

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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MARIA VELAZQUEZ,

Index No.: 309185/2011

Plaintiff(s),

-against-

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

NEW YORK CITY TRANSIT AUTHORITY
and THE CITY OF NEW YORK,

Defendant(s).

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Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment and Cross Motion to Amend the Complaint	Papers Numbered
Notice of Motion, Affirmation, and Affidavit in Support with Exhibits	1
Notice of Cross Motion Affirmation in Support of Cross Motion and in Opposition to Motion.....	2
Reply Affirmation in Support of Motion and in Opposition to Cross Motion...	3
Reply Affirmation in Support of Cross Motion	4

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendant CITY OF NEW YORK (hereinafter "City") moves for summary judgment dismissing the complaint pursuant to CPLR §3212 and/or to dismiss pursuant to CPLR §3211(a)(7). Plaintiff cross moves to amend the complaint.

Plaintiff commenced this action seeking damages for injuries allegedly sustained by her on December 24, 2010. Plaintiff alleges that on that date, she was a passenger on a BX 11 bus owned and operated by New York City Transit Authority (hereinafter, "NYCTA"). When the bus reached 170th Street and Jerome Avenue it stopped in the roadway, away from the actual bus stop, to drop off passengers including plaintiff. Plaintiff alleges that the bus driver failed to activate the "bus kneel." Plaintiff further claims that she fell off of the bus, into a pothole and injured her right knee as a result.

The City asserts that summary judgment is warranted because plaintiff has failed to prove the City had prior written notice of the alleged condition of the roadway, as required by New York

Admin. Code §7-201(c)(2), and further, that the pothole in the roadway was not the proximate cause of plaintiff's injury. The City also asserts that the complaint should be dismissed pursuant to CPLR 3211(a)(7) because plaintiff failed to alleged in her complaint that the City had prior written notice of the condition. Plaintiff opposes the motion, and cross moves to amend the complaint to include the allegation that the City did have prior written notice.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

Pursuant to section 7-201(c)(2) of the New York City Administrative Code,

> [n]o civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written

> acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Generally, a municipal defendant bears no liability under a defect falling within the ambit of §7-201(c), "unless the injured party can demonstrate that a municipality failed or neglected to remedy a defect within reasonable time after receipt of written notice" (*Poirier v. City of Schenectady*, 85 N.Y. 2d 310, 313 [1995]). The statute mandates that for purposes of liability, prior written notice must be received at least 15 days prior to any accident alleged (*Ock v. City of New York*, 34 A.D.3d. 542 [2d Dep't., 2006]; *Baez v. City of New York*, 128 A.D.2d 488, 489 1st Dep't., 2000]). Thus no liability will lie for an accident occurring within 15 days after which the municipality defendant receives written notice (*Silva v. City of New York*, 17 A.D.3d 566, 567 [2d Dep't., 2005]). The failure to demonstrate prior written notice leaves a plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying the alleged defect (*Katz v. City of new York*, 87 N.Y.2d 241, 243 [1995]).

An exception to the foregoing exists where it is claimed that the municipal defendant affirmatively created the condition alleged to have caused plaintiff's accident, in which case the absence of prior written notice is no barrier to liability (*Keirnan v.* Thompson, 73 A.D.2d 840 [1988]; *Elstein v. City of New York*, 209 A.D.2d 186, 186-187 [1st Dep't., 1994]; *Bisulco v. City of New York*, 186 A.D.2d 85 [1st Dep't.,1992]). A plaintiff seeking to proceed on a theory that the municipality created the defect alleged, however, must establish that the defective condition was improperly installed so as to bring the defect out of the ambit of ordinary wear and tear (*Yarborough v. City of New York*, 10 N.Y.3d 726, 728 [2008]; *Obler v. City of New York*, 8 N.Y. 3d 888, 890 [2007]). Stated differently, the proponent of a claim that a municipal defendant created a dangerous condition must establish that work performed by the municipal defendant was negligently performed such that it, "immediately result[ed] in the existence of [the] dangerous condition" alleged (*Yarborough* at 728 [internal quotation marks omitted].

With respect to whether certain documents establish prior written notice, any documents created by the agency responsible for the repair of the defect reflected therein constitutes

acknowledgment under §7-201(c)(3), and are sufficient to confer prior written notice in satisfaction of the statute (*Bruni v. City of New York*, 2 N.Y.3d 319, 326-327 [2004]). However, once the condition has been repaired, a new written notice and failure to correct is required before liability will attach (*Capobianco v. Mari*, 272 A.D.2d 497 [2d Dep't., 2000]). Additionally, repair orders, even if reduced to writing fail to establish prior written notice upon a municipality sufficient to satisfy §7-201 (*Marshall v. City of New York*, 52 A.D.3d 586, 587 [2d Dep't., 2008]; *Khemraj v. City of New York*, 37 A.D.3d 419, 420 [2d Dep't., 2007].

In support of the motion, the City submits the affidavit of Fulu Bhowmick ("Bhowmick"), an employee of the Department of Transportation of the City of New York ("DOT"). Bhowmick's duties include searching DOT records. At the City's request, Bhowmick conducted a search of DOT's records for the location of Plaintiff's accident. Specifically, Bhowmick searched for records related to the roadway located on East 170th Street between Townsend and Jerome Avenues. Bhowmick's search covered a period of two years prior to and including December 24, 2010. The search yielded four permits, four hard copy permits, zero applications, one hardcopy file from the Office of Construction Mitigation and Coordination, zero Corrective Action Requests ("CARs"), zero Notices of Violation ("NOVs"), zero Notifications for Immediate Corrective Action ("NICAs") nine inspections, zero contracts, one maintenance and repair order/record, one complaint, one gangsheet for roadway defects, zero gangsheets for milling and resurfacing records, zero records from the Office of Special Events, and two Big Apple Maps. The big Apple Maps were served upon the DOT by the Big Apple and Sidewalk Protection Corporations on July 30, 2003. The documents referred to in Bhowmick's affidavit are also submitted by the City.

The City also submits the affidavit of Larisa Dubina ("Dubina") also employed by the DOT. Dubina conducted a search for DOT records for the roadway of West 170th Street between Plaza Drive and Jerome Avenue including East 170th Street. The search revealed one permit, zero hardcopy permits, zero applications, one hardcopy file from the Office of Construction Mitigation and Coordination, zero CARs, zero NOVs, zero NICAs, three inspections, zero contracts, one maintenance and repair order/record, one complaint, one gangsheet for roadway defects, one handwritten gangsheet for roadway defects, zero gangsheets for milling and resurfacing records, zero records from the Office of Special Events and Two Big Apple Maps. The big Apple Maps were

served upon the DOT by the Big Apple and Sidewalk Protection Corporations on July 30, 2003. The documents referred to in Dubina's affidavit are also submitted by the City

The City's attorney argues that a review of the records submitted with the two aforementioned affidavits reveals that none of the permits submitted were issued to a City agency. Regardless, permits issued by the City do not constitute prior written notice (*Meltzer v. City of New York*, 156 A.D.2d 124 [1st Dep't., 1989]. The City argues that the records also reveal that the citizen complaint was made on December 3, 2009 for a "path-hole" at the bus stop on 170th Street and Jerome Avenue but that the said defect was closed on December 9, 2009, over a year prior to plaintiff's accident. The City contends, that the records also reveal that a citizen complaint was made for a "pothole located in the middle of street as you turn into E. 170th Street from Jerome Ave. NEC near crosswalk" but that the defect was marked closed on April 17, 2010, eight months prior to plaintiff's accident. Further, the search performed by Royanne Richards, Department of Environmental Protection for the City revealed a citizen complaint and Work Order for a missing catch basin and not a pothole which is the alleged defect in this case. Further the Big Apple Maps relate to defects in cross walks and plaintiffs accident did not occur in a crosswalk.

Despite the above, the City failed to provide an affidavit or deposition transcript from an individual with personal knowledge of the repairs performed on the potholes or explaining the records submitted with the motion. Without the same, the court is left to interpret records without the aide of a person with personal knowledge of what the entries on the documents mean and how the repairs were made, if at all. The records do not state clearly whether the potholes complained of were repaired. Instead, the records that the City's attorney argue establish that the potholes were "repaired" consist of computer data printouts indicating that a defect was "closed." It is unclear, based on the record, whether the defect was repaired, or the work order was deemed closed. Therefore, the City has failed to establish that it repaired the potholes acknowledged in the documents created by the City itself.

The City's reliance on *Abbot v. City of New York*, 114 A.D. 3d 515 (1st Dep't. 2014) to support its claims that the records, as submitted, are sufficient to establish lack of prior written notice, is misguided. In *Abbot*, the Appellate Division affirmed the trial court's order directing a verdict dismissing the complaint after proof was submitted to the court and to the jury. Likewise, in

Ocasio v. City of New York, 20 A.D.3d 311 (1st Dep't., 2006), the Appellate Division reversed the trial court's order setting aside a jury verdict. Again, proof as to lack of prior written notice was presented to the jury. On the contrary, in this matter, the record before the court does not establish lack of prior written notice and therefore, summary judgment on that basis is denied.

The City's second argument in support of summary judgment, that any negligence by the City was not the proximate cause of the plaintiff's injuries, is also unpersuasive. The plaintiff fell off of a bus and into a pothole in the street. The City failed to established that plaintiff's injury was not caused by her falling into the pothole, as opposed to her falling on a street without a pothole. Plaintiff's injuries may have indeed been caused, totally or in part, by the alleged defect in the roadway. Therefore, summary judgment is denied.

Finally, plaintiff's cross motion to amend the complaint is granted. The City's argument that the motion should be denied because it is submitted on the even of trial is unavailing. The matter is still in the pretrial conference phase and while the Note of Issue has been filed, the court finds that the amendment will not prejudice the City. The court notes that the original complaint does allege the City had prior notice of the alleged default, but failed to stated that such notice was written. Therefore, plaintiff may serve an amended complaint to include the language set forth in para. 13 of plaintiff's cross motion. Any such amended complaint must be served by plaintiff upon all parties within 30 days of the entry date of this order.

This constitutes the decision and order of the court.

Dated: 5/10/16
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.