SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

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YUCCI WONG,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, BENJAMIN ZUARO AS TRUSTEE, AND BENJAMIN ZUARO TRUST,

Defendants.

----------X

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 151202/2019

Motion Nos. 002
003

Recitation of the following papers pursuant to CPLR 2219(a) numbered "1" through "6" were marked fully submitted on October 1, 2021

	Papers Numbered
Notice of Motion for Summary Judgment, Affirmation and Amended Affirmation and Exhibits by Defendants THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION (dated April 29, 2021)	1, 2
Notice of Motion for Summary Judgment, Affirmation and Exhibits by Defendants BENJAMIN ZUARO, AS TRUSTEE, AND BENJAMIN ZUARO TRUST (dated May 5, 2021)	3, 4
Plaintiff's Affirmation in Opposition with Supporting Exhibits (dated July 19, 2021)	5
Reply Affirmation by Defendants THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION (dated August 6, 2021)	6

Upon the foregoing papers, the motion (MS_002) by defendants THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, and the motion by defendants BENJAMIN ZUARO, AS TRUSTEE and BENJAMIN ZUARO TRUST (MS_003) for summary judgment dismissing the complaint and any cross-claims are granted as follows:

FACTS

Plaintiff YUCCI WONG (hereinafter "plaintiff") commenced this action to recover damages for injuries she sustained when she tripped and fell on a portion of raised sidewalk located in front of 460 Clawson Avenue in Staten Island. It appears that on the evening of July 17, 2018, plaintiff was walking in a residential area and fell on a raised sidewalk located in front of a home owned by BENJAMIN ZUARO, AS TRUSTEE and BENJAMIN ZUARO TRUST (hereinafter "ZUARO"). Plaintiff asserts, *inter alia*, negligence causes of action against defendants THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION; NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION (hereinafter "THE CITY") and ZUARO as the owner of the property adjacent to the alleged defective sidewalk.

DISCUSSION

In the current application, the City moves (Motion No. 002) for summary judgment dismissing the complaint and any cross-claims on the ground that it lacked prior written notice of the condition of the sidewalk at the time of plaintiff's fall. According to the City, plaintiff must plead and prove as a condition precedent to recovery of damages that the City had prior written notice of the subject condition as prescribed in Section 7-201(c)(2) of the Administrative Code of the City of New York. The City argues that New York's Court of Appeals has indicated that

unless an injured party can demonstrate that a municipality failed or neglected to remedy a defect within a reasonable time after receipt of written notice, the municipality is excused from liability absent proof of prior written notice.

In this case, plaintiff has failed to meet her burden of pleading and proving compliance with the above prior written notice law. The City, however, in support of its motion, has submitted the affidavit of its records searcher, Christopher Sabile from the Department of Transportation. Mr. Sabile attests that he personally reviewed records for the two-year period prior to the date of the subject accident which included permits, applications for permits, OCMC files, CARs, NOVs, NICA, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints and Big Apple Map. The results of his search were corroborated by the deposition testimony of Larisa Dubina, a claims specialist for the Department of Transportation. This search revealed a complaint from the plaintiff following the accident and another complaint regarding a broken sidewalk located at 470 Clawson Street, not the location in question. There was one inspection relating to a nearby pedestrian ramp, which was also unrelated to the accident location. The City argues that the affidavit, deposition testimony and the attending records, including a Big Apple Map, which do not contain any notation regarding the alleged defect, is *prima facie* proof that it did not receive prior written notice of the alleged condition existing at the location of plaintiff's fall. Therefore, the City is entitled to dismissal of the complaint as well as any cross-claims against it.

In another motion (No. 003), Zuaro moves for summary judgment dismissing the complaint and any cross-claims against it, and argues that it bears no liability for the injuries sustained by plaintiff as it occurred on the sidewalk adjacent to its property. According to Zuaro, there is also no proof that he caused or created the condition existing on the sidewalk.

Additionally, the liability for the sidewalk adjacent to one-family, owner-occupied residential dwellings was shifted to the City pursuant to Administrative Code § 7-210. In support of his application, Mr. Zuaro testified that he has lived at 460 Clawson Street since 1997; it is a one-family residence; and that he has lived there with his stepson, his stepson's girlfriend; her mother and a baby. In addition, Mr. Zuaro is a retired school bus driver with no other sources of income and the property has never been used for any commercial purposes. He further testified that he still owns the home as the trustee, but he created a trust wherein his son and daughter are the beneficiaries of the trust. According to Mr. Zuaro, irrevocable trusts and their trustees are considered owners for the purposes of Administrative Code § 7-210 (see *Yiu v. Crevatas*, 33 Misc3d 267 [Sup. Ct. Kings Co. 2011], *affirmed* 103 A.D.3d 691 [2d Dept. 2013]). Zuaro has also submitted a copy of the deed confirming the status of ownership. Thus, Zuaro argues that he is entitled to dismissal of the complaint against him as well as any cross-claims.

In opposition to the City's motion, plaintiff argues, *inter alia*, that the City failed to make a *prima facie* showing of entitlement to summary judgment by failing to establish that it did not receive prior written notice of an alleged defect or that it did not create the alleged defect through an affirmative act of negligence. According to plaintiff, the records search by a paralegal revealed, *inter alia*, two sidewalk inspections and a Big Apple Map, both of which are sufficient to establish prior written notice. Nowhere does this paralegal indicate that the City did not have prior written notice. Plaintiff argues instead that this proof establishes that an inspection took place on May 16, 2018 (two months prior to the dated of the subject accident) on Clawson Street from the corner of Lindburg Avenue to Beech Street, which included the subject property at 460 Clawson Street and that 20 feet of sidewalk was ordered to be repaired. Moreover, plaintiff argues that the deposition testimony of the City's witness indicates that there was a prior

inspection of the sidewalk adjacent to 460 Clawson Street as evidenced by the Preliminary Inspection Report which she claims encompassed Clawson Street entirely.

The Court disagrees.

It is well established that the proponent of a summary judgment motion must make a *prima facie* showing of its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see* Alvarez v. Prospect Hosp., 68 NY2d 320 [1968]). The failure to make such a showing necessitates a denial of the motion, regardless of the sufficiency of the opposing papers (*see* Weingrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once that initial burden has been satisfied, however, the burden shifts to the party opposing the motion to produce sufficient evidence to raise a triable issue of fact (*id.*). Because summary judgment is the procedural equivalent of a trial, the presence of any significant doubt as to whether there is a material issue of fact, or where an issue of fact is "arguable", the motion must be denied (*see* Phillips v. Kantor & Co., 31 NY2d 307, 311 [1972]). However, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat the motion (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Here, the City has met its burden of establishing its *prima facie* entitlement to judgment as a matter of law. In opposition, plaintiff has failed to raise a triable issue of fact.

The law is well established that the City may not be held liable for any defect in, or obstruction to, a sidewalk or roadway in the absence of prior written notice of the alleged defective condition, unless the City fails to remedy the defect within 15 days after such receiving such notice (*see* Bruni v. City of New York, 2 NY3d 319, 324-326 [2004]). In addition, prior written notice is a condition precedent which a party is required to plead and prove to maintain a tort action against the City (*see* §7-201(c) of the Administrative Code of the City of New York;

Katz v. The City of New York, 87 NY2d 241, 243 [1995]). The purpose of said law is to limit liability to cases where the municipality has been given written notice and an opportunity to correct the hazardous condition (*see* Poirer v. City of Schenectady, 85 NY2d 310 [1985].

Here, in the opinion of this Court, the proof submitted by the City, including the affidavit of the record searcher detailing the results of his search and the deposition testimony of claims specialist Ms. Dubina wherein she explains the contents of the records uncovered including, *e.g.*, permits, inspections, complaints and violations, are sufficient to demonstrate the absence prior written notice of the condition which is claimed to have caused plaintiff to trip and fall as none of these records pertain to a defective sidewalk condition existing in front of 460 Clawson Street, but are more specific to a defective condition at 470 Clawson Street. These records also refer to the installation and/or repair of a pedestrian ramp located at the corner of Clawson Street and Beech Avenue, but not 460 Clawson Street. Moreover, the Big Apple Map submitted does not serve to raise questions regarding the City's notice since any markings contained on the map are not specific to the alleged condition which caused plaintiff to trip and fall (*see* D'Onofrio v. City of New York, 11NY3d 581 [2008] *aff'g* 41 AD3d 235 [1st Dept. 2007]). Thus, the City has established the absence of prior written notice and cannot be held liable for the condition which allegedly caused plaintiff to fall. Finally, the Court has also considered and rejected plaintiff's arguments regarding the City's compliance with Rule 202.8-b.

The same is true for Zuaro. It is without question that Administrative Code §7-210 legislatively shifted liability arising from a defective sidewalk from the City to the owner of the abutting real property *except* in the case of one, two and three-family houses that are both owner-occupied (in whole or in part) and used exclusively for residential purposes (*see* New York City Administrative Code §7-210). Here, none of the parties have submitted any opposition to

Zuaro's motion. Moreover, proof submitted by Zuaro in support of his application is more than sufficient to meet the above criteria. Accordingly, his motion is granted.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment (No. 002) by defendants THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION is granted and the complaint and any cross-claims against it are hereby severed and dismissed; and it is further

ORDERED that the motion for summary judgment (No. 003) by defendants BENJAMIN ZUARO AS TRUSTEE AND BENJAMIN ZUARO TRUST is granted and the complaint and any cross-claims against it are hereby severed and dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

This constitutes the decision and order of the Court.

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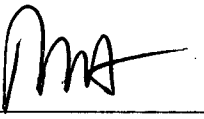

Hon. Thomas P. Aliotta, J.S.C.

DATED: December 6, 2021