SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 157840/2017

MOTION DATE 10/15/2021

MOTION SEQ. NO. 006

JUAN CASIANO, SARAI CASIANO,

Plaintiffs,

- v -

THE CITY OF NEW YORK, QWICK KURB INC., JOHN DOE, XYZ CORPS

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 108, 112, 114, 115, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165

were read on this motion to/for DISMISS .

In the underlying action, plaintiff Juan Casiano[1] alleges that on December 8, 2016, he tripped and fell in the roadway located on Amsterdam Avenue and West 96th Street, in the County, City, and State of New York. In the Notice of Claim (the "NOC") (NYSCEF Document #86), plaintiff alleges that a "yellow construction divider" (referred to herein as a "Qwick Kurb"), caused him to trip. Later, at the EBT held on October 11, 2019, plaintiff identified photos (NYSCEF Document #94) of the alleged defect.

Pending now before the court is a motion filed by defendant The City of New York, (the "City"), seeking an order, pursuant to Civil Practice Law and Rules ("CPLR") Section 3211, dismissing the complaint for failing to state a meritorious cause of action and/or granting summary judgment to the City, pursuant to CPLR 3212. Also pending before the court is a cross-motion

[1] Plaintiff Sarai CASIANO alleges claims for loss of consortium.

filed by plaintiffs wherein plaintiffs, pursuant to General Municipal Law ("GML") Section 50-e (6), permitting plaintiffs to amend their NOC to add a claim alleging prior notice.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). 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 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 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 the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 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 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Per the New York Court of Appeals, "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction [...] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

Arguments Made by the Parties

In its motion, the City argues, first, that plaintiffs failed to assert in the NOC, or plead in the complaint, that the City had prior written notice of the defect that allegedly caused the accident. The City argues this is fatal, and therefore the complaint must be dismissed as a matter of law.

Second, the City argues that even if, *arguendo*, plaintiffs had properly pleaded prior written notice, the Department of Transportation Records ("DOT") reveal that the City did not actually receive prior written notice of any allegedly defective Qwick Kurb base near the northern crosswalk at West 96th Street and Amsterdam Avenue, in the County, City, and State of New York.

Third, with respect to plaintiffs' general allegation that the accident location was poorly lit, the City argues that street lighting is a governmental function and any alleged failure to light the street cannot be regarded as an act of negligence.

Finally, the City argues that plaintiffs cannot now move for leave to serve a late or amended NOC or complaint because the Statute of Limitations (the "SOL") has expired. The City argues that GML § 50-e(5) gives the court discretion to allow a plaintiff to serve a late or amended NOC, but such discretion is limited to the one year and ninety-day period in which to commence an action. Here, the City argues, the SOL expired in 2018, over four years ago.

In support of its arguments, the City submitted the sworn Affidavit of Earnestine Bell, (NYSCEF Document #96), a DOT employee, who personally conducted a search for the time period two years prior to and including December 8, 2016, the date of the alleged accident, for permits, applications for permits, corrective action requests, notices of violation, inspections, contracts, maintenance and repair orders, complaints, gangsheets for roadway work and milling and resurfacing records, and Big Apple Maps at the above-mentioned intersection. The City argues that the results of this search show that the City did not receive prior written notice of the alleged defect.

The City also submitted the transcript of Omar Codling, a DOT employee, (NYSCEF Document #145), who appeared for an EBT on behalf of the City. The City argues that Mr. Codling, a record searcher at the DOT, testified that based upon his review of the DOT records, there were no violations found in connection with the subject Qwick Kurb system.

Importantly, plaintiffs do not dispute that the City lacked prior written notice of the subject defect, but argue, first, that GML 50-e(6) provides that a court may permit a plaintiff to amend the notice of claim due to a "mistake, omission, irregularity, or defect," while taking into account whether the mistake was in good faith, and whether the defendant would be prejudiced by the amendment. Plaintiffs argue that the court should allow plaintiffs to amend their NOC to provide a claim of prior written notice, as "the defect of failure to provide notice did not prejudice the defendant. Actual and/or constructive notice does not change the series of events that are the basis of the Plaintiffs' original claim."

Second, plaintiffs argue that should the court deny the request to amend the NOC, the court should still deny the City's motion. Plaintiffs argue that in this case, they were not required to plead notice, or prove, that such prior written notice existed, because there is a clear exception to the prior written notice requirement, in that a plaintiff may recover against a municipality where a condition was affirmatively created by the municipality. Here, plaintiffs argue, the City created the defective condition and/or had constructive notice of the defective condition and, therefore, prior notice of the condition was not required.

