STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

BARBARA HART,

Plaintiff,

- against -

DECISION AND ORDER
Index No. 818112/2018

CITY OF BUFFALO,
CITY OF BUFFALO PARKING DEPARTMENT,
ERIE COUNTY, and
BUFFALO CIVIC AUTO RAMPS, INC.,

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **LIPSITZ GREEN SCIME CAMBRIA LLP**
Richard P. Weisbeck, Jr., Esq., Of Counsel
Attorneys for Plaintiff, Barbara Hart

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WALKER, J.

Defendant, Erie County ("County"), has applied for an order (Motion 1; Docs. 12 and 36), granting summary judgment and dismissing the Complaint (Doc. 15) and all cross-claims against it. Defendants, City of Buffalo, City of Buffalo Parking Department, and Buffalo Civic Auto Ramps, Inc. (collectively, "City"), have cross-applied for an order (Motion 2; Doc. 37)

granting dismissal and summary judgment and dismissing the Complaint and all cross-claims against them.

Upon learning of numerous deficiencies in her response to the dispositive application and cross-application, Plaintiff, Barbara Hart, has applied for an order (Motion 3; Doc. 70) granting her permission to extend the time to respond to the County's Statement of Undisputed Material Facts and for leave to amend her Bill of Particulars (Docs. 76-77).

BACKGROUND

Plaintiff, Barbara Hart, served a Notice of Claim, dated November 24, 2017, on the City and County (Doc. 14), which alleges, *inter alia*, that on August 28 2017, at approximately 1:40 p.m., she was caused to trip and fall "while lawfully and properly traversing the sidewalk area" ("Sidewalk"; *Id*., at ¶5) "located at or near the west side of Pearl Street near the intersection of West Eagle Street behind the Family Court Building ("Building") adjacent to a grate in the City of Buffalo, County of Erie and State of New York" ("Incident") (*Id*., at ¶4). Plaintiff alleges that, as a result of the Incident, she sustained injuries to, *inter alia*, "her head, ribs and knees" (*Id*., at ¶8). It is undisputed that the County owns the Building.

Ms. Hart testified at her deposition that, upon returning to the Building after lunch, she was walking on the Sidewalk and fell in an area of deteriorated and broken concrete, which was adjacent to a metal grate covering an airway vault servicing the Building (Doc. 47, pp. 7-21).

DISCUSSION

The County's Application

The Prior Written Notice Rule

Ms. Hart contends that the defective condition that caused the Incident consists of "a hole in the sidewalk adjacent to a grate" (Doc. 19, ¶5). Ms. Hart does not allege violations of any statutes (*Id*., at ¶9). Instead, she contends that the County "was negligent, careless and reckless in the ownership, operation, possession, management, maintenance, construction, repair and control of the said premises, particularly a hole in the [S]idewalk . . ." (*Id.*, at ¶3).

With respect to notice, Ms. Hart contends that "notice of a condition is not a prerequisite to defendant's liability; however, the dangerous and defective condition existed for a sufficient length of time to give both actual and/or constructive notice to the defendant herein, including by reasonable inspection" (*Id*., at ¶¶6-8).

The County, however contends that Ms. Hart has failed to state a claim against it for which relief may be granted, because it enacted a prior written notice statute, with which Ms. Hart failed to comply.

Erie County enacted the Prior Written Notice Local Law of 2004 ("Local Law"), which provides as follows (at section 3 thereof), in relevant part:

> No civil action shall be maintained against the County of Erie, its public officers and/or employees . . . for . . . injuries . . . to person or property sustained by reason of any . . . sidewalk owned, operated or maintained by Erie County, being defective, out of repair, unsafe, dangerous or obstructed unless written notice is given to the Erie County Commissioner of Public Works of such defective, out of repair, unsafe, dangerous or obstructed condition of such . . . sidewalk and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove

the defect, danger, obstruction or condition complained of.

The County presumes that the claim against it is grounded in §413-48 or §413-50 of the City of Buffalo's Municipal Code ("City Code"), which makes the owners of real property abutting sidewalks responsible for maintaining them. The County owns the Sidewalk, and makes such presumption, because Ms. Hart has not pleaded a violation of sections §413-48 or §413-50 (or any other statute).

