

Friday v City of New York

2014 NY Slip Op 33576(U)

September 19, 2014

Supreme Court, New York County

Docket Number: 101924/2011

Judge: Kathryn E. Freed

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

EA
9/25/14
E

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 101924/2011
FRIDAY, LENA
vs
CITY OF NEW YORK
Sequence Number : 004
OTHER _____

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 04

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
ACCOMPANYING DECISION / ORDER**

RECEIVED
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NYS SUPREME COURT - CIVIL


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

FILED

SEP 25 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9-19-14
SEP 19 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

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

-----X
LENA FRIDAY,

Plaintiff,

-against-

DECISION/ORDER
Index No. 101924/2011
Seq. No. 004

THE CITY OF NEW YORK,

Defendant.
-----X

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.1,2.(Exs. A-W)
NOTICE OF CROSS MOTION AND AFFIDAVITS ANNEXED.....	.3,4.(Exs. A-J)..
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....	5(Exs. A-D),6..

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

Plaintiff Lena Friday moves, pursuant to CPLR 3212, for an order granting her summary judgment on the issue of liability against defendant The City of New York ("the City"). The City cross-moves for an order, pursuant to the same statute, granting it summary judgment dismissing the complaint. Both motions are opposed. After oral argument and a review of the parties' motion papers and the relevant statutes and case law, **the motion and cross motion are denied.**

FILED

Factual and Procedural Background:

SEP 25 2014

This case arises from an incident on October 22, 2010, in which plaintiff Lena Friday was

COUNTY CLERK'S OFFICE
NEW YORK

allegedly injured when she tripped and fell on a sunken manhole cover located within a crosswalk at the intersection of East 54th and Third Avenue in Manhattan. Ex. A.¹

On November 10, 2010, plaintiff filed a notice of claim alleging that she was injured when she tripped and fell in the western crosswalk of the intersection due to an “uneven, depressed, sunken, broken and/or misleveled portion of the roadway surrounding a manhole cover.” Ex. A. In its answer dated March 29, 2011, the City denied all substantive allegations of wrongdoing. Ex. B.

At her 50-h hearing on January 20, 2011, plaintiff testified, *inter alia*, that she was injured when she fell in a pedestrian crosswalk at the intersection. Ex. A to City’s Cross-Motion, at p. 9. The accident allegedly occurred when she tripped on a manhole cover she believed was “at least five or six inches” below the level of the surrounding asphalt. *Id.*, at 15-17.

In her verified bill of particulars dated April 11, 2011, plaintiff alleged that she was injured when she tripped and fell in the “western crosswalk of the intersection”, approximately 12-14 feet south of the northwest corner of that intersection. Ex. C. In a discovery response served the same day, plaintiff stated that, as of that time, she did “not possess any documents giving any written notice of an allegedly defective or dangerous condition” at the accident site. Ex. C, at par. 16.

In a discovery response dated November 21, 2011, the City produced the results of a search for roadway records performed by the New York City Department of Transportation (“DOT”). Ex. E. The search, which related to the accident site for the period October 22, 2008 through October 22, 2010, revealed permits, permit applications, a Big Apple Map, and no notices of violation or complaints. Ex. E.

¹Unless otherwise noted, all references are to the exhibits annexed to the affirmation of Anna Kull, Esq. submitted in support of plaintiff’s motion.

Plaintiff appeared for deposition on March 28, 2012. At her deposition, she testified that she was injured on October 22, 2010. Ex. H, at 10-11. She stated that she

was walking home from East 55th Street to - - on Third Avenue towards the subway on East 53rd and Third, when [she] was crossing the intersection, where pedestrians walk. And when [she] was crossing, [she] was almost in the middle of the intersection, when [her] right leg dropped abruptly. As it did, [her] left leg moved forward and it got stuck in the lip of the manhole . . . and [she] broke [her] ankle.”

Ex. H, at 11.

The manhole was located in the middle of a pedestrian crosswalk and was five or six inches below the surface of the asphalt. Ex. H, at 13.

On March 28, 2012, Cynthia Howard, a record searcher for the Litigation Support Unit of the DOT, appeared for deposition on behalf of the City. Ex. D to City’s Cross Motion, at 21. Howard testified that, on August 2, 2001, her co-worker, Dmitri Surkov, performed a search of records relating to the intersection for the period of October 22, 2008 through the accident date, October 22, 2010. *Id.*, at 8-11. The search revealed 5 permits and no complaints. *Id.*, at 8-11. A search was also performed for the intersection for the period of October 22, 2007 through October 22, 2010 but did not encompass the four crosswalks. *Id.*, at 16-17.

