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| <b>Gradess v Empire City Subway Co. (Ltd.)</b>   |
| 2022 NY Slip Op 33124(U)   |
| September 15, 2022   |
| Supreme Court, New York County   |
| Docket Number: Index No. 152627/2020   |
| Judge: Leslie A. Stroth  |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LESLIE A. STROTH PART 52**

*Justice*

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GAYLE GRADESS,

Plaintiff,

- v -

EMPIRE CITY SUBWAY COMPANY (LIMITED), CITY OF  
NEW YORK

Defendant.

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INDEX NO. 152627/2020

MOTION DATE 05/30/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for

JUDGMENT - SUMMARY

This is an action for personal injuries allegedly sustained by the plaintiff on July 19, 2019, on the roadway at the southwest corner intersection of 65<sup>th</sup> Street and Central Park West, New York, NY. Plaintiff alleges she was caused to trip and fall as a result of a “raised, mis-leveled, uneven, dangerous, defective and trap-like condition” on the roadway immediately adjacent to a manhole cover with the letters “ECS” engraved upon it. (*See* Exhibit A, Notice of Claim).

Defendant, the City of New York (the City) now moves for summary judgment seeking an order pursuant to CPLR 3212 dismissing the complaint and all cross-claims against it. The City maintains that it is entitled to summary judgment as it did not have prior written notice of a defective condition on the roadway, nor did it cause or create the defective condition.

It is a well-established principle that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989), quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). As such, 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. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *see also Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Once such entitlement has been demonstrated by the moving party, 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].” *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

In order to hold the City liable for injuries resulting from roadway defects, a plaintiff must demonstrate that the City has received prior written notice of the subject condition. *See Admin. Code of the City of New York § 7-201(c)(2)*; *Amabile v City of Buffalo*, 93 NY2d 471 (1999). The only recognized exceptions to the prior written notice requirement are where the municipality itself created the defect through an affirmative act of negligence or where the defect resulted from a special use by the municipality. *See Yarborough v City of New York*, 10 NY3d 726 (2008); *Amabile v City of Buffalo*, 93 NY2d 471 (1999).

In support of its motion, the City relies on a record search from the New York City Department of Transportation (DOT) (Exhibit I) and an affidavit of Talia Stover, the DOT record searcher who conducted the search (Exhibit K). The DOT search revealed voluminous records regarding the subject roadway for the two years prior to and including the date of plaintiff’s alleged incident. However, the City avers that no records retrieved impute the City with prior written notice of the specific defect that caused plaintiff’s accident. Thus, the Court finds that the City meets its initial prima facie burden, entitling it to judgment as a matter of law, by submitting evidence that it did not have prior written notice of the alleged defect on the curb.

Therefore, in opposition, “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.” *Yarborough v. City of New York*, 10 NY3d 726, 728 (2008). Neither plaintiff nor co-defendants submit opposition to this motion. Thus, plaintiff and co-defendants have failed to submit evidence demonstrating a triable issue of fact as to the applicability of an exception to Admin Code § 7-201 (c) (2). As a review of the applicable DOT records reveal that the City did not have prior written notice of the subject condition that allegedly caused Plaintiff’s accident, and there is no evidence that the City caused or created the subject condition, the City’s motion is granted, without opposition, and the complaint is dismissed as against it.

Accordingly, it is

ORDERED that the motion of defendant, the City of New York, to dismiss the complaint and all cross-claims herein is granted, and the complaint and any and all cross-claims are dismissed in their entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

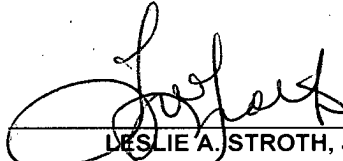
ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the 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](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that this action, including any pending motions, is transferred to a general IAS Part, as Corporation Counsel no longer represents any parties to this action.

This constitutes the decision and order of the Court.

|                          |                                     |                            |   |
|--------------------------|-------------------------------------|----------------------------|---|
| <u>9/15/2022</u><br>DATE |                                     |                            | <br>_____<br>LESLIE A. STROTH, J.S.C. |
| CHECK ONE:               | <input type="checkbox"/>            | CASE DISPOSED              | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION   |
|                          | <input checked="" type="checkbox"/> | GRANTED                    | <input type="checkbox"/> DENIED   |
| APPLICATION:             | <input type="checkbox"/>            | SETTLE ORDER               | <input type="checkbox"/> GRANTED IN PART  |
| CHECK IF APPROPRIATE:    | <input checked="" type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> SUBMIT ORDER   |
|                          |                                     |                            | <input type="checkbox"/> FIDUCIARY APPOINTMENT  |
|                          |                                     |                            | <input type="checkbox"/> OTHER  |
|                          |                                     |                            | <input type="checkbox"/> REFERENCE  |