With respect to causation, plaintiffs argue that the City caused the defect by failing to properly design, install, and maintain the subject Qwick Kurb. Plaintiffs claim that a "Qwick Kurb Long Term Instruction Manual" was provided to the City, but the City negligently "ignored" the guidelines set forth in the manual and in doing so, created a dangerous condition.

With respect to constructive notice, plaintiffs argue that the City records show that the subject Qwick Kurb was actually inspected by the City on the morning of plaintiff's accident and, therefore, the City was on constructive notice that the Qwick Kurb was in a defective condition.

Finally, plaintiffs argue that the street lighting that existed at the time of the accident was "inadequate for plaintiff to see the Qwick Kurb left turn calming traffic device at 6:00 PM on December 8, 2016." Plaintiffs argue that whether such lighting was adequate is a question of fact for the jury.

In support of their arguments, plaintiffs submitted the transcript of Adam Weir, the Supervisor of Traffic Device Maintainers for the DOT (NYSCEF Document #146). Plaintiffs argue that Mr. Weir's testimony is as follows: The City installs and maintains Qwick Kurb's traffic control devices. There existed no written procedures for installing any devices and the City did not consult with any engineers prior to installing the device in question. Where the Qwick Kurb should be in proximity to the crosswalk is driven by the project planner for the City. The City did not have any written procedures or training for maintaining the device that is at issue in this case. Mr. Weir does not remember that last time that he read through the "Qwick Kurb Long Term Instruction Manual." Regardless of whether or not a Qwick Kurb was scuffed, the City generally will not replace it unless it was damaged and needed to be replaced. The reflective markers on the Qwick Kurbs are not changed unless they are splintered. The Qwick Kurbs are not cleaned.

Plaintiffs also submitted the Expert Affirmation of Nicholas Bellizzi, (NYSCEF Document #148), which states, in part:

> 1. I am an engineer licensed in the State of New York. I graduated from the University of Leeds with a Master of Science, Fuels, and Generation of Electricity in 1993. Currently, I am the owner and the Managing Director of NB Engineering Services, Ltd.
>
> 2. I am not a party to this litigation. This affirmation is submitted in support of the plaintiff, JUAN R. CASIANO'S (hereinafter "Plaintiff Juan") and Plaintiff, SARAI CASIANO'S (hereinafter "Plaintiff Sarai"), opposition to defendant, THE CITY OF NEW YORK'S (hereinafter "Defendant" or "the City"), motion for summary judgment. My opinions are based upon my review of pertinent deposition testimony, and 50H hearing transcript of the plaintiff, JUAN R. CASIANO, the medical records, photographs, the Qwick Kurb Long Term Installation Manual, my site inspection, measurements, and photographs taken from same.
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> […]
>
> 11. In my opinion, the City created the defect immediately when installing the Qwick Kurb because their failure to consider the lane width created a further defect. This immediate defect caused an unsafe and dangerous defect because the end piece was too close to the crosswalk, which created a tripping hazard.

> 12. My site inspection exposed the damage sustained to the terminal easterly end piece of the base of the subject Qwick Kurb. It not only exposed same, but it showed that the blackened base piece was located within 1 to 2 inches of the white painted horizontal bar of the crosswalk, which was dangerously close for such a busy crosswalk. Further, the closest vertical reflector to the easterly end of the Qwick Kurb was missing and the most easterly vertical reflector, which was the one closest to the crosswalk, was missing.

Conclusions of Law Regarding Plaintiffs' Cross-Motion

With respect to the manner in which the claim arose, the NOC (NYSCEF Document #86) in this case merely states,

> While crossing over 96th Street at the intersection with Amsterdam Avenue, claimant was caused to trip and fall face forward, over a yellow construction divider.

With respect to the City, the Complaint (NYSCEF Document #1) states, in relevant part:

> FIRST CAUSE OF ACTION
>
> 2. Defendant The City of New York ("Defendant") was and still is a municipal corporation duly organized and existing under and by virtue of the laws of the State of New York.
>
> 3. Defendant New York was a Corporation doing business in the State of New York.
>
> 4. Defendant owned the public crosswalk at 96th Street and Amsterdam Avenue, in the County of New York, City and State of New York.
>
> 5. Defendant, its agents, servants and/or employees operated said public crosswalk at 96th Street and Amsterdam Avenue, in the County of New York, City and State of New York.
>
> 6. Defendant, its agents, servants and/or employees managed said public crosswalk at 96th Street and Amsterdam Avenue, in the County of New York, City and State of New York.
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> 7. Defendant, its agents, servants and/or employees maintained and controlled said public crosswalk ta 96th Street and Amsterdam Avenue, in the County of New York, City and State of New York.
>
> 8. Defendant, its agents, servants and/or employees were under a duty to operate, control, manage, maintain and/or inspect said public crosswalk in a safe, proper and lawful fashion.
>
> 9. The crosswalk located at 96th Street and Amsterdam Avenue was a public thoroughfare in the county, city and state of New York.

