SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JOANNE BERNARDO and ANDREW BERNARDO, as Guardian Ad Litem of the Plaintiff, JONELLE BERNARDO,

Plaintiff,

-against-

THE CITY OF NEW YORK, RICHARD HARVEY CHRISTINA OCCHIUTO,

Defendants.

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PART C-2
Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 100526/09
Motion Nos. 639-002
639-003

The following papers numbered 1 to 5 were marked fully submitted on the 4th day of June, 2014:

	Pages Numbered
Notice of Motion for Summary Judgment on the Issue of Liability by Defendants Richard Harvey and Christina Occhiuto, with Supporting Papers and Exhibits (dated February 12, 2014)	1
Notice of Cross Motion for Summary Judgment on the Issue of Liability by Defendant the City of New York, with Supporting Papers and Exhibits (dated February 18, 2014)	2
Affirmation in Opposition by Plaintiff, with Supporting Papers, Exhibits and Memorandum of Law (dated May 8, 2014)	3
City's Reply (dated June 2, 2014)	4
Affirmation in Opposition and Reply by Defendants Richard Harvey and Christina Occhiuto (dated June 3, 2014)	5

Upon the foregoing papers, the motion for partial summary judgment on the issue of liability by defendants Richard Harvey and Christina Occhiuto is denied; the cross motion for like relief by

defendant the City of New York (hereinafter the "City") is granted.

This is an action for personal injuries allegedly sustained by plaintiff Jonelle Bernardo (hereinafter "plaintiff"), a pedestrian, when she was struck by a motor vehicle operated by defendant Christina Occhiuto and owned by defendant Richard Harvey near "the bus stop [located] on the northbound (east) side of Arthur Kill Road [on] Staten Island[,]... approximately in front of 2876 Arthur Kill Road" (*see* Addendum to Notice of Claim, para 3; Verified Complaint, pp 1-2).[1] The accident occurred on June 14, 2008 at approximately 9:15 p.m. As a result of the accident, plaintiff has been diagnosed with, inter alia, "traumatic brain injury/vegetative state status post multiple fractures" (*see* Verified Bill of Particulars, para 11).

Based on the foregoing, plaintiff's guardian ad litem (hereinafter "plaintiff") commenced this action alleging that defendant Occhiuto was negligent in the operation of her vehicle. Plaintiff further alleges that the City was negligent "in failing to properly maintain the bus stop so as to prevent it from becoming unsafe and hazardous... because of [an] overgrowth of vegetation along the roadside, or water accumulations which prevented persons intending to utilize the bus stop from traversing to [and] remaining in, a position of safety while waiting [for a bus to arrive, or] failing to properly maintain the lighting in the vicinity of the bus stop" (*see* Addendum to Notice of Claim). According to the Verified Complaint, plaintiff additionally alleges that the City was negligent in "failing to remedy flooding conditions at the location of the bus stop... [and in] failing to properly maintain a drainage system in the vicinity [there]of " (*see* Verified Complaint, para Twenty-sixth).

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[1]While the above address as specified in the Addendum to plaintiff's Notice of Claim (City's Exhibit "A") indicates that this location is situated on the "northbound" side of Arthur Kill Road, the Verified Complaint (City's Exhibit "B") alleges (in paragraph "Sixteenth") that it is located on the "southbound" side of said roadway. However, plaintiff's Verified Bill of Particulars (City's Exhibit "D", para 2) indicates that the accident occurred "near 2911 Arthur Kill Road", which appears to be located on the southbound side of the street.

Plaintiff's father, Andrew Bernardo, testified at his deposition that neither he nor his wife were present at the accident location (*see* EBT of Andrew Bernardo, p 6). Nevertheless, he was aware that his daughter was working as a waitress at a nightclub, and that she would have been on her way home when the accident occurred (id. at 8).

