, 2011, defendant City moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes.

I. BACKGROUND

On July 17, 2009, plaintiff was allegedly injured when she tripped and fell on the roadway at West 129th Street between Broadway and West 125th Street in Manhattan. (Affirmation of Suzanne K. Colt, ACC, dated Mar. 3, 2011 [Colt Aff.], Exh. A). On or about October 6, 2009, plaintiff served City with a notice of claim, and on or about March 8, 2010 with her summons and complaint. (*Id.*, Exhs. A, B). City thereafter served its answer. (*Id.*, Exh. C).

On December 22, 2010, plaintiff testified at an examination before trial that as she stepped off of the sidewalk between West 129th Street and Broadway, her right foot went into a hole in the street, causing her to fall. (*Id.*, Exh. D).

At an examination before trial held the same day, a City Department of Transportation (DOT) records searcher testified that a search of DOT records for the location of West 129th Street between Broadway and West 125th Street for two years prior to and including the accident date yielded two applications for permits and two permits issued to non-City contractors, one of which was to Jersey Boring & Drilling Company, Inc. (Jersey) for work to be performed from January 31, 2008 to February 29, 2008, with no related corrective action requests or notices of violation. City issued three inspection reports related to Jersey's work, reflecting that Jersey passed inspections conducted on March 4, 2008, January 16, 2009, and August 18, 2009. (*Id.*, Exhs. E, F).

By decision and order dated April 4, 2011, I granted plaintiff leave to amend her summons and complaint to add Jersey as an additional defendant.

II. CONTENTIONS

City denies having received prior written notice of the hole in which plaintiff fell, relying on the DOT records, or having caused or created the hole. (Colt Aff.).

Plaintiff argues that City may have received notice of the defect by inspecting Jersey's work after it was completed, and that in any event, the motion is premature as discovery has not yet been completed and as plaintiff has added Jersey as an additional defendant, which may lead to discovery from Jersey that evidences City's liability. (Affirmation of Andrea V. Borden, Esq., dated May 16, 2011).

In reply, City observes that plaintiff does not deny that City had no prior written notice of the defect, and asserts that Jersey's work passed the inspections, thus demonstrating that City had no notice of the defect. It also contends that plaintiff's claim against Jersey is irrelevant to

whether she has a claim against City. (Reply Affirmation, dated May 25, 2011).

III. ANALYSIS

Pursuant to New York City Administrative Code § 7-201(c)(2):

> No civil action shall be maintained against the city for . . . injury to person . . . sustained in consequence of any street . . . sidewalk or crosswalk, or any part or portion of any of the foregoing . . . 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 of from the city of the defective, unsafe, or obstructed condition . . .

"[P]rior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City." (*Katz v City of New York*, 87 NY2d 241, 243 [1995]).

Here, City established, *prima facie*, that it received no prior written notice of the hole in which plaintiff allegedly fell. In opposition, plaintiff fails to show that City's inspections constitute the functional equivalent of notice of the defect, especially since Jersey's work passed the inspections. (*See Ramos v City of New York*, 55 AD3d 896 [2d Dept 2008] [evidence that City employee inspected catch basin and found that it "appeared to be good" did not constitute written acknowledgment of defect nor circumstantial evidence of prior written notice of defect]; *see generally Peloso v County of Putnam*, 6 AD3d 411 [2d Dept 2004] [fact that defendant may have inspected area before accident did not obviate need for prior written notice of defect]; *Cenname v Town of Smithtown*, 303 AD2d 351 [2d Dept 2003] [same]).

Moreover, plaintiff fails to set forth an evidentiary basis for her assertion that more

discovery is needed. (CPLR 3212[f]; *see eg Flores v City of New York*, 66 AD3d 599 [1st Dept 2009] ["the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion"]; *Goldes v City of New York*, 19 AD3d 448 [2d Dept 2005] [hope that discovery may yield evidence of defendant's affirmative negligence insufficient to deny motion]). And she does not demonstrate how any discovery she might receive from Jersey would reveal City's liability.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted, and the complaint is dismissed against defendant City of New York with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158 within 30 days of the date of this order.

FILED

SEP 28 2011

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

Barbara Jaffe, J.S.C.

BARBARA JAFFE

DATED: September 26, 2011
New York, New York

SEP 26 2011