On June 13, 2012, Victor Green appeared for deposition on behalf of the City. Ex. I. Green, who has worked for the DOT for approximately 25 years, testified that he was the training coordinator for its Highway Inspections and Quality Assurance Unit (“HIQA”). Ex. I, at 6-7. In this role, he scheduled training for DOT inspectors. *Id.*, at 7-8. He had previously been a DOT borough supervisor, who supervised inspectors and clerical staff in four boroughs for approximately 15 years. *Id.*, at 7-8. After plaintiff’s alleged accident, he went to the accident site to identify and photograph the manhole cover, which he said was a sewer cover belonging to the New York City Department

of Environmental Protection (“DEP”). *Id.*, at 12-18, 22, 38. Green marked one of the photographs to indicate that the DEP manhole was in the crosswalk on the west side of the intersection. *Id.*, at 20. He said that a manhole cover is supposed to be at the same level as the asphalt around it. *Id.*, at 27. Green instructed inspectors to call 311 to report a sunken manhole if it was two inches or more below the surface of the surrounding asphalt since such a condition presented a tripping hazard. *Id.*, at 42-43.

On June 26, 2012, George Crimarco, who was assigned to construction labor at the DEP, testified at a deposition on behalf of the City. Ex. J, at 1, 7. He stated that, if a street opening was made by the DEP, it would re-pave the area. *Id.*, at 10. If a complaint had been made about the manhole, a service order would have been created and a DEP inspector would have checked the problem. *Id.*, at 17. Prior to his deposition, he did not search for records relating to the subject manhole. *Id.*, at 12. Nor did he know of anyone who performed such a search. *Id.*, at 12. He further stated that the asphalt surrounding a DEP manhole was supposed to be level with the ground. *Id.*, at 14. Crimarco said that the paving in the area of the manhole involved “trench-style digging,” which typically was not performed by the DEP. *Id.*, at 18.

On June 26 and July 3, 2012, plaintiff demanded that the City produce, *inter alia*, records regarding the re-paving or resurfacing of the area surrounding the manhole. Ex. K; Ex. L.

On December 28, 2012, plaintiff demanded that the City provide, *inter alia*, records regarding any complaints, permits and work orders relating to the area where the manhole was located. Ex. P. The City responded to this demand on April 10, 2013. Ex. Q.

Plaintiff filed a note of issue on or about December 9, 2013. Ex. R.²

Plaintiff now moves against the City, pursuant to CPLR 3212, for summary judgment as to liability. In support of her motion plaintiff submits, *inter alia*, an attorney affirmation; her notice of claim; the pleadings; the bill of particulars; the deposition transcripts of plaintiff, Green, and Crimarco; and discovery demands and responses.

Further, plaintiff submits the expert affidavit of Michael Kravitz, P.E., a licensed engineer, who inspected the premises on June 26, 2013. Ex. V. Kravitz stated, *inter alia*, that “after photogrammetry was performed on the photographs taken [of the manhole] shortly after the accident, it is my professional opinion that on the date of the accident the depth of the manhole . . . was approximately two-one-eighth inches (2-1/8”) below the surface of the surrounding asphalt. Ex. V, Affidavit of Kravitz, at par. 8. Kravitz further stated that, after his inspection of the accident site and review of documents including, *inter alia*, pleadings, deposition transcripts and photographs, it was his professional opinion that the “subject location was re-paved within a five (5) year period, before the date of the subject accident, by [the DOT] and that during the re-paving of the street, the subject manhole was not raised to ensure that it was flush with the surrounding asphalt.” *Id.*, at par. 9. Kravitz opined that the City should have installed a manhole riser when paving the street and that its failure to raise the manhole caused the depression of 2 1/8 inches. *Id.*, at par. 9. Kravitz further stated that “the condition of the manhole was not a result of environmental conditions, wear and tear or a result of settlement” because “[d]epressions resulting from those conditions would [have]

²Although the affidavit of service reflects that the note of issue was served with a certificate of readiness, only an “affirmation of compliance” is annexed to it. Ex. R.

cause[d] the surrounding asphalt to have been broken, cracked and uneven. *Id.*, at par. 10.

Also submitted in support of her motion is an unsworn report by Kravitz dated July 1, 2013. In the report, Kravitz states, *inter alia*, that the DOT “periodically resurface[d] the area of the accident. . . [a]nd more probably than not the area was resurfaced within a (5) year period.”

