SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART 62**

Justice

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EULOGIA ENRIQUEZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Defendant.

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INDEX NO. 151168/2016

MOTION DATE 07/10/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

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

Pending before the court is a motion filed by all defendants (collectively, the "City") seeking an order pursuant to CPLR § 3212 granting summary judgment to the City on the grounds that, pursuant to § 7-201 of the Administrative Code of the City of New York, the City did not receive prior written notice of the defect that allegedly caused plaintiff's accident. Upon the foregoing documents, and upon oral argument held before the undersigned on December 17, 2020, the motion is hereby GRANTED.

The plaintiff fails to establish that the City had prior notice. The 311 call, as detailed below, was about a "clogged" catch basin. It is undisputed that the City inspector went out and no clogged catch basin was found. Plaintiff also concedes that there was no clogged basin, but maintains that some other defect in the roadway (in the area inspected by his expert) could have caused plaintiff's injuries, of which there is no proof of notice to the City.

Discussion

This is an action wherein plaintiff alleges that on November 20, 2015, at approximately 6:30 a.m., she was injured when she tripped and fell due to a defective roadway condition located on East 33rd Street, near its intersection with 2nd Avenue. Specifically, the alleged defect relates to the "catch basin" (also commonly known as a storm drain). Plaintiff alleges that the pavement surrounding the catch basin was cracked and not level; that the catch basin was not level with the pavement; and that the grate of the pavement was raised, which caused her to fall.

Plaintiff's primary argument in opposition to the City's motion is that the City received such notice in the form of a 311 call that was made to the City about the subject catch basin on March 21, 2015, approximately eight months before plaintiff's accident. A review of the report shows that a Mr. Jose Rosario had called the City's 311 number to complain that a catch basin was "clogged up" and flooding on East 33rd Street at the cross-street of 2nd Avenue (complaint SR #185903431). The City's records also show that a City inspector went out the next day, on March 22, 2015, and found "no such condition." The inspector's report did not note any other areas of concern, and hence, there was no further follow-up as to the condition of the catch basin.

Plaintiff alleges that "The City inspector negligently inspected the drain and should have ordered repairs." Plaintiff further argues that its own expert, licensed engineer Stanley H. Fein, had conducted an inspection of the site on March 26, 2017 and concluded that "the subject grating and surrounding paving were not maintained in a safe manner. It created an extreme tripping hazard. Therefore, the City of New York was negligent in permitting this condition to exist, which, in my opinion, was the proximate cause of the accident and injuries sustained by Plaintiff […]."

In reply, the City maintains that the 311 complaint did not constitute proper prior notice because: (1) complaint SR No. 185903431 did not reference the specific location of plaintiff's

incident; (2) complaint SR No. 185903431 is irrelevant because it relates to a wholly different condition than that alleged by plaintiff; (3) the City cannot be held liable for a "negligent inspection"; and (4) plaintiff's expert affidavit should be rejected as a matter of law because it is speculative and unsupported by evidence.

First, this court finds that the affidavit of Mr. Fein fails to address the central issue of whether the City had prior notice of the alleged defect, as Mr. Fein did not examine the catch basin until March 26, 2017, nearly one year and four months after the alleged incident. Accordingly, Mr. Fein's affidavit is not relevant to the issue at hand.

Administrative Code of City of NY § 7-201 [c] [2] (also known as the "Pothole Law") provides, in relevant part:

> No 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.

Here, plaintiff claims that complaint SR #185903431 provided the city with the requisite notice. However, the City is correct that for it to be liable for Plaintiff's alleged injuries, it must have received prior written notice of the *specific defect involved*, and not merely notice of a similar condition. The New York Court of Appeals held in D'Onofrio v. City of New York, 11 N.Y.3d 581 (N.Y. Ct. of Appeals 2008):

> The issue is whether a map submitted to New York City by Big Apple Pothole and Sidewalk Protection Corporation gave the City the notice of a sidewalk defect that is required by the Pothole Law […]

> Big Apple is a corporation established by the New York State Trial Lawyers Association for the purpose of giving notices in compliance with the Pothole Law. It does so through maps on which coded symbols are entered to represent defects. For example, a straight line is used for a raised or uneven portion of a sidewalk, a circle for a hole or hazardous depression, a line with a triangle at each end for an extended section of cracks and holes in a sidewalk, and so forth. In each of these cases, Big Apple submitted a map to the City before the accident; the map had a symbol at the place where the accident happened; and the issue is whether the symbol was sufficient notice of the defect complained of.
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> The symbol used in D'Onofrio was a straight line, indicating "[r]aised or uneven portion of sidewalk." There is no evidence, however, from which the jury could have found that such a defect caused Mr. D'Onofrio's injury. He testified that, as he was walking over a grating, both his feet became caught almost simultaneously, causing him to fall forward. He said that he felt the grating move, and that he observed broken cement in the area; he attributed his fall to "the movement of the grating, plus the broken cement, the combination of the two." It is not completely clear how the accident happened, but there is no evidence that Mr. D'Onofrio walked across a raised or uneven portion of a sidewalk, even on the assumption that the grating is part of the sidewalk. A photograph of the area where he fell does not show any surface irregularity or elevation. Since the defect shown on the Big Apple map was not the one on which the claim in D'Onofrio was based, the lower courts in that case correctly set aside the verdict and entered judgment in the City's favor.
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> Accordingly, in *D'Onofrio v City of New York*, the order of the Appellate Division should be affirmed, with costs.

