SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III **PART** IAS MOTION 62EFM

Justice

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JAMES HAWKINS,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, AND CONSOLIDATED EDISION, INC.

Defendant.

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INDEX NO. 155877/2014

MOTION DATE 02/14/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff commenced this action seeking damages from an alleged trip and fall on a manhole cover on Catherine Street between Henry and Madison Streets, New York, New York, on June 14, 2013. Defendant City of New York ("City") moves this court for summary judgment pursuant to CPLR § 3212, seeking dismissal of all claims and cross-claims asserted against it. Plaintiff opposes the motion.

In support of its motion, defendant City submits copies of the notice of claim, summons and complaint, defendants' answers, plaintiff's bill of particulars, plaintiff's 50-h transcript, and photographs; the photographs are unmarked (NYSCEF Doc Nos. 10-15). Defendant City also submits two affidavits from City Department of Transportation ("DOT") employees, Rita Shapsis, a paralegal, and Victor Green, a training coordinator (NYSCEF Doc Nos. 16 and 18), as well as a set of DOT documents (NYSCEF Doc No. 17). In opposition, plaintiff submits copies of defendant Consolidated Edison, Inc.'s ("Con Ed") discovery demands to defendant City, a case scheduling order dated February 9, 2018, and a status conference stipulation dated October 10, 2018 (NYSCEF Doc Nos. 22-24).

Defendant City argues that it is entitled to summary judgment because it is not responsible for the manhole cover on which plaintiff allegedly tripped and fell on June 14, 2013. In support of its position, defendant City points to the affidavit of Victor Green in which he concluded that the "manhole cover in question belongs to the Con Edison" (Green aff, NYSCEF Doc No. 18, at 4). Pursuant to 34 RCNY 2-07, defendant City argues that it is not responsible for the manhole cover and "twelve inches outward from the perimeter of the hardware" (34 RCNY 2-07 [b] [1]; *see Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]). Moreover, defendant City argues, summary judgment should be granted because there is no evidence (beyond speculation) to support plaintiff's theory of affirmative negligence (*see Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009] citing *Faulk v City of New York*, 16 Misc3d 1108 [A]

[Sup Ct, Kings County 2007]). According to defendant City, its submission of DOT records (NYSCEF Doc No. 17) indicates that it could not have caused or created the manhole cover condition at issue.

In opposition, plaintiff argues that defendant City failed to submit conclusive evidence that it did not create the alleged condition. Plaintiff argues that defendant City did not include an attached sworn statement that the City "neither worked on the sidewalk within 12 inches of the manhole nor worked on the manhole cover prior to the plaintiff's fall" (Sanyer aff at 10, NYSCEF Doc No. 21). Moreover, defendant City's motion is premature under CPLR § 3212 (f).

In reply, defendant City maintains that it is entitled to summary judgment based upon a showing that it did not own the subject manhole cover and did not cause or create the alleged condition.

The proponent of a motion for summary judgment must tender sufficient evidence to show the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing, "the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]; *see Prevost v One City Block LLC*, 155 AD3d 531 [1st Dept 2017]).

"Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous roadway[, sidewalk, or encumbrance] condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (*Phillips v. City of New York,* 107 A.D.3d 774 [2d Dept 2013] citing *Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *see* New York City Administrative Code 7-201 and 7-210).

"Where the City establishes that it lacked prior written notice under the Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). Additionally, the affirmative negligence exception 'is limited to work by the City that immediately results in the existence of a dangerous condition' (*Oboler v City of New York*, 8 NY3d 888, 889 [2007] [emphasis omitted], quoting *Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005])" (*Yarborough v City of New York*, 10 NY3d 726 [2008]; *see Chambers v City of New York*, 147 AD3d 471 [1st Dept 2017]).