Plaintiff also submits the affidavit of Michael Lydecker, a professional roadway paver with 36 years of experience. Ex. W. Lydecker opined, after reviewing photographs and deposition transcripts, that the “depressed and sunken condition” of the manhole “did not conform with the standards and practices of the paving industry.” *Id.*, at par. 4. He said that risers should have been installed beneath the manhole so that it could have been level with the surrounding asphalt. *Id.*, at pars. 5-6. He stated that it was his professional opinion that, by failing to install a manhole riser, the City created “an immediate tripping hazard.” *Id.*, at par. 11.

The City opposes plaintiff’s motion and cross moves for summary judgment dismissing the complaint. In support of its cross motion and in opposition to plaintiff’s motion, the City submits an attorney affirmation; plaintiff’s 50-h hearing transcript; results of a roadway search performed by the DOT on August 2, 2011 for records regarding the subject intersection for the period of October 22, 2008 through October 22, 2010; results of a roadway search performed by the DOT on February 1, 2012 for records relating to the subject intersection for the period of October 22, 2007 through October 22, 2010; and Howard’s deposition transcript. In addition, the City submits the results of a search of DEP records for the subject intersection for the period of October 22, 2008 through October 22, 2010. Ex. G to City’s Cross Motion. The City also submits the affidavit of Paul Cividanes, a paralegal employed by the DOT, who states that his search of DOT records for the intersection for the period of October 22, 2008 through October 22, 2010 revealed permits and

applications for permits but no complaints or corrective action requests. Exs. E and F to City's Cross Motion.

Positions of the Parties:

Plaintiff argues that her motion for summary judgment must be granted because the City was negligent as a matter of law in creating the condition which caused her to trip. Relying primarily on the affidavits of Kravitz and Lydecker, plaintiff argues that the City failed to properly pave the area surrounding the manhole.

The City argues that it is entitled to summary judgment dismissing the complaint because it did not have prior written notice of the alleged condition as required by section 7-201(c)(2) of the Administrative Code of the City of New York. The City also asserts that it is entitled to summary judgment because it did not cause or create the alleged hazardous condition, and thus did not fall within an exception to section 7-201(c)(2).

In opposition to plaintiff's motion for summary judgment, the City argues that plaintiff failed to establish its prima facie entitlement to judgment as a matter of law by demonstrating that the City created a defect which immediately resulted in the existence of a dangerous condition. Alternatively, the City argues that, even if it were negligent, plaintiff is not entitled to judgment as a matter of law because issues of fact exist regarding her comparative negligence. Further, the City argues that plaintiff improperly attempts to impose liability on it based on the theory of constructive notice, which is inapplicable here because liability herein is governed by the prior written notice statute.

In a reply affirmation submitted in further support of her motion and in opposition to the

City's cross motion, plaintiff argues that she need not prove that the City had prior written notice of the alleged defect since it created the same. Alternatively, plaintiff argues that, even if the City did not create the alleged condition, it was negligent in failing to maintain the manhole cover in a reasonably safe condition pursuant to the special use doctrine. Plaintiff further asserts that the City failed to raise an issue of fact regarding whether it created a defective condition.

In a reply affirmation submitted in further support of its cross motion and in further opposition to plaintiff's motion,³ the City argues that it is entitled to summary judgment as a matter of law because it did not have prior written notice of the alleged defect and it did not create the defect. The City further asserts that the special use doctrine is inapplicable herein.

Conclusions of Law:

Plaintiff's Motion for Summary Judgment

It is well-settled that the proponent of a motion for summary judgment "must 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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation." *Morgan v. New York Telephone*, 220 A.D.2d 728 (2d Dept. 1985). If there is any doubt as to the existence of a

³That portion of the affirmation submitted in further opposition to plaintiff's motion constitutes a sur-reply affirmation which, having been submitted without leave of this Court, will not be considered in determining the said motion. *See Weinstein v Jenny Craig Operations, Inc.*, 41 Misc3d 1220(A), n. 1 (Sup Ct New York County 2013).

triable issue of fact, summary judgment must be denied. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978); *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 (1st Dept. 2002). As discussed below, plaintiff failed to meet this burden and thus her motion for summary judgment must be denied without even considering the City's opposition papers.

It is well established that, in order to hold the City liable for injuries resulting from defects in a roadway, a plaintiff must demonstrate that the City has received prior written notice of the defect. See Administrative Code of the City of NY §7-201(c)(2); *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 (1999). The Court of Appeals recognizes only two statutory exceptions to the prior written notice requirement: where the municipality itself created the defect through an affirmative act of negligence, or where the defect resulted from a special use by the municipality. See *Yarborough v. City of New York*, 10 N.Y.3d 726, 728 (2008); *Oboler v. City of New York*, 9 N.Y.3d 888, 889 (2007); *Amabile v. City of Buffalo*, *supra* at 474. Where, as here, a plaintiff alleges that the City's affirmative negligence created a defective condition, that plaintiff must establish that the City's actions immediately resulted in the creation of the condition. See *Rosenblum v. City of New York*, 89 AD3d 439 (1st Dept 2011); *Bielecki v. City of New York*, 14 AD3d 301 (1st Dept 2005).

