SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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LINDA RABICH, AS ADMINISTRATRIX OF THE ESTATE OF PLAINTIFF, JOSEPH RABICH, DECEASED,

Plaintiff,

- v -

THE CITY OF NEW YORK, OLSON'S CREATIVE LANDSCAPING, DONALD W OLSON, EMPIRE CITY SUBWAY, KEVIN KEOGH

Defendant.

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INDEX NO. 159567/2016

MOTION DATE 01/31/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 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

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

Linda Rabich, as administratrix of the Estate of plaintiff, Joseph Rabich (plaintiff) brings this negligence action against the City of New York (the City) for personal injuries sustained as a result of an alleged trip and fall accident on January 13, 2016, when Joseph Rabich fell due to a broken street in the crosswalk at the intersection of Broadway and West 109th Street, New York, NY.

The City argues that it did not have notice of the alleged condition, as required by the Administrative Code of the City of New York § 7-201, nor did it cause or create the alleged condition. Plaintiff opposes the motion, arguing that a triable issue of fact exists as to whether the City caused or created the subject condition by performing pothole repair work at the subject location prior to the plaintiff's alleged accident.

I. Analysis

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); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman,* 3 NY2d at 404. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf,* 153 AD2d 520 at 521.

To hold the City liable for injuries resulting from an allegedly defective condition, a plaintiff must demonstrate that the City has received prior written notice of the subject condition. *See* Administrative Code § 7-201; *Amabile*, 93 NY2d 471. The only 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 (2004); *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 N, NYSCEF doc. no. 138) and an affidavit of Talia Stover, the DOT record searcher who conducted the search (Exhibit O, NYSCEF doc. no. 139). The DOT search revealed records regarding the subject intersection for the two years prior to and including the date of plaintiff's alleged incident. The DOT search records include three maintenance and repair records and corresponding gang sheets. The City avers that none of the records retrieved, including the maintenance and repair orders, impute the City with prior written notice of the specific defect that caused plaintiff's accident.

In opposition, plaintiff does not argue that the City had prior written notice of the alleged defect. Therefore, the City has demonstrated its prima facie entitlement to judgment as a matter of law. The

burden then shifts to plaintiff to demonstrate that there is a triable issue of fact as to whether the City caused or created the defective crosswalk condition. *See Yarborough*, 10 NY3d 726. Plaintiff argues that the City was negligent in causing and creating the subject dangerous and hazardous condition while completing the pothole repair. Specifically, plaintiff alleges that work done by the DOT pothole crew on May 2, 2015 on the roadway located at Broadway and West 109th Street raises a question of fact as to whether the City caused or created the subject defect.

i. Expert Affidavit

In support of her position, plaintiff submits the "Expert Affidavit" of professional engineer Stanley H. Fein. *See* Exhibit G, NYSCEF doc. no. 161. Mr. Fein purportedly inspected the scene of the subject accident and reviewed photographs of the roadway at issue. *Id.* at ¶ 24-25. He states that it is his opinion, within a reasonable degree of engineering certainty, that the improper repair of the pothole at the area on May 2, 2015 immediately resulted in the depression/hole that existed at the time of the plaintiff's accident. *Id.* at ¶ 26.

Defendants argue that Mr. Fein's expert affidavit should not be considered, because it is speculative and improperly expresses legal conclusions. Mr. Fein's affidavit fails to include any specific scientific or technical analysis or facts in support of his conclusions. Mr. Fein fails to address how he arrived at his conclusions. Nowhere in his affidavit does Mr. Fein offer any evidence for his conclusory statement that this condition resulted from improper paving and/or that insufficient asphalt was used.

The City correctly notes that Mr. Fein's affidavit impermissibly sets forth legal conclusions and must be disregarded. See *Nevins v Great Atl & Pac Tea Co*, 164 AD2d 807, 808-09 (1st Dept 1990) (concluding that it was error for the expert to testify as to the ultimate issue in the case, thereby usurping the function of the jury); *Measom v Greenwich & Perry St Hous Corp*, 268 AD2d 156, 159 (1st Dept 2000) (finding that, "[e]xpert testimony as to a legal conclusion is impermissible." [internal citations

omitted]). Therefore, Mr. Fein's affidavit is insufficient to establish plaintiff's entitlement to summary judgment.

ii. Affirmative Negligence Exception

Notwithstanding Mr. Fein's affidavit, plaintiff raises a triable issue of fact as to whether the affirmative negligence exception applies here. The City explicitly acknowledges that the records for work done by the DOT pothole crew on May 2, 2015 do not indicate whether the pothole was located in the crosswalk at West 109th Street and Broadway. *See* Vapnar Affirmation in Reply at ¶ 5; *see also* Exhibit E, NYSCEF doc. no. 159, Defect No. DM2015120006. There is a genuine issue of material fact as to whether the City's work immediately resulted in the depression/hole that existed at the time of the plaintiff's accident. Although the City's records indicate that the May 2, 2015 defect was marked as "closed" eight months prior to plaintiff's accident, the City does not establish that the alleged defect was not the sort that would be "immediately apparent at the conclusion of the City's roadway work." *See Torres v City of New York*, 39 AD3D 438 (1st Dept 2007). The Court has reviewed the parties' remaining contentions and finds them to be unavailing.

II. Conclusion

Accordingly, it is ORDERED that the City's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

10/11/2022
DATE

LESLIE A. STROTH, J.S.C.

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