> 10. On or about the 8th day of December 2016, Plaintiff, JUAN R. CASIANO, tripped and fell upon said public crosswalk located at 96th Street and Amsterdam Avenue, in the county, city and state of New York, because the crosswalk contained a device and/or divider which was not easy to observe constituting an unreasonable and dangerous trap and public nuisance.
>
> 11. On or about the 8th day of December 2016, the Plaintiff, JUAN R. CASIANO, suffered serious injuries as a result of the aforesaid trip and fall.

Now, plaintiffs argue that they should be allowed to amend the NOC, pursuant to GML §50-e (6), to add prior notice. This provision, on which plaintiffs rely, reads, in relevant part:

> Mistake, omission, irregularity or defect. At any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

"[T]he General Municipal Law 50–e(6) notice of claim amendment provision merely permits correction of good faith, non-prejudicial, technical mistakes, defects or omissions, not substantive changes in the theory of liability" (Mahase v Manhattan and Bronx Surface Tr. Operating Auth., 3 AD3d 410 [1st Dept 2004]). Further, "pursuant to Administrative Code of the City of New York § 7–201(c)(2), prior written notice is a condition precedent to maintaining an action against the City arising from a street defect" (Campisi v Bronx Water & Sewer Serv., Inc., 1 AD3d 166 [1st Dept 2003]). Therefore, adding prior written notice is the type of non-substantive change that is not covered under GML §50-e (6). *In contrast, see* Ritchie v Felix Assoc., LLC, 60 AD3d 402 (1st Dept 2009) (where the First Department unanimously affirmed the trial court's decision to allow plaintiff to amend the notice of claim under GML 50-e(6), complaint and all subsequent pleadings to correct the date of the accident from March 15, 2005 to March 2, 2005); Ciaravino v City of New York, 110 AD3d 511 (1st Dept 2013) (where the First Department held that plaintiff should have been allowed to amend her NOC under GML 50-e(6) to change the location of the subway exit where she fell from Union Square West to Union Square East).

Additionally, as the City properly argues, GML § 50-e(5) gives the court discretion to allow a plaintiff to serve a late or amended NOC, but such discretion is limited to the one year and ninety-day period in which to commence an action. *See* Beauvoir v City of New York, 176 AD3d 437 (1st Dept 2019), where the First Department held:

> […] the one–year–and–90–day statute of limitations is a bar to all the state claims, including plaintiff Green's malicious prosecution claim and we lack any discretion to allow expired claims to proceed thereafter (*see* Pierson v. City of New York, 56 N.Y.2d 950 [Ct. of Appeals 1982] ["To permit a court to grant an extension after the Statute of Limitations has run would, in practical effect, allow the court to grant an extension which exceeds the Statute of Limitations, thus rendering meaningless that portion of section 50–e"]; Galloway v. NYC Police Department, 7 A.D.3d 444 [1st Dept. 2004] [section 50–i statute of limitations requirement is strictly construed]).

Here, the alleged accident occurred on December 8, 2016 and the SOL expired in 2018, over four years ago. Therefore, plaintiffs cannot now serve a late or amended NOC or complaint because the SOL to do so has expired.

Accordingly, plaintiffs' cross-claim to amend the NOC is DENIED.

Conclusions of Law Regarding City's Motion

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.

As noted above, plaintiffs do not argue that the City had prior written notice of the defect, but instead argue that such notice is not required in this case because the City created the defective condition and/or had constructive notice of the defective condition. In Yarborough v City of New York, 10 NY3d 726 (2008), the New York Court of Appeals held: "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." Accordingly, because it is undisputed that the City had no prior written notice, the burden now shifts to plaintiffs to demonstrate the applicability of one of the two recognized exceptions to the rule.

With respect to plaintiffs' constructive notice argument, in Amabile v City of Buffalo, 93 NY2d 471, 474 (1999), the New York Court of Appeals held:

> This Court has recognized only two exceptions to the statutory rule requiring prior written notice, namely, where the locality created the defect or hazard through an affirmative act of negligence […] and where a "special use" confers a special benefit upon the locality […]. Here, plaintiffs argue for a third exception: constructive notice when the defect was not known by the city but could have or should have been known by the exercise of ordinary diligence and care on its part.
>
> […]
>
> We conclude that constructive notice of a defect may not override the statutory requirement of prior written notice of a sidewalk defect. The Legislature has made plain its judgment that the municipality should be protected from liability in these circumstances until it has received written notice of the defect or obstruction. As we have previously stated,
>
> > *The state created the defendant as a political agency of government and the adjustment of its powers and duties, and of the relative rights of citizens and municipality, was the province of the legislature. * * * [Although the city charter's] requirement that a written notice shall have been given to the common council, as a condition precedent to the maintenance of an action, [may] be regarded as harsh, correction is not to be sought from the courts. The requirement is the expression of the legislative will" (MacMullen v. City of Middletown, 187 N.Y. 37, 47, 79 N.E. 863).*

With respect to plaintiffs' argument that the City caused or created the defect, the Court of Appeals stated in Garcia v O'Keefe, 34 AD3d 334 (1st Dept 2006):

> The intent underlying the notice of claim requirement embodied in General Municipal Law § 50-e is to protect the municipality from unfounded claims and ensure that it has an adequate opportunity to timely explore the merits of the claim while the facts are still "fresh" (Adkins v City of New York, 43 NY2d 346, 350 [1977]; see also Brown v City of New York, 95 NY2d 389, 392 [2000] [in order "(t)o enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim"]). Causes of action for which a notice of claim is required, that are not delineated in the plaintiff's original notice of claim, may not be interposed because " '[t]he addition of such causes of action which were not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of the plaintiffs' claims'.

Here, the only allegations stated in the complaint with respect to the City are that the City negligently "operated said public crosswalk at 96th Street and Amsterdam Avenue;" "managed said public crosswalk;" "maintained and controlled said public crosswalk;" and was "under a duty to operate, control, manage, maintain and/or inspect said public crosswalk." Plaintiffs did not plead in the NOC or in the complaint that the City caused the defect by failing to properly design or install the subject Qwick Kurb. Accordingly, plaintiffs are precluded from doing so now, more than five years after the accident occurred. *See also* White v New York City Hous. Auth., 288 AD2d 150 (1st Dept 2001) ("Plaintiff's new allegation was not within the scope of permissible corrections to the notice of claim covered by General Municipal Law § 50-e (6). Instead, this allegation created a new theory of liability. Any amendment that creates a new theory of liability is not within the statute's purview"); Barksdale v New York City Tr. Auth., 294 AD2d 210 (1st Dept 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").

The court also notes that the Affidavit of plaintiffs' expert Engineer Bellizzi was dated March 14, 2022, more than five years after the accident, and there is nothing in the Affidavit that suggests that Mr. Bellizzi was familiar with the condition of the subject Qwick Kurb as it existed on December 8, 2016, which is the date of the accident.

Finally, with respect to plaintiffs' argument that the street lighting at the time of the accident was inadequate, neither the NOC nor the complaint mention improper lighting, and plaintiffs cannot now attempt to raise these claims.

This court finds that plaintiffs have failed to meet their burden in demonstrating the applicability of one of the two recognized exceptions to the prior written notice requirement and there is no dispute on this record that prior written notice had been given. Accordingly, the City's motion is granted.

Conclusion

For all of the reasons set forth herein, it is hereby:

ORDERED that the City's motion is GRANTED; and it is further

ORDERED that plaintiffs' cross-motion to amend their Notice of Claim is DENIED; and it is further

ORDERED that the complaint and any cross-claims against the City are dismissed; and it is further

ORDERED that the caption is amended as to remove the City of New York as a named defendant in this action; and it is further

ORDERED that this action is randomly reassigned to a General IAS part; and it is further

ORDERED that counsel for the City shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

7/29/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		**CASE DISPOSED**		**NON-FINAL DISPOSITION**		
	X	**GRANTED (City defendant's motion)**	X **DENIED (Plaintiffs' Cross motion)**	**GRANTED IN PART**	X	**OTHER**
APPLICATION:		**SETTLE ORDER**		**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	X	**INCLUDES TRANSFER/REASSIGN**		**FIDUCIARY APPOINTMENT**		**REFERENCE**