Although plaintiff alleges in her complaint that the City had prior written notice of the alleged defect (Ex. A), her motion is based on the argument that the City created an immediate hazard which caused her injury. However, she has failed to establish, as a matter of law, that the City did so.

In asserting that the City created an immediate hazard, plaintiff relies on the affidavits of her experts, Kravitz and Lydecker (Exs. V and W, respectively), as well as on the report submitted by Kravitz. Ex. V. Kravitz opines in his affidavit that the "subject location was re-paved within a five

(5) year period, before the date of the subject accident, by [the City's DOT] and that during said repaving of the street, the subject manhole was not raised to ensure that it was flush with the surrounding asphalt." *Id.*, at par. 9. Kravitz opined that the City should have installed a manhole riser when paving the street and that its failure to raise the manhole caused the depression of 2 1/8 inches. *Id.*, at par. 9. Kravitz further stated that "the condition of the manhole was not a result of environmental conditions, wear and tear or a result of settlement" because "[d]epressions resulting from those conditions would [have] cause[d] the surrounding asphalt to have been broken, cracked and uneven. *Id.*, at par. 10. He admits that he did not visit the site until June 26, 2013 (Ex. V, at par. 3[m]) and that he reviewed photographs of the site. Ex. V, at par. 3(a).⁴

Importantly, however, Kravitz sets forth no basis for his belief that the area adjacent to the manhole was paved within the five years preceding the incident or that such paving was performed by the DOT. Since he has no actual knowledge of whether, or when, such paving was performed, his opinion is speculative and conclusory, and thus fails to establish plaintiff's prima facie entitlement to summary judgment. *See Green v City of New York*, 76 AD3d 508 (2d Dept 2010); *Bigman v City of New York*, 2012 NY Misc LEXIS 663 (Sup Ct New York County 2012). Additionally, since Kravitz's affidavit is devoid of any indication that he observed the area of the manhole at the time it was paved or at any time shortly thereafter, or even reviewed photographs depicting the area at that time, there is no basis for his conclusion that the City created an immediate hazard. *See Green, supra; Bigman, supra.*

The speculative nature of Kravitz's opinion is underscored by the report he wrote which is submitted in support of plaintiff's motion. Kravitz states in the report that the DOT "periodically

⁴Kravitz does not state in his affidavit when the photographs he reviewed were taken.

resurface[d] the area of the accident. . . [a]nd more probably than not the area was resurfaced within a (5) year period.” (*emphasis added*). Ex. V. In any event, since the report is not sworn, it is not in admissible form, lacks probative value, and may not serve as the basis for establishing plaintiff’s entitlement to summary judgment. *See Grasso v Angerami*, 79 NY2d 813, 814 (1991); *Miller-Francis v Smith-Jackson*, 113 AD3d 28, 34-35 (1st Dept 2013); *101 Maiden Lane Realty Co., LLC v Tran Han Ho*, 88 AD3d 596 (1st Dept 2011).

Lydecker’s affidavit is similarly speculative and conclusory. Although he, too, states that the City created an immediate tripping hazard (Ex. W), there is likewise no indication that he observed the condition of the area surrounding the manhole at the time it was paved or soon thereafter. Since he also lacks personal knowledge which would allow him to opine as to the creation of an immediate hazard, his opinions are speculative and conclusory as well. *See Green, supra; Bigman, supra.*

“Here, plaintiff presented no evidence of who last repaved this section of the roadway before the accident, when any such work may have been carried out, or the condition of the asphalt abutting the manhole cover after any such resurfacing.” *Oboler, supra* at 890. Thus, she has failed to establish, as a matter of law, that the City created an immediate hazard which would constitute an exception to the prior written notice statute.

Further, plaintiff failed to establish that the City is liable pursuant to the special use exception to §7-201(c)(2). First, this argument is improperly raised by plaintiff for the first time in her reply affirmation. *See Goldstone v Gracie Terr. Apt. Corp.*, 110 AD3d 101 (1st Dept 2013). Even if the argument had been properly raised, it is without merit since plaintiff “presented no proof of any special benefit conferred on the City” by the manhole cover. *Oboler, supra* at 890.