Defendant Christina Occhiuto testified at her deposition that on the night of the accident, she was driving to work, at Curve's Gentlemen's Club, which is located at 2945 Arthur Kill Road. According to the witness, it was dark and raining heavily at the time in question (*see* EBT of Christina Occhiuto, pp 6,12-16). Defendant further testified that she was driving at approximately 30 miles per hour prior to the accident (id. at 61), and that she did not see plaintiff until her body made contact with the windshield (id. at 33). At this point, the witness "swerved and then [she] had to come back into [her] lane because there was a car coming in the other direction" (id. at 34). In her view, the accident occurred when plaintiff "walked out into [her] car" (id. at 69). The witness called "911" and "had to stop traffic from running [plaintiff] over" (id.). When asked to specify where on Arthur Kill Road the accident took place, the witness testified that the impact occurred "beyond" the location of the bus shelter (id. at 33-34), although she could not recall whether she was driving in the north-or southbound direction at the time (id. at 38). Neither did the witness recall whether there were puddles or other accumulations of water on Arthur Kill Road near the point of impact (id. at 37).

Police Detective Michael Racioppo testified at his deposition that he responded to the scene of an accident "in the vicinity of a bus stop... for southbound traffic" near 2911 Arthur Kill Road, shortly after the occurrence (*see* EBT of Michael Racioppo, pp 5-6, 9). As part of his duties, he prepared a preliminary investigation report, which included the apparent circumstances of the accident and a diagram of the scene (id. at 6). As documented in his report, Racioppo noted that there was no

evidence of alcohol, cell phone usage or other driver distraction involved in the accident (id. at 21), and although the detective recalled that the roadway was wet, he did not recollect the presence of any puddles or other accumulations of water at the accident scene, neither of which was indicated in his report. In addition, the detective testified that he was not aware of any complaints regarding the accumulation of water on Arthur Kill Road in the vicinity of plaintiff's injury (id. at 9, 17).

Police Officer Bryan Mullane testified at his deposition that upon his response to the scene of the accident, he prepared a standard accident report (*see* EBT of Bryan Mullane, p 5-6). According to the witness, although the accident description contains basic historical information, the portion thereof which indicates that "the pedestrian walked out in front of [the driver]" was relayed to him by someone else (id. at 44). When the officer arrived at the scene, he recalled that it was raining and that the roads were wet. However, he did not notice any puddles or the accumulation of water along the roadway (id. at 9-10, 28-29).

Tajinder Jassal, a director for the City's Department of Transportation, testified at his deposition that his duties included oversight of "the Bus Stop Management Unit's planning and operation area, as well as [certain] administrative duties" (*see* EBT of Tajinder Jassal, p 6). According to the witness, in the absence of any specific complaint about a particular bus stop, his department would not normally conduct an inspection of same (id. at 7). Rather, as a matter of practice, once the MTA selects a prospective bus stop location, his inspectors survey the area and look for anything that might constitute a hazard, including the condition of the sidewalk (id. at 13). Upon performing a search for any surveys or complaints regarding either the north- or southbound bus stops in the vicinity of plaintiff's accident, the witness did not find any relevant records pertaining thereto (id. at 27-28).

Joseph Gentile, a supervisor for the City's Department of Environmental Protection, testified

at his deposition that part of his responsibility was to "see if the [roadside] catch basins need[ed] to be cleaned or [the] sewer[s]... flushed" (*see* EBT of Joseph Gentile, p 5). According to the witness, absent any complaint about a particular location, the periodic inspection of catch basins is performed on a three-year cycle (id. at 14). Based upon his review of certain documents presented to him at his deposition (annexed to the moving papers as the City's Exhibit "P"), the witness indicated that one of the catch basins[2] located on Arthur Kill Road between Grill Court and Bloomingdale Road (i.e., in the general vicinity of the accident) was last inspected on June 16, 2006 (id. at 33). Additional documents produced by the City indicated that the complaint of a clogged catch basin near 2777 Arthur Kill Road on May 3, 2007 was addressed on May 8, 2007 (id. at 43-45), and that a "311" complaint registered six months prior to the accident (i.e. on January 15, 2008) about street flooding in the area of 2876 Arthur Kill Road[3] (the address specified in plaintiff's Notice of Claim and Verified Complaint, but not her Bill of Particulars) was resolved on the same day (id. at 36-38). A synopsis of this last document indicated to the witness that the catch basin in question had apparently become over taxed by a heavy rain which fell on January 11, 2008 (id. at 39-42).

