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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

CORCHADO

INDEX NO. 117716/05

MOTION DATE

- v -

MOTION SEQ. NO. 04

CITY OF NEW YORK, et.al.

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 annexed decision.



Dated: 10/20/11

CYNTHIA S. KERN J.S.C.

J.S.C.

Check one: ✓ FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

----------x

ANNA CORCHADO,

Plaintiff,

Index No. 117716/05

-against-

**DECISION/ORDER**

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

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 when she tripped and fell in a hole in the roadway in front of 2027 Jerome Avenue, Bronx, New York on March 29, 2005. Plaintiff now moves for an order pursuant to CPLR §3126 striking defendant the City of New York's (the "City") answer for its failure to provide certain discovery until the eve of trial. The City cross-moves for summary judgment dismissing plaintiff's complaint on the grounds that it did not have prior written notice of the defective condition, that it did not cause and create the defective condition and that it did not use the roadway for a special use. 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. Plaintiff alleges that she sustained injuries when she tripped and fell in a hole in the roadway located in front of 2027 Jerome Avenue, Bronx, New York on March 29, 2005. Prior to commencing litigation, plaintiff made several FOIL requests to the City for "any cut forms, permits or any other documents issued 2 years prior to the date of the accident, for any work performed in the above mentioned location. More specifically, the names of any contractors or departments that may have repaved and/or repaired the above-referenced location." The first FOIL request was sent to the New York City Department of Transportation ("DOT") on April 19, 2005. Plaintiff received a prompt response to her request, dated April 29, 2005, which stated there were "Permits and Complaints found." A complaint revealed that a citizen had reported on April 29, 2004 that there was a "large pothole in street/never repaired last year" at the exact location where plaintiff alleges to have tripped and fell. The page following the complaint about the pothole stated that the issue was "referred to maintenance."

Plaintiff again sent a FOIL request to the DOT on May 13, 2005 specifically asking for "cut forms, permits or any other documents issued 2 years prior to the date of the accident for any work performed in the above mentioned location. More specifically the names of any contractors or departments that may have repaved and/or repaired the above referenced location." Again, the DOT responded and stated that "Permits and Complaints [were] found" but did not include any evidence that any repairs had been undertaken or completed. On or about February 2, 2006, in response to the FOIL request, the City provided plaintiff with documents pertaining to a record search covering the dates March 29, 2003 through March 29, 2005, the date of plaintiff's

accident. The search was for applications, permits, cutforms, complaints/repair orders, violations, contracts, milling/resurfacing. The City stated that the only items found were three complaints/repair orders and the only records provided were the FITS reports describing the location of the repairs and what was done to the roadway.

Plaintiff commenced the instant action on or about December 15, 2005. On April 6, 2006, plaintiff sent a Notice of Discovery and Inspection and Combined Demands to the City. In paragraph number "4" of the demands, plaintiff requested specifically "[a]ll records of inspection, maintenance and/or repair regarding the premises located at and/or in front of 2027 Jerome Avenue in the County of Bronx, City and State of New York as of March 29, 2005, and for a period of two (2) years prior thereto." On June 6, 2006, a preliminary conference was held which resulted in the Case Scheduling Order of Justice Paul G. Feinman. Pursuant to said Order, the City was to provide, among other items, "Cut forms, repair orders and repair records for 2 years prior to and including the date of occurrence." Plaintiff alleges she never received any repair records from the City.

Finally, on October 31, 2006, at the deposition of Ms. Cynthia Howard, the record searcher provided by the City, Ms. Howard informed plaintiff's counsel that the "repair records" she was looking for, describing the actual repairs done to the roadway in question, were gang sheets or work logs, and that they are not part of the routine record search conducted by the City. At the deposition, plaintiff requested that the DOT conduct a search for the gang sheets for the location of plaintiff's accident for the two years prior to March 29, 2005. Plaintiff, however, never followed up with the City to obtain the gang sheets that were discussed at the deposition either through a written demand or during any of the numerous compliance conferences held

during the course of litigation. Thus, the matter proceeded through discovery and was put on the trial calendar. A jury was selected for this case on January 25, 2010.

Subsequent to the completion of jury selection, the City faxed sixteen pages of repair records to plaintiff's counsel which consisted of the gang sheets from the repair to the pothole on which plaintiff tripped and fell. The records identify specific dates and times of repairs to the location of plaintiff's accident, names of crew members who were present for the repairs to the pothole in the road, a list of the materials and equipment used for the repairs of the pothole and the amount of time the DOT spent repairing the defects in that area. Upon reporting to the Honorable Shlomo Hagler for trial, plaintiff objected to the City's late exchange of the repair records and asserted that the entire theory of her case had changed. She claimed that her initial theory of the case was that the City had notice of a defect in the roadway. However, subsequent to receiving the repair records, plaintiff asserted that her new theory of the case is that the repair was performed negligently as evidenced by the large pothole in the roadway on which plaintiff tripped and fell. Plaintiff argued that in order to support her new theory of the case, she would need further depositions of the crew members who worked on the repairs in the roadway and would need to hire an expert to evaluate the repairs performed in order to form an opinion about how such a pothole could exist after the alleged repairs had been performed months earlier.