Compliance with the Local Law is a substantive element of Ms. Hart's claims against the County (*Cipriano v. New York*, 96 AD2d 817, 818 [2d Dept 1983] ["Plaintiffs' failure to allege that written notice of the dangerous condition was given to the city requires dismissal of the complaint as against it"]; *Rowe v. City of North Tonawanda*, 288 AD2d 917 [4th Dept 2001]).

The County's actual and/or constructive notice of an alleged defect in the Sidewalk would not obviate Ms. Hart's need to comply with the Local Law (*Amabile v. City of Buffalo*, 93 NY2d 471, 475-76 [1999]["notice of a defect may not override the statutory requirement of prior written notice of a sidewalk defect"]).

The Court of Appeals has recognized two (2) exceptions to the statutory rule requiring prior written notice namely, where the municipality created the defect or hazard through an affirmative act of negligence, or where a "special use" confers a special benefit upon the municipality (*Poirier v. City of Schenectady*, 85 NY2d 310 [1995]). Ms. Hart has pled that the County created the hole (Docs. 14, 15, 19). She has not pled special use.

The exception grounded in an affirmative act of negligence "is limited to work by the . . . [municipality] that **immediately** results in the existence of a dangerous condition" (*Oboler v City of New York*, 8 NY3d 888, 889 [2007] [emphasis in original]).

The County submitted the affidavit of Kenneth Pearl, R.A. (registered architect) (Doc. 27), wherein Mr. Pearl opines, within a reasonable degree of architectural and building science certainty, as follows:

> [A]ny deterioration to the public sidewalk in the public right-of-way is a result of normal wear and tear that occurred, not immediately, but over time from public use, and not from any cause, action, or use by the Defendant.
>
> . . . Defendant was not negligent, careless, or reckless in the ownership, operation, possession, management, maintenance, construction, repair, or control of the Defendant's premises.
>
> . . . Defendant was not negligent, careless, or reckless in the ownership, operation, possession, management, maintenance, construction, repair, or control of the public sidewalk, curbing, and street adjacent to the Defendant's premises

(*Id*., at ¶¶41-43).

Mr. Pearl ultimately concluded, within a reasonable degree of architectural and building science certainty, that "the hole in question developed as a result of cars striking the nearby curb, and not as the result of the grate in the sidewalk, and further that the condition developed over a period of years" (*Id*., at ¶44).

Mr. Pearl based his conclusions on, *inter alia*, his review of Plaintiff's Bill of Particulars, numerous deposition transcripts, code books, text books, journals, and an inspection of the Sidewalk and its surroundings (Doc. 27, ¶¶8-11).

The court accepts Mr. Pearl as an expert in his field of architecture and building science and finds that there are sound bases for his conclusions.

Accordingly, the County has demonstrated *prima facie* entitlement to the relief requested, thus shifting the burden to Ms. Hart to submit admissible evidence creating a material issue of

fact sufficient to defeat summary judgment (*Ferluck AJ v. Goldman Sachs & Co.,* 12 NY3d 316, 320 [2009]).

Actual and/or Constructive Notice

Ms. Hart refers to the testimony of multiple County employees responsible, to varying degrees, for, *inter alia*, maintaining the Building, who each testified to noticing and otherwise being aware of the deteriorating condition of the Sidewalk in the vicinity of the grate at the time of the Incident (*see* transcripts at Docs. 59-62). Ms. Hart relies on such testimony in support of her contention that the County possessed actual or constructive notice of the Sidewalk's condition. However, such notice is irrelevant, because it does not satisfy either of the exceptions to the statutory rule requiring prior written notice.

The Special Use Exception to the Prior Written Notice Rule

Ms. Hart retained John Lydon, R.A., as an expert in the field of architecture. Mr. Lydon opined, to a reasonable degree of certainty in the fields of architectural design and property maintenance, that the Sidewalk's deteriorated and broken concrete was caused by: the thermal expansion of the concrete against the immovable steel perimeter of the metal grate; the expansion of the steel angle perimeter of the metal grate caused by oxidation or rusting; the freeze-thaw cycle of water on the ledge of the steel angle holding the metal grate; and the lack of an expansion joint between the metal grate and the concrete (Doc. 66).