Pursuant to New York City Administrative Code § 7-210, "[i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition" and the

property owner "shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition". This provision does not apply to owner-occupied one-, two-, or three-family properties "used exclusively for residential purposes" (New York City Administrative Code § 7-210). Moreover, "the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks" unless the sidewalk abuts an exempted property or city-owned property (*id.*). Finally, pursuant to 34 RCNY 2-07, if defendant City does not own a certain hardware, including manhole covers or grates, defendant City is not responsible for the hardware and "twelve inches outward from the perimeter of the hardware" (34 RCNY 2-07 [b] [1]); rather, owners of hardware are exclusively responsible to maintain the hardware and the twelve-inch perimeter (*see Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]), unless a non-owner affirmatively created the condition (*see Kearney v Capelli Enterprises*, 151 AD3d 521 [1st Dept 2017]) or derives a special use from the hardware (*see Patterson v City of New York*, 1 AD3d 139 [1st Dept 2003]; *Posner v New York City Transit Authority*, 27 AD3d 542 [2d Dept 2006]; *see generally Kleckner v Meushar 34th Street, LLC*, 80 AD3d 478 [1st Dept 2011]).

In the instant matter, plaintiff alleges that his injury occurred as a result of a trip and fall on a raised manhole cover (NYSCEF Doc No. 14, plaintiff's 50-h transcript, at 18-19). As such, under *Storper* (*supra*), *Lewis v City of New York*, 89 AD3d 41 (1st Dept 2011), and *Yarborough* (*supra*), the City cannot be held liable unless it owned the subject manhole cover and had notice of the alleged condition, affirmatively created the condition, or made special use of the manhole. On a motion for summary judgment, defendant City bears the burden of establishing that it did not own the manhole cover (*see Storper*, *supra*); if defendant City establishes it did not own the manhole cover, then the burden shifts to plaintiff to demonstrate the applicability of affirmative negligence or special use (*see Yarborough*, *supra*).

Here, defendant City submitted an affidavit from Victor Green, a training coordinator employed by DOT, who stated that he "personally conducted an onsite inspection to identify the owner of the utility cover located on the sidewalk at Catherine Street between Henry Street and Madison Street, County, City and State of New York" and that "[a]s a result of my inspection, and based on my years of training and experience, I determined that the utility cover in question belongs to the Con Edison" (NYSCEF Doc No. 18).

"Mr. Green's affidavit, standing alone, does not establish that the City did not own the grate on the date of plaintiff's accident. Mr. Green's affidavit is conclusory because it does not explain how his training and experience led him to the conclusion that the City does not own the grate nor does Mr. Green opine that the City did not own the grate on the date of plaintiff's accident which is a critical inquiry" (*Vega v City of New York*, 2016 WL 7489220, 2016 NY Slip Op 32580 [U] [Sup Ct, NY County 2016]). The same can be said here with respect to the manhole cover at issue. The description of Mr. Green's duties in his affidavit do not describe any way by which he determines ownership of manholes or property generally during the course of his work or if he ever has occasion to do so. Moreover, the method of his determining ownership of the manhole cover through visual inspection is not made clear in the affidavit (*see* Green aff, NYSCEF Doc No. 18). Furthermore, and crucially, his affidavit does not speak to the issue of ownership on the date of the alleged occurrence (*id.*).

Upon the foregoing, and all papers and exhibits submitted concerning the relief sought herein, this court finds that defendant City has failed to meet its *prima facie* burden to establish its entitlement to judgement as a matter of law, and defendant City of New York's motion for summary judgment dismissing plaintiff's Complaint and all cross-claims against it is denied.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected.

Accordingly, it is ORDERED, that this motion for summary judgment is denied, and it is further,

ORDERED, that defendant City of New York is to serve a copy of this Order with Notice of Entry within twenty days of entry upon all parties and the General Clerk's Office.

This constitutes the decision and order of the court.

The parties are directed to appear for the currently scheduled compliance conference on May 23, 2019.

April 3, 2019

HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	[ ]	CASE DISPOSED	[X]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ] OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE