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SCANNED ON 11/10/2011

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

P JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 116990/2006
HOGIN, DAVID R.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGEMENT
Cal # 53

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

his motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 09 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: 10/31/11
OCT 31 2011

_____ J.S.C.
BARBARA JAFFE

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 5

----------x

DAVID R. HOGIN AND KAREN M. HOGIN,

Plaintiff,

-against-

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, NICO ASPHALT, INC., AND MANETTA INDUSTRIES, INC.,

Defendants.

----------x

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

NICO ASPHALT, INC., AND MANETTA INDUSTRIES, INC.,

Third-Party Defendants.

----------x

Index No. 116990/06

Motion Subm.: 8/9/11
Motion Seq. No.: 002

DECISION & ORDER

Third-Party Index No. 590452/07

BARBARA JAFFE, JSC:

For plaintiffs:
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For City:
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By notice of motion dated January 11, 2011, defendant City moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it. Plaintiffs

oppose and, by notice of cross motion dated February 7, 2011, move pursuant to CPLR 3124 and 3126 for an order striking City's answer or compelling it to provide discovery. City opposes the cross motion.

I. BACKGROUND

On August 11, 2005, plaintiff David R. Hogin was allegedly injured when he tripped and fell in a hole in the crosswalk at the intersection of Central Park South/West 59th Street and Seventh Avenue in Manhattan. (Affirmation of Jessica Wisniewski, ACC, dated Jan. 11, 2011 [Wisniewski Aff.], Exh. A).

On or about November 2, 2005, plaintiffs served City with their notice of claim, and on or about January 3, 2006 with their summons and complaint. (*Id.*, Exhs. A, B). On or about August 5, 2008, plaintiffs served a supplemental summons and amended complaint, and on or about September 5, 2008, City served its answer. (*Id.*, Exhs. B, C).

On October 30, 2008, plaintiff testified at an examination before trial (EBT) that, as pertinent here, as he walked into the crosswalk, he stepped over a hump in the street, composed of asphalt, and into a sinkhole the approximate size of a car in front of the hump, causing him to fall and sustain injuries. (*Id.*, Exh. E).

In response to the case scheduling order dated October 27, 2008, City provided plaintiffs with discovery, including the results of a search of the records of the Department of Transportation (DOT) for the two years before and including plaintiff's accident relating to the location of West 59th Street between Seventh Avenue and Columbus Circle, finding 20 permits, three maintenance and repair records, three gangsheets for roadway defects, and a Big Apple Map (Map). Eight permits, valid between January 3, 2004 to November 24, 2003 and June 1,

2005 to October 15, 2005, were issued to Tully Construction Co., Inc. (Tully) to open the roadway on West 59th Street and Seventh Avenue for a reconstruction project on behalf of City's Department of Design and Construction (DDC). The records also reflect that on October 24, 2004, a pothole was reported on West 59th Street between Seventh Avenue and Columbus Circle, and that a City work crew responded to the location on October 25, 2004. The report was closed on October 25, 2004. Another pothole was reported on February 18, 2005. A work crew responded on February 19, 2005 and the report was closed the same day. Another pothole was reported on August 11, 2005 and a work crew responded on August 12, 2005, when the report was closed. (*Id.*, Exh. F).

City also provided search results for Seventh Avenue between West 58th Street and Central Park South (a/k/a 59th Street), which consisted of one maintenance and repair record showing that on August 30, 2004, a pothole was reported at that location and was closed on August 31, 2004. (*Id.*).

On January 30, 2009, City DOT employee Stacey Williams testified at an EBT as to the records produced by City. She did not know what work was performed by each responsive work crew, whether the potholes had been closed or repaired, or the dimensions or exact location of the potholes. (*Id.*, Exh. G).

On October 8, 2009, Monica Bell, a DOT highway repairer, testified at an EBT that on February 19, 2005 a DOT highway maintenance crew went to West 59th Street between Seventh Avenue and Columbus Circle and closed a medium-size pothole. (*Id.*, Exh. I).

By affidavit dated May 5, 2010, DDC employee Ashwinkumar Patel states that he reviewed DDC's books and records related to Tully's project for DDC, and that no work was

performed for the project at the intersection of Seventh Avenue and Central Park South. (*Id.*, Exh. H).

By response dated May 18, 2010, City supplemented its earlier discovery responses by producing the handwritten gang sheets related to the three pothole repairs made in 2004 and 2005 at the accident location. (*Id.*, Exh. K).

