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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 : 117382/2009
O'DONOGHUE, PATRICIA
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 117382/09
MOTION DATE
MOTION SEQ. NO. 01
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

FILED
OCT 12 2011
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

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

Dated: 10/7/11

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.

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

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PATRICIA O'DONOGHUE,

Plaintiff,

Index No. 117382/09

-against-

THE CITY OF NEW YORK, RIVERGATE LP and MANHATTAN SKYLINE MANAGEMENT, CORP..,

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 on June 27, 2009 when she tripped and fell on a raised brick near a tree well while walking on the sidewalk in front of 401 East 34th Street. Defendant the City of New York (the "City") moves for summary judgment on the ground that the City did not have prior written notice of the defect as required by Administrative Code §7-201. Although Defendants Rivergate LP ("Rivergate") and Manhattan Skyline Management, Corp. ("Manhattan Skyline") cross-moved for summary judgment dismissing the complaint, they have since withdrawn their motion in its entirety. The court grants the City's motion for the reasons set forth below.

The relevant facts are as follows. Plaintiff was walking in an easterly direction on the

north side of East 34th Street. Plaintiff fell when her right foot got caught in a raised brick that was a part of a tree well. A Big Apple Map of the north side of East 34th Street between First Avenue and FDR Drive – the area where plaintiff was walking before her accident – indicated that there was an "extended section of raised or uneven sidewalk" that spanned the sidewalk including the sidewalk next to the tree well where plaintiff fell.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant case, the 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 the instant case, the City makes out its prima facie case that it did not receive prior written notice of the defective condition. Nalik Zeigler, a records searcher for the City's Department of Transportation testified that he performed a sidewalk search for the area in front of 401 East 34th Street going back two years from the date of the accident and did not find any permits issued to the City or a City contractor. William Steyer, the director of the forestry division for the City's Department of Parks, testified that a search going back two years from the date of the accident was performed by the Department of Parks which encompassed all inspections, records of complaints and activity conducted by the Parks Department. This search included any permits to do work in the tree wells. No permits were located to perform work in the tree wells. Mr. Steyer further testified that the Parks Department did not install the bricks in the tree well nor did anyone perform the work on behalf of the Parks Department. In short, nothing in the searches produced prior written notice to the City of the defective condition. Accordingly, the court finds that the City has met its burden of demonstrating that it did not have prior written notice of the defect.

Plaintiff concedes that the only manner in which the City could be deemed to have prior written notice is through the Big Apple map. Plaintiff first argues the symbol on the Big Apple map showing a raised or uneven sidewalk in the area near plaintiff's accident constitutes prior written notice. She also argues that the "V" symbol on the map at the location of the tree well shows that there was a defect at the tree well. Both of plaintiff's arguments are without merit.

The Court of Appeals has held that when a Big Apple Map is used to satisfy the prior written notice requirement, the type and location of the defect must be precisely noted on the

map. *See D'Onofrio v. City of New York*, 11 N.Y.3d 581 (2008). In *D'Onofrio*, the plaintiff tripped and fell on defective grating. He attributed his fall to a combination of the defective grating and broken cement nearby. *See id* at 585. Plaintiff argued that a Big Apple map of the area indicating raised or uneven sidewalk in the area of his accident constituted prior written notice to the City of the defect that caused his injury. The Court of Appeals – in affirming the decisions of the lower courts setting aside the verdict in favor of plaintiff and finding in the City's favor on the ground that the City did not have prior written notice – found that the symbol on the Big Apple map indicating uneven sidewalk in the area of plaintiff's fall did not constitute prior written notice of the defect that caused plaintiff's injury because plaintiff did not provide any evidence that he walked across a raised or uneven portion of the sidewalk or that there was surface irregularity or elevation in the actual area where he fell.

In the present case, nothing on the Big Apple map gives sufficient prior written notice to the City of the defect that caused plaintiff's accident. With respect to plaintiff's argument that the symbol on the map showing an extended section of raised or uneven sidewalk serves as prior notice, that symbol is insufficient to provide notice to the City of the defect that caused plaintiff's injury because plaintiff herself has testified that it was a raised brick that caused her to fall and that the brick was definitely in the area for the tree as opposed to a part of the sidewalk. Therefore, the symbol indicating a raised or uneven sidewalk does not constitute sufficient notice.

Moreover, plaintiff's argument that the "V" symbol on the map provides notice of a defective tree well also fails. According to the legend accompanying the map, the "V" symbol on the Big Apple map merely indicates tree wells without a fence or in place barrier. As this symbol

does nothing to provide notice of a raised brick in the tree well, it does not serve to provide the City with prior written notice of the defect that caused plaintiff's accident. As neither the symbol indicating an uneven sidewalk nor the symbol indicating a tree well without a fence constitutes written notice of a raised brick in the tree well, the court finds that plaintiff has not met her shifting burden of presenting evidentiary proof demonstrating a triable issue of fact as to whether the City had prior written notice of the defect that caused her injury.

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

Dated: 11/7/11

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.