In support of her motion for summary judgment, defendant Occhiuto submits a copy of the "Motor Vehicle Accident and Mechanism Report" prepared by Police Officer Bryan Mullane, which contains a diagram demonstrating that the point of impact was not located near any intersection or

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[2]While the document identified the catch basin by number "506436", its location relative to the scene of the accident remains unclear (*see* City's Exhibit "P"; EBT of Joseph Gentile, p 35). In any event, this catch basin was not due for re-inspection until 2009.

[3]According to the City, "[t]his... address [is situated] near the southbound S74 bus stop[,] on the opposite side of [Arthur Kill Road,] and over 300 feet away from the accident location" (Affirmation of Tricia Reddington Testaverde, Esq., p 16 [emphasis supplied]). Insofar as it appears, this reference is erroneous, as 2876 Arthur Kill Road seems to be located on the northbound side of the roadway.

crosswalk (*see* Defendant Occhiuto's Exhibit "G"). Also submitted is a copy of the "Preliminary Accident Report" prepared by Detective Racioppo, which contained a hearsay statement attributing the accident to "pedestrian error" (*see* Defendant Occhiuto's Exhibit "I"). In addition, defendant argues that plaintiff violated Vehicle and Traffic Law (hereinafter VTL) §§ 1151(b) and 1152(a).[4]

Although a violation of the VTL constitutes negligence as a matter of law (*see Colpan v. Allied Cent Ambulette, Inc,*. 97 AD3d 776, 777 [2nd Dept 2012]), it is well settled that "[t]here can be more than one proximate cause of an accident" (*see Spadaro v. Parking Sys Plus, Inc.*, 113 AD3d 833, 835 [2nd Dept 2014][internal quotation marks omitted]). Thus, a defendant moving for summary judgment motion in an action such as this requires the prima facie demonstration of his or her freedom from comparative negligence as a matter of law (id.). While amenable to resolution as a matter of law, the issue of comparative negligence is generally one for the trier of fact (id.). In this case, the Court opines that defendants Harvey and Occhiuto have failed to make a prima facie showing of their freedom from comparative negligence as a matter of law (*see Espiritu v. Shuttle Express Coach, Inc*., 115 AD3d 787, 789 [2nd Dept 2014]). Rather, the EBT testimony of the defendant driver raises triable issues of fact as to whether Occhiuto failed to see what was there to be seen through the proper use of her senses; failed to exercise due care to avoid the collision; and/or was traveling in excessive rate of speed in the heavy rain that was falling at the time (id.; *see Spicola v. Piracci*, 2 AD3d 1368, 1369 [4th Dept 2003]).[5]

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[4]VTL §1151(b) provides that "[n]o pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield." VTL §1152(a) provides that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway."

[5]In opposition, plaintiff has asserted the Noseworthy doctrine (*see Noseworthy v. City*, 298 NY 76 [1948]). However, since defendants Harvey and Occhiuto have failed to establish their prima facie entitlement to judgment as a matter of law, the Court need not decide at this time whether the

Turning to the City's motion for summary judgment, it argued that (1) no evidence has been adduced of a causative link between the accident and any alleged negligence pertaining to the maintenance of the nearest catch basin or the location of the bus stop; (2) despite the claim of heavy rain, both police witnesses testified that they failed to notice any flooding on the subject roadway on the night in question; and (3) the City has governmental function immunity regarding its exercise of discretion in the design and installation of both its storm water drainage system (i.e. catch basins) and bus stop placement (*see e.g. Valdez v. City of New York*, 18 NY3d 69, 76-77 [2011]). Lastly, the City asserts that there is no evidence that "the location or condition of the Northbound bus stop in front of 2876 Arthur Kill Road was [a] proximate cause of the accident that [appears to have] occurred in the Southbound lane near... [the] bus stop [located] in front of 2911 Arthur Kill Road" (*see* Affirmation of Tricia Reddington Testaverde, Esq. para 44).