The testimony of several of the County's representatives is consistent with Mr. Lydon's opinion.

In describing the Sidewalk, Mr. Pearl (the County's expert) describes the steel grate in the Sidewalk where the Incident occurred as,

> a part of the Erie County Family Court's air intake for the internal mechanical systems. The subsurface portion of the air intake is known collectively as an areaway and the grate is the walkable cover over this underground concrete areaway that serves as a louver to allow outside air through the sidewalk surface to move down to the equipment in the basement space within the Family Court Building. Stated another way, the grate and its areaway below are an element of the Defendant's building (Doc. 27, ¶15).

Ms. Hart contends that this statement constitutes an admission that the steel grate constituted a special use. While the court disagrees with the characterization of Mr. Pearl's statement as an "admission," it acknowledges Ms. Hart's contention that the County's use of the grate in the Sidewalk in the vicinity of the Incident constitutes a special use.

Ms. Hart, however, may not rely on the special use exception to the prior written notice rule, because she failed to assert it in her Notice of Claim (Doc. 14), Complaint (Doc. 15), or Bill of Particulars (Doc. 19).

A party may not pursue a new theory of liability not included in the notice of claim (*Clare-Hollo v. Finger Lakes Ambulance EMS, Inc.*, 99 AD3d 1199 [4th Dept 2012]); *O'Dell v. County of Livingston*, 174 AD3d 1307 [4th Dept 2019]). Special use is a theory of liability that must be pleaded in a notice of claim, and cannot be relied upon in opposition to a summary judgment motion (*Methal v. City of New York*, 116 AD3d 743, 744 [2d Dept 2014] ["The plaintiff failed to allege the special use exception in either her notice of claim or her complaint [citation omitted]. Therefore, that new theory of liability was improperly raised in opposition to the City's motion for summary judgment"]; *Taustine v. Incorporated Village of Lindenhurst*, 158 AD3d 785, 786 [2d Dept 2018] ["The plaintiffs failed to allege the special use exception in either the notice of claim, the complaint, or the bill of particulars, and therefore, that new theory of

liability was improperly raised for the first time in opposition to the defendant's motion for summary judgment"]).

For the reasons that follow, and in order to provide the parties with a full record, had Ms. Hart pled special use, the result would have been different; the County's application would have been denied.

The special use exception to the requirement of prior written notice is narrow, involving,

> a use different from the normal intended use of the public way, and thus, '[t]he special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use'

(*Minott v. City of New York*, 230 AD2d 719, 720 [1996] quoting *Poirier v. City of Schenectady*, 85 NY2d 310, 315 [1995]).

The County contends that the grate in the Sidewalk does not constitute a special use, because it derives no private benefit from the grate - it being part of the mechanical system associated with the Building, which is a public building (*see Barnes v. City of Mount Vernon*, 245 AD2d 407, 408 [2d Dept 1997] [defective drainage grating not deemed a special use, because it "served to provide for the proper maintenance of a safe parking lot and, thus, served no municipal function inuring to the special benefit of the defendant"]).

The instant matter is distinguishable from *Barnes*, where the defective drainage grate was part of the municipal parking lot where plaintiff fell. By contrast, the grate at issue in the instant matter serves the adjacent Building, not the Sidewalk where the Incident occurred. *Barnes* would apply to the facts and circumstances of the matter before this court if the underlying grate served to drain the Sidewalk.

In this regard, the instant matter is more similar to the facts in *Posner v. New York City Tr. Auth*. (27 AD3d 542 [2d Dept 2006]), where the court found that the installation of a manhole cover in the public right-of-way, for the purpose of providing access to underground electrical cables, constituted a special use. This court finds that the grate in the Sidewalk (which is a part of the adjacent Building) is more akin to the manhole cover in *Posner* (which serves underground electrical cables), than the grate in *Barnes* (which serves the very parking lot where the plaintiff therein fell).

Moreover, had Ms. Hart pled special use, summary judgment would have been denied to the extent the grate may be considered a part (or extension) of the Building (as described by Mr. Pearl). That is, had Ms. Hart slipped inside the Building, the prior written notice rule would not apply. For this reason, the court rejects the County's contention that there is no nexus between the grate (as the alleged special use) and the Incident. In limiting the cause of the Sidewalk's deterioration to "cars striking the nearby curb" (Doc. 68, p. 10), the County ignores Mr. Lydon's reasoned opinion that the Sidewalk's deteriorated and broken concrete was caused by the thermal expansion of the concrete against the immovable steel perimeter of the metal grate; the expansion of the steel angle perimeter of the metal grate caused by oxidation or rusting; the freeze-thaw cycle of water on the ledge of the steel angle holding the metal grate; and the lack of an expansion joint between the metal grate and the concrete.

Highway Law §139

Section 139(1) of the Highway Law provides, in relevant part, as follows:

> When, by law, a county has charge of the repair or maintenance of a road . . . , the county shall be liable for injuries to person or property . . . sustained in consequence of such road . . . being

> defective, out of repair, unsafe, dangerous or obstructed existing because of the negligence of the county, its officers, agents or servants.

Section 139(2) of the Highway Law further provides, in relevant part, as follows:

> Notwithstanding the provisions of subdivision one of this section, a county may, by local law duly enacted, provide that no civil action shall be maintained against such county for damages or injuries to person or property sustained by reason of any highway . . . being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition was actually given . . . ; and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, **or, in the absence of such notice, unless such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence** . . . (emphasis added).

Ms. Hart contends that the Local Law is unenforceable, because it violates Highway Law §139. Preliminarily, Ms. Hart failed to plead the County's alleged violation of Highway Law §139 in her Bill of Particulars (Doc. 19).

There is no merit to Ms. Hart's contention, because the County's authority to enact the Local Law was not derived from Highway Law §139. Rather, it was derived from the State Constitution, Art. IX, §2(c) (*Holt v. Tioga County*, 56 NY2d 414, 420 [1982] ["the Legislature has deferred to the localities to determine what notice is required. The County of Tioga, which 'exercise[s], by delegation, a portion of the sovereign power', acted within its constitutionally mandated powers in enacting Local Law No. 2. Neither section 139 of the Highway Law nor section 50-e of the General Municipal Law indicate any intention by the Legislature to restrict the county's constitutionally delegated powers or to bar prior notification statutes"] [internal citations omitted]; *see also*, this court's recent decision in *Papaj v. County of Erie*, 73 Misc3d

1202(A) [Sup Ct, Erie Co 2021] [applying the Local Law to bat plaintiff's claims against the County]).

22 NYCRR §202.8-g

Section 202.8-g(a) of the Uniform Rules for the New York State Trial Courts requires the County, as the movant, to submit a "short and concise statement, in numbered paragraphs, of the material facts as to which [it] contends there is no genuine issue to be tried." The County complied with section 202.8-g(a) (*see* Doc. 25).

Section 202.8-g(b) requires the party opposing summary judgment to respond to the movant's statement of material undisputed facts. Section 202.8-g(b) provides, in relevant part, as follows:

> the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

In the event the party opposing summary judgment fails to comply with §202.8-g(b) by not submitting a counter-statement of facts, "[e]ach numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted . . ." (§202.8-g[c]).

Ms. Hart failed to submit a counter-statement of undisputed material facts. Thus, the Statement of Material Undisputed Facts submitted by the County must "be deemed to be admitted," pursuant to §202.8-g(c).

Ms. Hart filed a sur-reply, seeking to remedy her failure to comply with §202.8-g(c).

However, in doing so, she failed to first request the court's permission, in violation of §202.8-c, which provides, in relevant part, as follows:

> Absent express permission **in advance**, sur-reply papers, including correspondence, addressing the merits of a motion are not permitted, except that counsel may inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues, but there shall be no additional argument. Materials submitted in violation hereof will not be read or considered. Opposing counsel who receives a copy of materials submitted in violation of this Rule shall not respond in kind (emphasis added).

Sections 202.8-g and 202.8-c are **mandatary**. They are neither precatory, nor discretionary, and the court has no discretion to ignore or refuse to apply them, as clearly and expressly written, notwithstanding *Crouse Health System, Inc. v. City of Syracuse*, 126 AD3d 1336 [4th Dept 2015]).

In order to provide the parties with a complete record, the court reviewed, but did not consider Ms. Hart's sur-reply submission. Had the court considered the sur-reply submission, the result would have been the same, for the reasons previously stated.

The City's Cross-Application

The Prior Written Notice Rule

The City, like the County, has enacted a prior written notice statute. City Code §21-2 provides, in relevant part, as follows:

> No civil action shall be maintained against the city for damage or injuries to person or property sustained in consequence of any street, part or portion of any street including the curb thereof and any encumbrances thereon or attachments thereto, . . . sidewalk or crosswalk, pedestrian walk or path, . . . being defective, out of repair, unsafe, dangerous or obstructed, . . . unless previous to the occurrence resulting in such damage or injuries written notice of

> such alleged condition relating to the particular place and location was actually given to the city clerk and there was a failure or neglect within a reasonable time thereafter to remedy or correct the alleged condition complained of.

For the reasons stated in connection with the County's Local Law, City Code §21-2 bars Ms. Hart's claims against the City, because she failed to comply with it.

The Special Use Exception to the Prior Written Notice Rule

Notwithstanding that Ms. Hart has pled that the City created the unsafe condition (i.e., the hole in the Sidewalk), the record belies her claim. The hole was not created (and did not develop) immediately as a result of the City's negligence, nor is there any evidence that the City has made any special use of the Sidewalk.

Duty to Warn

It is undisputed that the Sidewalk, which is adjacent to the Building, is owned by the County. Nor does the City occupy the Building in any way. Accordingly, the City had no duty to warn or protect Ms. Hart from the hole in the adjacent Sidewalk (*Galindo v. Town of Clarkstown*, 2 NY3d 633, 636 [2004] ["[t]he reason for such a rule is obvious - a person who lacks ownership or control of property cannot fairly be held accountable for injuries resulting from a hazard on the property"]).

Moreover, City Code §413-48 charges the County, as the owner of the adjacent family Court building, with the duty to maintain the Sidewalk.

22 NYCRR §202.8-g

Ms. Hart also failed to submit a counter-statement of material undisputed facts in response to the City's Statement of Undisputed Material Facts. Inexplicably, however, while she

applied for an order granting her leave to respond to the County's Statement of Undisputed Material Facts, she did not make a similar application with respect to her failure to respond to the City's Statement of Undisputed Material Facts.

Ms. Hart's Application

Ms. Hart has made numerous errors in proceeding with this action, from its inception through her recent response to Movants' dispositive applications, including that she failed to plead required elements of her claim in the Notice of Claim, the Complaint, and in her Bill of Particulars. Specifically, Ms. Hart failed to plead that the County made a special use of the Sidewalk and grate and she failed to identify those statutes, laws, and ordinances, which she contends the Defendants violated, including Highway Law §139 and several provisions of the City Code.

In addition, Ms. Hart failed to comply with multiple provisions of the Uniform Rules of the Trial Courts, including those requiring that she respond to the County's and the City's respective Statements of Undisputed Material Facts (*see* 22 NYCRR §202.8-g), and that she first seek permission from the court before submitting a sur-reply (*see* 22 NYCRR §202.8-c).

Ms. Hart's violation of §202.8-g is particularly egregious in light of the fact that both the County's and the City's Statements of Undisputed Material Facts reference that section in their first paragraphs.

This matter was commenced approximately three (3) years and two (2) months ago, discovery is complete, and Movants' have laid their respective cases bare in making their respective motion and cross-motion for summary judgment. Under these circumstances, Movants would be prejudiced in the event Ms. Hart were granted the relief she seeks. It is far too

late for Ms. Hart to be seeking this relief. Her blatant pleading failures and ignorance of the Rules shall not be excused at this very late stage of the action, after Movants have already laid bare their respective positions in seeking summary judgment.

Ms. Hart's application is denied.

In light of the foregoing, it is hereby

ORDERED, that the County's application for summary judgment is granted, and the Complaint and all cross-claims are dismissed as against the County; and it is further

ORDERED, that the City's cross-application for dismissal and summary judgment is granted, and the Complaint and all cross-claims are dismissed as against the City; and it is further

ORDERED, that Ms. Hart's application for leave to file a late counter-statement of undisputed material facts and amend her Bill of Particulars is denied.

This constitutes the Decision and Order of this Court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: January 20, 2022
Buffalo, New York

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice