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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT ~~HON. KATHRYN FREED~~ Justice
JUSTICE OF SUPREME COURT

PART 5

INDEX NO. 112568/11

MOTION DATE

MOTION SEQ. NO. 01 and 02

Altagracia Rodriguez
-v-
The City of New York, et al.

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying amended decision and order, dated August 15, 2014

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

FILED
SEP 05 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8-15-14
AUG 15 2014

HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

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

[* 2]

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

----------X

ALTAGRACIA RODRIGUEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY FIRE DEPARTMENT, THE NEW YORK CITY DEPARTMENT OF SANITATION and 33 VERMILYEA, LLC,

Defendants.

----------X

AMENDED DECISION AND ORDER

Index № 112568/11

HON. KATHRYN E. FREED, J.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of these motions:

PAPERS	NUMBERED
CITY'S NOTICE OF MOTION AND AFFIDAVIT ANNEXED.....	.1,2.(Exs. A-L)
VERMILYEA'S NOTICE OF MOTION AND AFFIDAVIT ANNEXED	.3,4.(Exs. 1-9).
ANSWERING AFFIDAVITS.....	.....5.....
REPLYING AFFIDAVITS.....	.....6,7.....
EXHIBITS.....	.....
OTHER.....(Memo of Law).....	.....8.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTIONS IS AS FOLLOWS:

In this personal injury action, The City of New York, The New York City Fire Department (FDNY) and The New York City Department of Sanitation (Sanitation) (together, the City) move, under motion sequence number 001, for an order, pursuant to CPLR 3212, dismissing the complaint. Under motion sequence number 002, defendant 33 Vermilyea, LLC (Vermilyea LLC) also moves for an order, pursuant to CPLR 3212, dismissing the complaint as against it. Vermilyea LLC also seeks an order awarding it costs and attorney's fees against plaintiff's counsel pursuant to CPLR 8303-a, and imposing sanctions against plaintiff's counsel pursuant to 22 NYCRR 130.1.1. The motions, under motion sequence numbers 001 and 002, are

consolidated for disposition.

For the purpose of the consolidated motions, it is undisputed that, on August 24, 2010, plaintiff Altagracia Rodriguez was caused to sustain serious physical injuries to her left knee, leg and hip when she fell on the sidewalk in front of an FDNY firehouse, Engine 95, located at 29 Vermilyea Avenue in upper Manhattan (the firehouse). The firehouse is adjacent to a building owned and operated by Vermilyea LLC, at 33 Vermilyea Avenue.

It is Rodriguez's contention that the cause of her trip and fall accident was two small white supermarket, or grocery store-type bags (grocery bags) which blew out of a large black trash bag and became entangled around her feet. The black trash bag was piled among others outside the firehouse which were to be picked up by Sanitation. Following her accident, Rodriguez underwent knee surgery involving open reduction with internal fixation, followed by physical therapy. She now claims permanent restriction of motion and mobility, and gait instability.

Before proceeding with claims against the municipal defendants, Rodriguez filed a notice of claim and, pursuant to General Municipal Law (GML) § 50-h, she appeared for a hearing, together with counsel, on June 15, 2011. On or about November 3, 2011, Rodriguez commenced this action for damages by filing her summons and complaint in the Office of the New York County Clerk. Her theory of liability is that the City permitted garbage to accumulate and create a hazardous condition in front of the firehouse, and that the City failed to take adequate steps to contain and/or secure the collected garbage. The negligence theory as against Vermilyea LLC is that it contributed to the unsafe garbage condition in the area or around the sidewalk in front of the two buildings.

Issue was joined by service of the City's answer on or about November 29, 2011, and Vermilyea LLC's answer on or about December 13, 2011. After the parties pursued a course of oral and documentary discovery, plaintiff filed her note of issue, on or about October 15, 2013, and defendants served their respective motions for summary judgment. Annexed to each motion are copies of documents, photographs of trash piled in front of the firehouse, and the transcripts of plaintiff's and defendants' depositions. Plaintiff opposes both motions, insisting that the evidence presents material questions of fact warranting the denial of both motions.

To obtain summary judgment, the City and Vermilyea LLC must each "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citation omitted]). Upon making this showing, the burden shifts to Rodriguez to come forward with competent proof to demonstrate the existence of a triable issue of fact. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a prima facie showing (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Among the proofs submitted in support of the motions are the transcripts of Rodriguez's depositions[1] and GML § 50-h hearing, in which she testified about the circumstances surrounding her accident. According to Rodriguez, on August 24, 2010, she was walking from her apartment, at 35 Thayer Street in Manhattan, to a senior center located at 84 Vermilyea Avenue. She stated that the senior center provides meals to elderly people like herself, and that it was part of her

[1] Rodriguez was deposed twice. The first deposition took place on June 14, 2011 [tr I] and the second took place on June 15, 2012 [tr II]).

daily routine to walk there each day for lunch. Rodriguez also stated that she would walk by the firehouse on her way to the senior center and that she regularly saw trash bags piled on the sidewalk in front of the firehouse as she passed by.

Plaintiff testified that it was sunny and breezy on the day of her accident, and that she was walking in the middle of the sidewalk. As she passed in front of the firehouse, four grocery bags flew out of one of the large black trash bags which was open at its top. She recalled that each of the grocery bags was tied at its top, although there was nothing inside any of them, and that the wind was blowing them along the sidewalk. Rodriguez testified that she observed garbage and debris swirling in front of the firehouse from about three buildings away (Rodriguez tr I at 82) and that she did not have an opportunity to step around the blowing grocery bags because she was about three or four feet away (Rodriguez tr II at 32), and it was just three or four seconds between the time she saw the them fly out of the large black trash bag and when they reached her feet (*id.* at 34).

When questioned in detail about the cause of her fall, Rodriguez stated: "[t]he first bag hit the front of my foot and I ended up stepping on it and the, right after then, the other bag hit my left foot and that's when I tripped" (*id.* at 36). She explained that, once her foot became tangled in the bag, she was unable to take any other steps, and she fell forward, hitting the sidewalk with her left knee (*id.* at 37-38). In an effort to identify the exact location of her accident, counsel asked the following questions and Rodriguez gave the following responses:

> "Q. If I understand you correctly, you fell in front of the firehouse?
> A. Yes, surely.
>
> * * *
>
> Q. When you fell to the ground, were you in front of the garbage pile, were you past the garbage pile; where were you positioned when you fell"

A. Exactly in front of the garbage.
Q. That was the garbage that was piled in the corner of the firehouse where you fell?
A. Yes, the fire department."

(*id.* at 29, 38).

Although Rodriguez also reported seeing garbage spread out on the sidewalk, she did not know how long the garbage had been there, who placed it there on the day of her accident, or on any other day prior to her accident, guessing that it had been left here by the people who live in the nearby apartment building (Rodriguez tr I at 36). She also did not know whether anyone other than she had had an accident at that location, admitting that she had never complained to anybody about garbage on the sidewalk (Rodriguez tr II at 23), and did not know if anyone else had complained (Rodriguez tr I at 25). When asked about possible witnesses to her accident, Rodriguez stated that there was no one in front of either the firehouse or the apartment house at the time of her accident (*id.* at 27).

For its deposition, the City produced Francis Occhiogrosso (Occhiogrosso), a captain with the FDNY, who was assigned to the Engine 95 firehouse at the time of plaintiff's accident. Occhiogrosso described his duties and responsibilities as captain. These include basic upkeep, cleanliness, and maintenance of the firehouse quarters. He testified that the firehouse keeps a 24-hour group chart containing the work schedule for the firefighters assigned to that FDNY location, and a company log containing basic information such as roll call, alarm responses, drills, chief visits, and the results of general inspections (Occhiogrosso tr at 10, 21). Upon further questioning, Occhiogrosso testified that an on-duty FDNY officer performs a visual inspection to "make[] sure that the firehouse is maintained all the time and firemen are

responsible to do it. It just gets done," and that any notes made during the inspection are placed in the company log (*id.* at 22).