Finally, plaintiff's own submissions create a question of fact regarding the alleged defect. *See generally Lebreton v New York City Trans. Auth.*, 267 AD2d 211 (2d Dept 1999). While plaintiff testified that the manhole cover was at least 5-6" below the level of the asphalt (Ex. A to City's Cross Motion at 15-17), Kravitz states that it was 2 1/8 inches below the asphalt. Ex. V.⁵

Since plaintiff does not argue that the City had prior written notice of the alleged defect (despite alleging so in her complaint), and has failed to establish either exception to §7-201(c)(2), her motion for summary judgment must be denied regardless of the sufficiency of the City's opposing papers. *See Winegrad, supra* at 853.

The City's Cross Motion for Summary Judgment

While it is plaintiff who bears the burden of establishing at trial that the City had prior written notice of the alleged defect (*see Katz v. City of New York*, 87 N.Y.2d 241, 243 [1995]), she does not bear this burden at the pleading stage. Indeed, it is the City, as a moving party, who must establish the absence of prior written notice. *McNeill v. City of New York*, 40 A.D.3d 823, 824 (2d Dept. 2007). This the City has failed to do.

In support of its motion for summary judgment, the City submits the results of a roadway search performed by the DOT on August 2, 2011 for records regarding the subject intersection for the period of October 22, 2008 through October 22, 2010. Ex. B to City's Cross Motion. Howard testified that her co-worker performed the search, which revealed 5 permits and no complaints. *Id.*, at 8-11.

⁵This Court further notes that, although Kravitz states that he determined the depth of the manhole by using "photogrammetry" (Ex. V), he does not define this test or explain how or why it was used.

The City also submits the affidavit of Paul Cividanis, a paralegal employed by the DOT, who states that his search of DOT records for the intersection for the period of October 22, 2008 through October 22, 2010 revealed permits and applications for permits but no complaints or corrective action requests. Exs. E and F to City's Cross Motion.

However, the foregoing, which addressed only searches by the DOT, did not establish the City's entitlement to summary judgment as a matter of law. As noted above, Green, an employee of the DOT, testified that the manhole cover belonged to the DEP. Ex. I, at 12-18, 22, 38. Crimarco, an employee of the DEP, testified that, if a street opening was made by the DEP, it would re-pave the area. Ex. J, at 10. If a complaint had been made about the manhole, a service order would have been created and a DEP inspector would have checked the problem. *Id.*, at 17. Prior to his deposition, he did not search for records relating to the subject manhole and did not know whether any such search was performed. *Id.*, at 12.⁶ Although he testified that the paving in the area of the manhole involved "trench-style digging," which typically was not performed by the DEP (*Id.*, at 18), he did not state who paved the area or when it was paved.

Although the City submits the results of a search of DEP records for the subject intersection for the period of October 22, 2008 through October 22, 2010 (Ex. G to City's Cross Motion), it fails to provide any deposition testimony or affidavit "from any [DEP] official or employee demonstrating that a search of the appropriate [DEP] records had been done and that [the DEP had] no prior written notice of the alleged dangerous condition that caused the plaintiff's accident." *Martinez v City of New York*, 105 AD2d 1013, 1014 (2d Dept 2013). Since Green's testimony reflects that plaintiff

⁶Although the City argues, in effect, that it produced Crimarco to authenticate these records (Aff. In Support of City's Cross Motion, at par. 24), it is apparent that this contention is disingenuous given his testimony.

tripped in an area adjacent to a DEP manhole (Ex. I, at 12-18, 22, 38), it was incumbent upon the City to establish that the DEP, as well as the DOT, had no prior written notice of the alleged defect. Since the City failed to make this showing with respect to the DEP, it failed to establish its prima facie entitlement to summary judgment as a matter of law. *See Martinez, supra.*

Since the City failed to establish its prima facie entitlement to summary judgment, its motion is denied regardless of the sufficiency of the City's opposing papers. *See Winegrad, supra* at 853.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for summary judgment is denied; and it is further,

ORDERED that the City's cross motion for summary judgment is denied; and it is further,

ORDERED that the parties are to appear for a settlement conference at 80 Centre Street, Room 280, at 2:30 p.m. on December 9, 2014; and it is further,

ORDERED that this constitutes the decision and order of this Court.

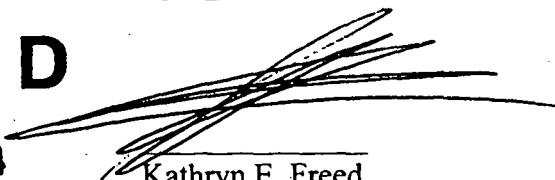
DATED: September 19, 2014

ENTER:

SEP 19 2014

FILED

SEP 25 2014



Kathryn E. Freed,

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
COUNTY CLERK'S OFFICE
NEW YORK