By response dated May 26, 2010, City produced the results of a two-year search of records maintained by the Department of Environmental Protection (DEP) for the accident location, which reflect that in April 2004 two hydrants were leaking and/or inoperative and that DEP repaired them in April 2004, May 2004, October 2004, and May 2005. On February 16, 2005, a caller reported a deep hole in the street near the curb in front of 230 West 59th Street, classified by DEP as a street cave-in or depression, and on March 29, 2005 a DEP employee inspected the location and found no such condition in the area. (*Id.*, Exh. L).

On August 30, 2010, Anthony Stio, a DEP employee, testified at an EBT that he responded to the February 16, 2005 complaint about a street cave-in, inspected the entire street, and found no deep holes or cave-ins. He also stated that the hydrants which were inspected by DEP may have been leaking water into the street and underneath the sidewalk and that such leakage may cause a street cave-in or pothole, although he had no personal knowledge as to whether water had been leaking from the hydrants or the cause of any alleged cave-in or pothole. (*Id.*, Exh. M).

II. CITY'S MOTION

A. Contentions

City denies having had prior written notice of the sinkhole which allegedly caused

plaintiff's accident, relying on Patel's testimony that Tully's work on behalf of DDC was not performed at the accident location, DOT repair records which reflect that any potholes at the location were repaired and/or closed before plaintiff's accident, and Stio's testimony that he found no sinkhole or cave-in at the location. City also denies that the MAP shows any defects in the crosswalk or that it caused or created the sinkhole. (Wisniewski Aff.).

Plaintiffs maintain that DEP employees negligently failed to observe the sinkhole or danger posed by the alleged water leaks emanating from the hydrants on the street, and that City documentation of hydrant repairs and/or potholes constitute prior written notice of the sinkhole. (Affirmation of John M. Downing, Jr., Esq., dated Feb. 7, 2011).

In reply, City observes that DEP found no sinkhole at the location and thus had no prior notice of it, that any claim that a non-negligent DEP inspection would have revealed water leaks is speculative as is the claim that the sinkhole was caused by water leaks coming from the hydrants. City also denies that records relating to hydrant leaks or potholes constitute prior written notice of the sinkhole. (Reply Affirmation, dated Mar. 7, 2011).

B. Analysis

The party seeking summary judgment must show prima facie entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the prima facie showing by submitting admissible evidence, demonstrating the existence of factual issues that requires a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, denial of the motion is required, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at

853).

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, 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 reasonable safe.

"[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]).

Where the City establishes a lack of prior written notice of a defect, the burden shifts to the plaintiff to demonstrate that an exception applies, either that the City affirmatively created the defect through an act of negligence, which requires a showing that work performed by City immediately resulted in the existence of the defect, or that it made a special use of the place where the defect was located. (*Yarborough v City of New York*, 10 NY3d 726 [2008]).

Here, City established, *prima facie*, that it received no prior written notice of the sinkhole on which plaintiff allegedly tripped as the DOT records relate only to potholes which were repaired before plaintiff's accident, and the DEP record related to a sinkhole reflects that DEP inspected the area and found no sinkhole. There is also no evidence demonstrating that the alleged hydrant leaks caused or were related to the sinkhole.

Plaintiff failed to offer any evidence showing that City performed work that immediately resulted in the creation of the sinkhole. Rather, they argue that City's failure to inspect the area and/or to discover or repair sufficiently any leaks under the street caused the sinkhole. Not only is their claim purely speculative, but a claim of negligent inspection or failure to repair does not establish that City affirmatively created the defect. (*See Vega v City of New York*, 2011 WL 4835685, 2011 NY Slip Op 07161 [1st Dept] [City's failure to perform permanent repair of roadway defect not affirmative act of negligence]; *Farrell v City of New York*, 49 AD3d 806 [2d Dept 2008] [failure to maintain or repair roadway constitutes act of omission rather than affirmative negligence]; *Silva v City of New York*, 17 AD3d 566 [2d Dept 2005], *lv denied* 5 NY3d 705 [failure to repair water main does not establish that City created defect]). Plaintiffs have thus failed to demonstrate that any triable issues exist as to whether City affirmatively created the sinkhole.

III. PLAINTIFF'S MOTION

In light of this result, and as none of the records or witnesses that plaintiffs seek pertain to the issue of prior written notice or the creation of the sinkhole, plaintiffs' motion to strike or compel is denied.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted, and the complaint and any cross claims are 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. Plaintiffs shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

ENTER:

FILED

NOV 09 2011

Barbara Jaffe, JSC

NEW YORK COUNTY CLERK'S OFFICE

BARBARA JAFFE
J.S.C.

DATED: October 31, 2011
New York, New York

OCT 31 2011