Occhiogrosso explained that daily committee work is performed each morning by on-duty firefighters in order to maintain the firehouse in a clean, orderly and safe condition. The firefighters sweep, clean and wash whatever needs to be washed, and "[w]aste baskets are emptied into larger pails that are lined with large plastic bags and the garbage is taken out" (*id.* at 24). Occhiogrosso confirmed that, back in August 2010, the firefighters used large, heavy-duty black plastic bags for their garbage, which, when full, were secured closed with a tied knot, as the trash bags did not come with any type of drawstring or tie. The garbage bags, like other cleaning and maintenance supplies used at the firehouse, were requisitioned through the central storehouse catalogue issued by the City of New York. When asked about procedures for trash removal, Occhiogrosso stated that the firehouse procedure was, and still is, to take the trash out between 9:00 and 10:00 a.m. each morning, and if necessary, to take the trash out again later on in the day. The firefighters placed the trash bags against the exterior wall of the firehouse, awaiting pick-up by Sanitation, which occurred around midday on Mondays, Wednesdays and Fridays. Occhiogrosso stated that, with the exception of bulk items such as broken office chairs, all garbage was, and still is, put out for pick-up in the large, black heavy-duty trash bags (*id.* at 41).

Next, Occhiogrosso testified that, while he was not positive about where it came from, he was aware that other trash has been mixed in with, and/or added to, the firehouse's trash bags awaiting pick-up, and he acknowledged that firefighters have complained about this problem because they are responsible for cleaning up other garbage tossed in with their own (*id.* at 42, 46). He also acknowledged that the additional garbage would appear on a fairly frequent basis,

and that he has personally seen plastic grocery store bags (like the ones described by plaintiff) mixed in with the firehouse trash bags (*id.* at 49, 53). However, he was not aware of any instances in which the firehouse's trash bags were opened by people passing by.

When asked about loose trash, grocery bags and/or litter found in front of the firehouse, Occhiogrosso stated that the firefighters would place, or "pack," these items into their heavy duty black bags, including any garbage they saw spilling out of the bags (*id.* at 62, 80-81).

Occhiogrosso also testified that an FDNY deputy chief conducted inspections of the firehouse each spring, and that, while he (Occhiogrosso) was advised of the inspection results, he was not provided with a copy of the actual report. Occhiogrosso confirmed that he was never advised, prior to August 24, 2010, of any issues pertaining to the placement of trash outside the firehouse (*id.* at 82). Finally, Occhiogrosso denied any knowledge of Rodriguez's accident prior to the commencement of her lawsuit, was unaware whether anyone at the firehouse had witnessed her accident, or whether anyone else, prior to August 24, 2010, had any type of accident involving the trash bags placed out front of the firehouse (*id.* at 62, 63).

Vermilyea LLC produced Gregorio Rojas (Rojas), the building superintendent at 33 Vermilyea Avenue, for deposition. According to Rojas, he began working for Vermilyea LLC in or about June 2010, a few months before plaintiff's accident, and among his duties and responsibilities, were the tasks of cleaning and performing repairs at the building. With respect to the sidewalk in front of the building, which he estimated to extend approximately 15 feet from the building to the curb, Rojas testified that he would inspect and sweep the sidewalk pavement each morning between 7:00 and 9:00 a.m., and inspect it at lunch time, and again at 5:00 p.m., to make sure it was free of garbage and debris (Rojas tr at 34, 38, 42).

Rojas testified that it was his responsibility to organize the garbage and the recycling

brought down by the individual tenants. He explained that, to reach the building's collective trash and recycling cans, tenants walked down eight steps through an exterior hallway, and put their garbage, which was allowed to be placed in little grocery store bags, into the appropriate cans kept along the right side of the building's exterior. Rojas stated that he lined the garbage cans with large, heavy black trash bags and the recycling cans with clear or light blue plastic bags, and that he placed signage by the cans directing the tenants as to which cans to use for what purpose. It was also his responsibility to bring the cans to the front of the building for trash and/or recycling pick-up between 7:00 and 8:00 a.m., on Mondays, Wednesdays and Fridays (*id.* at 43, 44).

Rojas acknowledged that it was common for tenants to place items in the wrong cans, and that it was his job to separate any misplaced garbage and recyclables, and to dispose of them in the proper cans prior to being picked up by Sanitation. Rojas observed white bags of various sizes in the area of the FDNY's trash bags, and he saw the small, plastic grocery store-type bags in that area on a daily basis (*id.* at 64). Rojas acknowledged that there were two occasions prior to plaintiff's accident when firefighters complained to him about tenants from 33 Vermilyea tossing their garbage into the area where the firehouse placed its trash, and that while he, personally, had not seen tenants do so, he made a sign asking the tenants not to put their trash into FDNY's pile, but to place it where it belonged.

Rojas testified that he was required to place all garbage into black plastic trash bags for pick-up by Sanitation, and that the bags had to be tied closed. He said that if any little white bags were left around, Sanitation would leave them and possibly ticket the building on that basis. Insinuating that Sanitation would only cite his building, and not the firehouse, for any garbage-related issues, Rojas stated that he would sometimes pick up some of the bags left around after a

Sanitation pick-up, even if they were in front of the firehouse (*id.* at 78-79).

The City now moves for summary judgment on the grounds that: (1) it did not receive prior written notice of the alleged dangerous condition, as required under the Administrative Code of the City of New York § 7-201 (c) (2); (2) there is no evidence that the City caused or created the alleged condition; and (3) the alleged condition was open and obvious, and plaintiff was aware of its presence. Vermilyea LLC seeks summary judgment arguing that plaintiff's own testimony releases it from liability in this matter since, according to Rodriguez, the accident occurred in front of the firehouse, not 33 Vermilyea Avenue. Vermilyea LLC asserts that, not only does it not have an obligation to clean or maintain the sidewalk in front of the firehouse, but that August 24, 2010, fell on a Tuesday, which was not one of the days on which Rojas brought the tenants' trash to the front of his building for pick-up by Sanitation. Since there is no evidence, probative or otherwise, that the grocery bags came from its tenants, or that the grocery bags were, at the time of plaintiff's accident, in front of its building, or that Vermilyea LLC had been notified of a situation on August 24, 2010 involving grocery bags or any other garbage on the sidewalk in front of its building, plaintiff's claims against it rest solely on speculation, which is inadequate to defeat its motion for summary judgment.

Vermilyea LLC also seeks an award of costs and attorney's fees based on plaintiff's refusal to discontinue this action against it, despite requests from counsel following depositions. Vermilyea LLC asserts that, because plaintiff knew, by the completion of depositions in November 2012, that she did not have a good faith basis to maintain this action against it, but rather continued to pursue her meritless claim, the court should impose sanctions and award costs and reasonable attorney's fees based on a finding of frivolity (*see* 22 NYCRR 130-1.1; CPLR 8303-a).

For the following reasons, summary judgment is granted in favor of defendants and against plaintiff, and defendant Vermilyea LLC is entitled to an award of costs and attorneys' fees.