Plaintiff put all the above objections on the record before Judge Hagler and requested that the Judge disband the jury for further discovery. Judge Hagler granted plaintiff's application and disbanded the jury to permit additional discovery and a deposition of someone with personal knowledge of the repairs to the roadway, which plaintiff conducted in April 2010. Plaintiff now asserts that the City's late exchange of the repair records has cost her the ability to prove that the

defect in the roadway on which plaintiff tripped and fell was negligently repaired as the entire roadway in front of 2027 Jerome Avenue, Bronx, New York was resurfaced and repaved nearly two years after plaintiff was injured. Thus, plaintiff claims that had the City timely and properly disclosed the gang sheets, plaintiff could have and would have retained an expert to determine whether said repairs were performed in a proper manner. Plaintiff now moves for an order pursuant to CPLR 3126 striking the City's answer or in the alternative deeming the issue of liability resolved in favor of plaintiff.

"[I]t is well-settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith." *McGilvery v. New York City Tr. Auth.*, 213 A.D.2d 322, 324 (1st Dept 1995). Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses. *See Johnson v. City of New York*, 188 A.D.2d 302 (1st Dept 1992). However, the First Department has held that "[a]ctions should, wherever possible, be resolved on the merits, and, therefore, litigants who have not replied expeditiously to notices of discovery and inspection should be afforded reasonable latitude before imposition of the harshest available penalty, the striking of pleadings." *Bassett v. Bando Sangsa Co., Ltd.*, 103 A.D.2d 728 (1st Dept 1984).

In the instant action, plaintiff's motion for an order striking the City's answer is denied as plaintiff has not demonstrated that the City's failure to comply with discovery was willful and contumacious. While plaintiff has made numerous requests to the City for repair records for the location of plaintiff's accident since 2005, the City's delay in producing the gang sheets at issue

does not amount to willful and contumacious behavior. At the deposition of Ms. Howard in 2006, plaintiff was informed that the repair records she was looking for were known as gang sheets or work logs and that such records would not have been produced after a routine record search conducted by the City. However, plaintiff never formally followed up with the City to request said gang sheets with either a written demand or during a compliance conference throughout the litigation. While plaintiff may have been prejudiced by the City's late disclosure of the gang sheets, the First Department has held that the striking of a pleading is a drastic remedy, one which will be imposed when the party is shown to have evaded court-ordered discovery. *See Henderson-Jones v. City of New York*, 2011 WL 3715415 (N.Y.A.D. 1 Dept.). In this case, there were no court orders requiring the City to provide the gang sheets to plaintiff. As more fully explained above, plaintiff could have formally requested said records at a discovery conference but did not do so.

Furthermore, plaintiff's assertion that had she received the repair records in a timely manner then she could have proven the City negligently repaired the roadway is without merit as this argument is complete speculation. Plaintiff has provided no evidence that the City's repair of the pothole at issue was defective or negligently performed. While plaintiff did not have access to certain repair records such as the gang sheets, plaintiff did have access to photographs of the location where plaintiff fell and no evidence exists from these photographs that the repair by the City was done improperly. Thus, plaintiff's motion to strike the City's answer must be denied.

The court now turns to the City's cross-motion for summary judgment dismissing plaintiff's complaint. 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. 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). Moreover, 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). Additionally, it is well-settled that a repair order or FITS report showing repairs made to the roadway in the area where plaintiff's accident allegedly occurred does not constitute prior written notice of such a defect. *See Gorman v. Town of Huntington,* 12 N.Y.3d

275 (2009); *see also Khemraj v. City of New York*, 37 A.D.3d 419 (2d Dept 2007).

In the instant case, the City has made out its prima facie case that it did not receive prior written notice of the defective condition. In response, plaintiff has failed to raise an issue of fact as to whether the City had prior written notice of the defective condition based on the Big Apple Map. The Big Apple Map does not contain markings specifying the defect at issue in this case - an alleged pothole in the roadway. As shown in the Legend corresponding to the Big Apple Map, the only symbols depicted in the roadway are for the pedestrian crosswalk. It is well-settled that the prior written notice given to the City must be for the specific defect involved, and not merely a similar or nearby condition. *See D'Onofrio*, 11 N.Y.3d 581. Moreover, the FITS report produced by the City, which reflects only that a pothole was repaired in the subject roadway, is insufficient to constitute written notice to the City of the specific defect complained of by plaintiff. *See Gorman*, 12 N.Y.3d 275.

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 demonstrated that the City did any work at the location of plaintiff's accident that immediately created the alleged hazard and she has not pointed to any negligence on the part of the City in repairing the pothole at issue. While plaintiff asserts that she is unable to prove negligence on the City's part as the roadway was repaved subsequent to plaintiff's accident, this argument is without merit as plaintiff has had numerous opportunities, through written discovery demands and compliance conferences, to request the gang sheets from the City but did not do so.

Accordingly, plaintiff's motion for an order striking the City's answer is denied and the City's cross-motion for summary judgment dismissing plaintiff's complaint is granted. The Clerk is directed to enter judgment in favor of the City and against plaintiff. This constitutes the decision and order of the court.

Dated: 10/20/11

Enter: _____
J.S.C.



CYNTHIA S. KERN
J.S.C.