It is well established that a municipality is immune from liability arising out of claims that it negligently designed, e.g., a water drainage system, as this represents the exercise of a governmental function that is discretionary in nature (*see Bilotta v. Town of Harrison,* 106 AD3d 848 [2nd Dept 2013]). However, this same immunity will not serve to bar liability where it is claimed that said system was negligently maintained, as these claims represent a challenge to conduct which is ministerial in nature (*Fireman's Fund Ins Co v. County of Nassau*, 66 AD3d 823, 824 [2ndDept 2009]). Nevertheless, a prima facie case to recover damages under a theory of negligent inspection or maintenance still requires a plaintiff to demonstrate that the municipal defendant (1) had notice of a dangerous condition requiring remediation or reason to believe that its failure to act was likely to cause injury; (2) failed to undertake reasonable efforts to inspect and repair the defect, and (3) such failure was a proximate cause of plaintiff's injuries (*see Bilotta v. Town of Harrison,* 106 AD3d at 849).

Noseworthy doctrine applies (*see Christensen v. Karaket*, 112 AD3d 775, 776 [2nd Dept 2013]).

Here, it is the determination of this Court that the evidence adduced by the City is sufficient to demonstrate its prima facie right to dismissal as a matter of law, i.e., that the unrebutted testimony of its employees is sufficient to establish in the first instance that it was not negligent in the maintenance of its drainage system (*see e.g. Carbonaro v. Town of N Hempstead*, 97 AD3d 624, 625 [2nd Dept 2012]). To the contrary, there is unrebutted testimony that in response to a "311" complaint, the catch basin which was identified during the EBT testimony of the City's witness Gentile[6], had been inspected just six months earlier, and was found to be functioning properly (*see* EBT testimony of City's witness Joseph Gentile, p 35-40). Accordingly, the City has met its initial burden of demonstrating prima facie its freedom from comparative negligence as a matter of law, i.e., that the sole proximate cause of the accident was not related to any maintenance failures attributable to the City (id. at 625-626).

In opposition, plaintiff has submitted, inter alia, (1) a copy of the "311" service request dated January 15, 2008 regarding street flooding near the location of 2876 Arthur Kill Road, which should have provided the City with prior notice of an alleged water accumulation problem some six months prior to the accident date[7]; (2) a copy of climatological reports for several surrounding weather stations issued by the National Climatic Data Center to show that the flooding reported on January 15, 2008 will support an inference of flooding on the accident date; and (3) photographs taken by plaintiff's sister[8] allegedly one week post-accident to demonstrate an accumulation of curbside ground water at the northbound bus stop. More specifically, plaintiff's counsel argues from the

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[6]But see footnote 2 (supra).

[7]Cf. footnote 1 (supra).

[8]In this regard, plaintiff's sister, Andrea Bernardo attests, based on unstated sources of information and belief, that the annexed photographs fairly and accurately depict the scene of the accident, which occurred approximately one week earlier (*see* Affidavit of Andrea Bernardo).

annexed weather reports that since the flooding reported on January 15, 2008 was the product of "total precipitation [of] between .32 inches at Somerset Airport and 2.3 inches at Monmouth" during the previous two days, the 1.36 to 2.1 inches of rain, which was reported to have fallen over "a shorter period of time", i.e., on the accident date, "was clearly sufficient to result in flooding" (*see* Affirmation of Gerard DeCapua, Esq., p 5). Finally, in an effort to explain how the City's alleged negligence regarding the maintenance of the catch basin near the northbound bus stop relates to the subject motor vehicle accident, plaintiff's counsel argues in his memorandum of law that "[e]very reasonable inference suggests that plaintiff was [waiting] where[ever] she was because [she] would have been standing in ankle deep water if she [had] waited at the bus stop for the northbound S74 [bus] to St. George's Ferry Terminal" (*see* Memorandum of Law, p 12). The Court disagrees.

Although it is well settled that conclusions such as those upon which plaintiff seeks to rely, if based solely on conjecture, speculation or surmise, are generally without probative value, an issue of fact in a case of negligence based wholly on circumstantial evidence may be established *if* plaintiff can show the presence of facts and conditions from which the negligence of the defendant in causing the accident may be reasonably inferred (*see Dixon v. Superior Discounts*, __AD3d__, 2014 NY Slip Op 4661 [4th Dept]). This is so, because there can be many possible causes of an accident. Thus, a plaintiff may raise a triable issue and avoid summary judgment by showing that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency (*see Burgos v. Aqueduct Realty Corp,* 92 NY2d 544, 550 [1998]; *Gayle v. City of New York*, 92 NY2d 936 [1998]; *Raghu v. 24 Realty Co*, 7 AD3d 455, 456 [1st Dept 2004]).

Here, the Court is of the opinion that the evidence adduced by plaintiff is insufficient to meet this threshold, i.e., that the alleged flooding at the bus stop was not only the result of negligent

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However, there is no representation as to the possible effect of any intervening climatic conditions.

maintenance by the City, but a proximate cause of this accident, as well. As the Court of Appeals noted long ago in *Lamb v. Union Railway Co.* (195 NY 260, 266 [1909]), "[i]t is a well-settled rule of law that you cannot base inference upon inference. Every inference must stand on some clear, direct evidence, and not some other inference or presumption [internal quotation marks omitted]". Here, there is no direct evidence of flooding on Arthur Kill Road in the vicinity of plaintiff's accident on the night in question. Accordingly, plaintiff's theory of causation, which is itself based upon circumstantial evidence of "flooding" is insufficient to raise a triable issue of fact (*see Hamilton v. King Tung Kong*, 93 AD3d 821,822 [2nd Dept 2012]).

Moreover, inasmuch as plaintiff has invoked the Noseworthy doctrine (*see Noseworthy v. City*, 298 NY 76 [1948]), which lowers her burden of proof, the proper application of this doctrine does not relieve a plaintiff of the obligation to provide some evidence from which a defendant's negligence can be inferred (*see Neenan v. Quinton*, 110 AD3d 967, 969 [2nd Dept 2013]). Here, it has been determined as a matter of law that plaintiff failed to raise a triable issue of fact as to whether the accident was caused, even in part, by an allegedly unsafe condition which arose due to the City's purported negligence in the maintenance of its storm sewers, as opposed to possible defects in the design of the system. In addition, since (1) the City's knowledge as to the cause of this accident is no greater than plaintiff's (*see Hod v. Orchard Fields, LLC*, 111 AD3d 794 [2nd Dept 2013]) and (2) plaintiff has failed to make any showing of negligence on the part of the City, the application of the Noseworthy doctrine as against this defendant is unwarranted (*see Clark v. Amboy Bus Co*, 117 AD3d 892 [2nd Dept 2014]).

In all events, while a municipality may be subjected to liability for negligence in the maintenance of its sewer system (*see Azizi v. Village of Croton-on-Hudson*, 79 AD3d 953, 955 [2nd Dept 2010]), it is not an insurer of that system and cannot be held liable in the absence of such proof

of negligence as is lacking in this case (*see Linden Towers Coop 4, Inc. v. City of New York*, 272 AD2d 587 [2nd Dept 2000]). Evidence of flooding, standing alone, is insufficient to sustain a cause of action against a municipality to recover damages based on allegations of neglect (id.). To the contrary, in the absence of any direct or indirect evidence of a maintenance failure, a trial jury would be forced to speculate whether the flooding alleged by plaintiff was the result of the City's purported neglect in the maintenance of its water drainage system or the product of negligent design. Not only is the City immune from liability in the latter instance, but it renders plaintiff's attempts to establish prior notice irrelevant.

Accordingly, it is

ORDERED that the cross motion for summary judgment by defendant the City of New York is granted; and it is further

ORDERED that the complaint and any cross claims asserted against said defendant are hereby severed and dismissed; and it is further

ORDERED that the motion for summary judgment by defendants Christina Occhiuto and Richard Harvey is denied; and it is further

ORDERED that the action shall proceed against the remaining defendants; and it is further

ORDERED that the Clerk shall enter judgment and mark his records accordingly.

ENTER,

___/S/_____
HON. THOMAS P. ALIOTTA
J.S.C.

DATED: August 5, 2014