See also Cross v. City of New York, 32 Misc. 3d 1219(A) (N. Y. Cnty. Sup. Ct. 2011) ("Here, the symbol for a pothole does not appear at the accident location on the Map, whereas a solid circle does. As a solid circle does not appear on the legend and thus has no significance, it does not represent the pothole at issue and does not provide defendant with prior written notice of this defect."); *and* O'Donoghue v. City of New York, 100 A.D.3d 402 (Sup. Ct. App. Div. 1st Dept. 2012) ("Here, in opposition to the City's showing of entitlement to judgment as a matter of law, plaintiff submitted, *inter alia*, a Big Apple Map to prove that the City had notice of the allegedly defective condition. However, the map only provided notice that every tree well on the block lacked a fence or barrier, which was not sufficient to bring the particular condition to the City's attention").

Here, based on plaintiff's own assertions, the 311 complaint was about a catch basin that was "clogged up" and flooding. It made no mention whatsoever of the pavement surrounding the

catch basin being cracked or not level; of the catch basin not being level with the pavement; or of the grate of the pavement being raised. Accordingly, the court finds that the 311 call did not provide the City with the necessary prior notice.

Because the City has established the absence of written notice, the burden shifts to plaintiff to establish an issue of fact as to whether the City affirmatively created a dangerous condition (Connor v. City of New York, 29 Misc. 3d 1208(A) [N.Y. Cnty. Sup. Ct. 2010]). Here, plaintiff alleges that the City inspector was negligent[1] in failing to notice the pavement/grating defect when he went to inspect the catch basin. Importantly, plaintiff does not allege that the City created such condition. Moreover, plaintiff failed to plead "negligent inspection" as a cause of action in her Notice of Claim and Summons and Complaint, and it is well-settled that all theories of liability must be expressly articulated in the Notice of Claim (*see* Barksdale v. New York City Transit Auth., 294 A.D.2d 210, 211 [1st Dep't 2002] ["Plaintiff's notice of claim set forth a theory of liability based on the lack of and/or improperly maintained safety chains between the subway cars where the decedent allegedly fell. After expiration of the period within which amendment of her notice of claim would have been permissible, i.e. the statute of limitations, plaintiff served a bill of particulars attributing the decedent's harm to design defects in the gates 'or other devices' between subway cars. The court thus properly precluded plaintiff from submitting proof at trial relating to this new theory of liability."]). *See also* Haulsey v. City of New York, 123 A.D.3d 606 (Sup. Ct. App. Div. 1st Dept. 2014):

[1] Even if the inspector had noticed an alleged pavement or grating defect and had put in a repair order for such, repair orders and reports do not constitute prior written notice (Cross v. City of New York, *id*). *See also* Abott v. City of New York, 114 A.D.3d 515 (Sup. Ct. App. Div. 1st Dept. 2014) ("Repair orders or reports, reflecting only that pothole repairs had been made to the subject area more than a year before the accident, are insufficient to constitute prior written notice of the defect that allegedly caused plaintiff's injuries"); and Worthman v. City of New York, 150 A.D.3d 553 (Sup. Ct. App. Div. 1st Dept. 2017) ("The City's records of citizen reports of [...] potholes in the area and FITS reports of repairs made to potholes [...] did not provide the City with prior written notice of the particular defect in the crosswalk where plaintiff fell").

> The City established its entitlement to judgment as a matter of law in this action where plaintiff was injured when, while walking within a crosswalk, her foot became stuck in a pothole causing her to fall. The City showed that it was not provided with prior written notice of the subject pothole […], and the remaining defendant's contention that plaintiff's 311 calls, permits issued to Consolidated Edison, and repair orders (FITS reports) regarding potholes in the vicinity of the accident 19 months earlier satisfied the "written acknowledgment" alternative under Administrative Code § 7–201(c)(2), is unavailing […].
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> Plaintiff's 311 calls were insufficient to satisfy the statutory requirement, even if her complaints were reduced to writing […], and permits issued to other parties do not show notice of the defective condition […]. The FITS reports were also insufficient because it was unclear whether any of the potholes that were repaired 19 months prior to the accident was the pothole that caused plaintiff's fall. Furthermore, there was no evidence that the City's repairs "immediately result[ed] in the existence of a dangerous condition" […].

Conclusion

Accordingly, for the reasons stated in detail above, the City's motion is HEREBY GRANTED and this action is DISMISSED WITH PREJUDICE against all defendants.

This is the order of the court.

12/17/2020
DATE

J. MACHELLE SWEETING, J.S.C.

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