Vermilyea LLC has made a prima facie showing of entitlement to judgement as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853) and, in response, plaintiff has failed to present evidentiary proof that a factual issue exists requiring a trial (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Rodriguez testified that her accident occurred in front of the firehouse, and that the cause of her accident was two grocery bags which flew out of one of the trash bags piled against the firehouse (Rodriguez tr II at 36, 37). This evidence precludes the possibility that her accident occurred on the sidewalk in front of 33 Vermilyea Avenue, as alleged in her complaint and bill of particulars. Plaintiff counsel's attempt to create a question of fact out of Rojas's decision to post signs advising tenants to place their trash in the apartment building's receptacles is both unavailing and misguided, as is counsel's attempt to create an obligation on Vermilyea LLC's part to monitor the sidewalk and the trash in front of the firehouse based on Rojas's testimony that he works hard to keep the sidewalk clean in order to avoid citations/tickets from Sanitation. Inasmuch as plaintiff's opposition is based on little more than conjecture and unsupported assertions, Vermilyea LLC's motion for summary judgment must be granted and the claims against it dismissed (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In its discretion, this Court finds that Vermilyea LLC is entitled to recover costs and reasonable attorney's fees from plaintiff's attorneys, Ferro, Kuba, Mangano & Skylar, P.C., based on the fact that counsel's conduct in continuing to prosecute this action against that defendant following the completion of depositions was frivolous. CPLR 8303-a provides that, in an action

for damages for personal injury, where a claim is continued and found "at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars."

Here, it is evident from Rodriguez's sworn testimony that there was no legal or factual basis to continue its claims against Vermilyea LLC, as she repeatedly and consistently testified that the location of her accident was directly in front of the firehouse, and the cause of her accident was two grocery bags which flew out of the firehouse trash bags. Despite the obvious lack of merit of the allegations against Vermilyea LLC, plaintiff's counsel elected to continue the action against that defendant, forcing it to serve a formal motion for summary judgment. Moreover, upon being served with Vermilyea LLC's summary judgment motion, plaintiff's counsel elected, once again, not to withdraw or discontinue its claims against this defendant, opting instead, to proffer unfounded theories of liability premised on surmise and conjecture, rather than on facts and competent evidence. Due to plaintiff counsel's continued pursuit of frivolous claims against Vermilyea LLC, and refusal to discontinue the action as to this defendant when it became obvious that there was no basis for liability, Vermilyea LLC is entitled to recover from plaintiff's counsel reasonable attorney's fees and costs, not to exceed ten thousand dollars, to cover the expenses of having to make this motion and having to respond to plaintiff's opposition thereto.

Despite the finding of frivolity, this court, in its discretion, denies that aspect of Vermilyea LLC's motion which seeks sanctions pursuant to 22 NYCRR 130-1.1.

With respect to the City, it is well settled that prior written notice is a condition precedent to maintaining an action against the City for personal injuries stemming from a dangerous or defective condition occurring on a public sidewalk (*see Katz v City of New York*, 87 NY2d 241,

243 [1995]; Administrative Code § 7-201 [c] [2]). In addition to the deposition transcripts and photographs, the City submits copies of records maintained by Sanitation and by New York City's Department of Transportation (DOT), together with the affidavit of the DOT record searcher who conducted the search for prior written notice, as evidence that the City had not received a written complaint regarding any condition involving the sidewalk in front of the firehouse prior to August 24, 2010.

A review of the Sanitation records fails to reveal any violations having been issued between August 14, 2008 through August 24, 2010, pertaining to 29 Vermilyea Avenue. Similarly, DOT's records for the month prior to, and including, August 24, 2010, also fail to reveal any complaints regarding the 29 Vermilyea Avenue location. Additionally, the firehouse log book entries for a period of three months prior to, and including, August 24, 2010, and the inspection reports prepared by an FDNY deputy chief, for a period of two years prior to August 24, 2010, up to and including the day of her accident, all fail to contain any entries or notations relating to the trash bags, or to any other trash-related condition on the sidewalk in front of the firehouse.

The foregoing evidence, coupled with Occhiogrosso's testimony and plaintiff's own denial of having made a prior complaint about any garbage or debris on the sidewalk in front of the firehouse (Rodriguez tr II at 23), constitutes prima facie evidence that the City lacked prior written notice of the alleged defect. Accordingly, the burden shifts to Rodriguez to demonstrate the applicability of one of two recognized exceptions to the prior written notice rule, namely, that an affirmative negligent act by the City proximately caused the plaintiff's accident, or that there existed, with respect to the subject sidewalk, a special use which conferred a special benefit on the City (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Amabile v City of*

Buffalo, 93 NY2d 471, 474 [1999]).

Plaintiff concedes the lack of prior written notice, but contends that the lack of notice does not serve as a bar to her action against the City since it was the City's own negligent act and/or omission which proximately caused her to sustain injuries. Plaintiff explains that the City created the dangerous condition by placing and permitting the trash bags to accumulate in front of the firehouse without adequately securing and containing these bags to prevent them from becoming a tripping hazard. More specifically, she contends that, on the day of her accident, garbage was able to, and did, spill out of one of the black heavy-duty trash bags awaiting pick-up in front of the firehouse because it was not knotted at its top. As a result of this negligence, a dangerous condition was created by the City which ultimately resulted in plaintiff's accident and injuries.

Rodriguez buttresses her argument with references to Occhiogrosso's testimony, in which he stated that the trash bags were supposed to be knotted at the top (Occhiogrosso tr at 35), that he was aware of firefighters's complaints about finding extraneous trash mixed in with theirs (*id.* at 42, 46), and that he had seen other garbage left on top of the firehouse trash bags (*id.* at 49, 53). She also references several photographs which show large black trash bags piled against the firehouse and various other types of garbage strewn on top. This, plaintiff contends, shows that the firehouse routinely failed to maintain its trash in an orderly, nonhazardous condition. She also contends that the City's failure to prove that it had properly knotted or secured the trash bag from which the grocery bags flew out on August 24, 2010, and/or to prove exactly when it last inspected the sidewalk, raises material questions of fact as to the City's negligent management of its trash bags awaiting collection by Sanitation, precluding summary judgment.

Contrary to plaintiff's assertion, Occhiogrosso's testimony about firefighters complaining

at various times about finding extraneous garbage mixed in with theirs, and then having to clean it up, does not constitute proof that the City was negligent in its handling of the firehouse trash on August 24, 2010, or at any other time. Plaintiff seeks to defeat the City's motion for summary judgment on the ground that the City must be presumed to have known about the condition that caused plaintiff's accident because Occhiogrosso was aware that extraneous garbage was often found strewn about the firehouse trash bags, and/or because the firefighters, who responded to a fire alarm earlier that day, must have seen the condition of the trash bags on their way in and out of the firehouse bays. However, her arguments are without merit. Not only is there no evidence that one of the trash bags was left open, or inadequately knotted closed, but any failure to do so would constitute an act of omission rather than an affirmative act of negligence, which does not fall within an exception to the prior written notice requirement (*see Yarborough v City of New York*, 10 NY3d at 728; *Monteleone v Incorporated Vil. of Floral Park*, 74 NY2d 917, 919 [1989]; *Rosenblum v City of New York*, 89 AD3d 439, 440 [1st Dept 2011]). Additionally, plaintiff's argument, based on the fact that the firefighters must have seen the trash bag left open at its top (and therefore, been on notice) when they passed by earlier that day, is speculative at best.

Plaintiff's alternative argument, which is loosely based on the theory that the City had constructive notice of an ongoing dangerous or defective condition on the public sidewalk in front of the firehouse because extraneous garbage was often found mixed in with its own, does not satisfy the prior notice requirement. The Court of Appeals in *Amabile v City of Buffalo, supra,* directly addressed, and rejected, the argument made by the plaintiff in that action for recognizing constructive notice as a third exception to the notice requirement. In its decision, the Court concluded that "[j]udicial recognition of a constructive notice exception would contravene

the plain language of the statute and serve only to undermine the rule" (93 NY2d at 476). Accordingly, this court rejects constructive notice as a basis for holding the City liable in this matter.

Next, plaintiff disputes the City's arguments that, because the trash bags and small grocery bags constituted an open and obvious condition, it was relieved of liability for failing to warn or protect against this condition (*see Pinero v Rite Aid of N.Y.*, 294 AD2d 251, 252 [1st Dept 2002], *affd* 99 NY2d 541 [2002]), and its further assertion that, because the condition was in plain sight, she should have stopped walking or taken a different path. Rodriguez responds to this defense by describing the blowing grocery bags as a "cloaked or concealed defect that suddenly and unexpectedly came from the unsecured large plastic garbage bag" (affirmation of plaintiff's counsel, ¶ 44), and suggests that she was caught off guard and unable to avoid them.

Plaintiff's response, however, is inconsistent with her deposition testimony, in which she stated that she noticed the grocery bags and debris swirling in front of the firehouse "about three buildings before I fell," and that she did not consider turning around and/or walking on the other side of the street "because I was so used to walking by there" (Rodriguez tr I at 82). Accordingly, plaintiff's argument is unsupported by the record. It also does not fall within one of the two recognized exceptions to the prior written notice requirement.

To the extent that plaintiff appears to claim that her cause of action against the City is not barred by the notice requirement because the blowing grocery bags constituted a transitory condition, her argument is without merit. New York courts have consistently held that a transitory condition such as this is included among "the types of potentially dangerous conditions for which prior written notice must be given before liability will attach" (*Estrada v City of New York*, 273 AD2d 194, 194 [2d Dept 2000], *lv denied* 95 NY2d 764 [2000]; *see also Min Whan*

Ock v City of New York, 34 AD3d 542, 542 - 543 [2d Dept 2006]).

Finally, no evidence has been submitted regarding a previous injury resulting from a defective, unsafe, dangerous or obstructed condition involving the trash at the location of the firehouse. Nor has any evidence been proffered as to how the trash bag became open at its top. Since there is no evidence that the City received prior written notice of the condition that ultimately resulted in plaintiff's accident and serious injuries, and no evidence that the City affirmatively created the condition which resulted in grocery bags blowing out of one of the firehouse trash bags and entangling plaintiff's feet, the City's motion for summary judgment must be granted.

Accordingly, it is:

ORDERED that the motion of municipal defendants The City of New York, The New York City Fire Department and The New York City Department of Sanitation for summary judgment, under motion seq. 001, is granted and the complaint is dismissed with costs and disbursements to the municipal defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the motion of defendant 33 Vermilyea, LLC for summary judgment, under motion seq. 002, is granted to the extent that the complaint is dismissed with costs and disbursements to this defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and it is further,

ORDERED that that branch of 33 Vermilyea, LLC's motion that seeks an award of reasonable attorney's fees and costs payable by plaintiff's counsel, Ferro, Kuba, Mangano & Skylar, P.C., in an amount not to exceed ten thousand dollars, is granted, pursuant to CPLR 8303-a, to reimburse 33 Vermilyea LLC's counsel for the expenses of having to make the instant

motion and having to respond to plaintiff's opposition thereto despite the fact that, even after depositions, there was no evidence linking 33 Vermilyea LLC to the premises where the alleged incident occurred, and the matter of such attorneys' fees and costs is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the damages issue; and it is further

ORDERED that counsel for 33 Vermilyea, LLC shall, within 20 days, serve a copy of this Order and an accompanying Order of Reference, together with Notice of Entry, on the Special Referee Clerk in the Motion Support Office at 60 Centre Street, Room 119, as well as on all parties, to arrange a date for the reference to the Special Referee; and it is further

ORDERED that that branch of 33 Vermilyea, LLC's motion that demands sanctions pursuant to 22 NYCRR 130-1.1, is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 15, 2014

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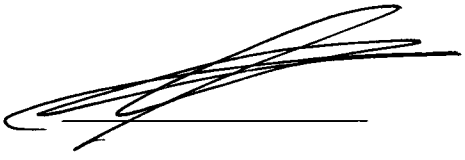

KATHRYN E. FREED,
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT