SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **05RCP**

Justice

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WANDA L. RODRIGUEZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Defendants.

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INDEX NO. 158658/2018

MOTION DATE 07/22/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion for SUMMARY JUDGMENT.

On September 18, 2018, plaintiff commenced this negligence action to recover for injuries allegedly sustained on July 5, 2017, when she tripped and fell due to a defective condition approximately twenty feet southeast of the northwest corner of Nichols Avenue and Fulton Street in Brooklyn, New York (NYSCEF Doc. No. 1 [Compl. at ¶¶7-8, 11]). At her General Municipal Law ("GML") §50-h hearing, plaintiff testified that she fell after stepping with her right foot into a pothole the "size of a football" at the subject location (NYSCEF Doc. No. 18 [Rodriguez GML §50-h Tr. at pp. 22-23]).

Defendants the City of New York (the "City") and the New York City Department of Transportation ("DOT") now move, pursuant to CPLR §3212, for an order granting them summary judgment and dismissing this action, on the grounds that the City did not receive prior written notice of the subject condition as required by Administrative Code §7-201. In support of their motion, defendants submit: (1) the affidavit of Lorenzo Bucca, a paralegal at the DOT, attesting

to his search of DOT records and Big Apple Maps for the roadway located at Fulton Street between Nichols Avenue and Grant Avenue and the intersection of Fulton Street and Nichols Avenue in Brooklyn, New York for a period of two years prior to and including July 5, 2017 (NYSCEF Doc. No. 22 [Bucca Aff.]); (2) the records resulting from Bucca's search, i.e., four permits, four hardcopy permits, four applications, one inspection, five maintenance and repair orders/records: five complaints, four gangsheets for roadway defects; four handwritten gangsheets for roadway defects, as well as two Big Apple Maps (NYSCEF Doc. No. 21 [City CSO Response]); and (3) the affidavit of Jesus Algarin, an Administrative Superintendent of Highway Operations at the DOT's Brooklyn Street Maintenance Division of Roadway Repair and Maintenance, in which he attests that the repair orders in these records document that all defects that were the subject of these orders were timely repaired, with the most recent repair performed on March 10, 2017 (NYSCEF Doc. No. 233 [Algarin Aff. at ¶¶4-12]).

Defendants argue that, as a matter of law, these affidavits and records establish that the City did not have prior written notice of the subject defect. In opposition, plaintiff argues that the City's submissions are insufficient to establish its prima facie case or, alternatively, that a question of fact exists as to whether the City created the subject defect through an affirmative act of negligence. In connection with the latter argument, plaintiff submits the affidavit of Nicholas Bellizzi, P.E., attesting that:

> The subject pothole defect was irregular in shape and had a non-uniform and irregular depth of 1½ to 2 inches .... It was a formerly repaired pothole. In addition to the subject pothole, the intersection area, i.e., the square shaped box formed by the four crosswalks across the corners of the intersection, was riddled with potholes of a similar nature and characteristics.
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> ...

> The subject defective pavement segment was mis-leveled, non-flush, missing, irregular, uneven, non-uniform, discontinuous, broken, sunken and depressed … The subject street pavement defect was never constructed or installed according to final paying pavement restoration standards, i.e., the temporary pavement was never removed and the final permanent wearing course pavement was never installed
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> …
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> Based on the NYCDOT pothole repair work record, on March 9, 2017, two (2) potholes of a Class "C" size were repaired in 10 to 23 minutes. It is important to note that hot asphalt plants are closed during the winter cold weather months from approximately November 20th through the end of March/early April. As a result, when NYCDOT performed the pothole repairs on March 9, 2017, they could not have performed permanent repairs since the hot asphalt plants in the City would have been closed. During the cold subfreezing winter months, NYCDOT pothole repairs utilize "cold patch", which is a temporary repair with a limited "two week" shelf life, i.e., it cannot be expected to last, or be effective, for more than two weeks. As a result, the NYCDOT work crew, its supervisors, and management new [sic] that upon installing the cold patch into the potholes, they would have to come back to replace the cold patch with hot asphalt and perform the permanent pothole repair. As a result, NYCDOT was immediately aware that the cold patch pothole repair was a stop-gap, intern temporary repair in need of a permanent repair, when the hot asphalt plants would be open in a few weeks at the end of March/early April.
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> ….
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> The cause of the defective pavement segment was the improper, incomplete, substandard, unsafe and inadequate temporary street pavement restoration performed at the site in the form of an improper and inadequate top (wearing) course pavement application. A proper and adequate "permanent" wearing course was never installed. The temporary "cold patch" asphaltic pavement had outlived its useful life, which is typically no more than 14 days, subject to weather and wear and tear due to traffic. The street pavement resurfacing repair means and used methods and protection methods were not in conformance with good and commonly accepted safe industry practices and applicable NYCDOT Highway Rules. The defective street pavement segment that was caused and created by improper and faulty temporary (functional for no more than two (2) weeks) pothole street pavement restoration was the sole proximate cause of Ms. Rodriguez's accident and her resulting injuries. If the pothole had been properly repaired with a "permanent" hot asphalt repair versus left with the "temporary" repair, which by definition was short term and required a follow-up "permanent" restoration, there would have been no defect and hence, no accident.

(NYSCEF Doc. No. 28 [Bellizzi Aff. at ¶¶10-18] [emphasis added]).

DISCUSSION

As a threshold matter, the Court is not persuaded by plaintiff's argument that the City's failure to submit a statement of material facts mandates the denial of the motion; there is no evidence that the City's non-compliance has prejudiced plaintiff (See Meserole Hub LLC v Rosenzweig, 71 Misc 3d 1222(A) [Sup Ct, Kings County 2021]; but see Amos Financial LLC v Crapanzano, 145 NYS 3d 366 [Sup Ct, Rockland County 2021]). Accordingly, the Court will address the City's motion on its merits.

"[T]he 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. 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, 324 [1986] [internal citations omitted]). The City has met its burden here by establishing that it did not have prior written notice of the pothole required under Administrative Code §7-201.

Section 7-201 of the Administrative Code of the City of New York provides, in pertinent part, that:

> 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.

(Administrative Code 7-201[c][2]).

Here, the Bucca affidavit and records referenced therein, along with the Algarin affidavit, are sufficient to meet the City's burden here (See Harvey v Henry 85 LLC, 171 AD3d 531, 531-32 [1st Dept 2019]). Plaintiff notes that Bucca does not attest that the DOT records produced by his search did not provide the written notice of the defective condition but this omission is of no moment in light of the City's submission of the records themselves (See Thana v The City of New York, 2014 NY Slip Op 33562[U] [Sup Ct, Bronx County 2014] ["While is it is true that Collins and Robinson's affidavits do not allege or state that defendants had no prior written notice of the missing manhole cover, the documents which they incorporate by reference and provide establish the absence of prior written notice"]; but see Henderson v City of NY, 2014 NY Slip Op 31478[U] [Sup Ct, NY County 2014]). In addition, the affirmation of counsel for the City establishing that the 311 complaints, citizen complaints, and permits produced by Bucca's searches cannot establish prior written notice of the subject defect as a matter of law (See Kapilevich v City of New York, 103 AD3d 548, 549 [1st Dept 2013]).

In light of the foregoing, the burden shifts to plaintiff to submit evidence in admissible form that raises a question of fact as to whether the City had prior written notice or, failing that, created the defect through an affirmative act of negligence or where the defect resulted from a special use by the City (See Yarborough v City of New York, 10 NY3d 726, 728 [2008]). Plaintiff has failed to do so.

Contrary to plaintiff's argument, the fact that Bucca has not been deposed is immaterial under the circumstances where, as here, plaintiff fails to suggest any facts essential to opposing

the instant motion that could be revealed in his deposition[1] (See e.g., A & W Egg Co. v. Tufo's Wholesale Dairy, Inc., 169 AD3d 616 [1st Dept 2019]). In addition, to the extent that plaintiff observes that the gangsheets produced by the City reference potholes at the subject intersection, they do not establish prior written notice—per the undisputed Algarin affidavit, these gangsheets establish timely repairs were performed well in advance of plaintiff's accident (See Abott v City of New York, 114 AD3d 515, 516 [1st Dept 2014] ["repair orders or reports, reflecting only that pothole repairs had been made to the subject area more than a year before the accident, are insufficient to constitute prior written notice of the defect that allegedly caused a plaintiff's injuries"]). Finally, contrary to plaintiff's claim, she is not entitled to a witness from the City to interpret the symbols on the Big Apple Maps in the record. "[T]he City does not create or produce the Big Apple map and, as such, it cannot produce a witness to testify regarding it" (Diaz v The City of New York, 2010 NY Slip Op 31063[U] [Sup Ct, New York County 2010]).

Plaintiff also argues that a question of fact exists as to whether the City was affirmatively negligent in its repair of the pothole, based on Bellizzi's affidavit. However, an identical argument has already been rejected by the Appellate Division, First Department in Vega v City of New York, 2011 NY Slip Op 07161 [1st Dept 2011]). In Vega, the trial court held that the plaintiff's submission of an affidavit from Nicholas Bellizzi stating that "in repairing the pothole with only cold patch, the city performed repair work which immediately resulted in a dangerous condition. … [because] the cold patch would strip off quickly (not immediately), due to weather, road, bicycle and foot traffic" was sufficient to raise a triable issue of fact as to whether the City created the

[1] In opposition, plaintiff also submits the examination before trial ("EBT") transcript of DOT records searcher Stacey Williams. Williams's testimony concerns a records search performed by Reginald Pierre, yet plaintiff fails to attach the records produced by this search. Under the circumstances, the Court does not credit plaintiff's argument that an affidavit of Pierre is necessary to meet defendants' prima facie burden. In addition, the Court observes that the segment of Williams's EBT referenced by plaintiff involves her testifying as to 311 complaints which, as discussed above, cannot establish prior written notice as a matter of law.

defective condition through its own affirmative negligence (Vega v The City of New York, 2009 NY Slip Op 32416[U] [Sup Ct, New York County 2009], revd sub nom. Vega v City of New York, 88 AD3d 497 [1st Dept 2011]). The First Department reversed, however, holding that

> Even assuming that the pothole that defendant repaired is the same defect that caused plaintiff's accident, there is nothing in the record indicating that defendant performed that repair negligently or that it resulted in an immediately dangerous condition. Furthermore, plaintiff's contention that defendant's failure to perform a subsequent permanent repair constituted an affirmative act of negligence, is unavailing. As a failure to act is not an affirmative act, such conduct amounts to nonfeasance, rather than affirmative negligence

(Vega v City of New York, 88 AD3d 497, 498 [1st Dept 2011] [internal citations and quotations omitted]). As in Vega, Bellizzi asserts that the work at issue—also performed four months prior to the subject accident—was a temporary solution that degraded over time. Accordingly, as in Vega, the Bellizzi affidavit does not create a triable issue of fact.

The First Department cases on which plaintiff relies do not support a contrary conclusion, as they either involve defects that developed over time which were similarly insufficient to create a question of fact as to negligent repair (See Speach v Consol. Edison Co. of New York, Inc., 52 AD3d 404 [1st Dept 2008] and Bielecki v City of New York, 14 AD3d 301, 301 [1st Dept 2005]) or involve a question of fact as to whether the work performed immediately created a hazard which, as discussed above, is not the situation here (See Bania v City of New York, 157 AD3d 612 [1st Dept 2018] and Martin v City of New York, 191 AD3d 152, 155-56 [1st Dept 2020]).

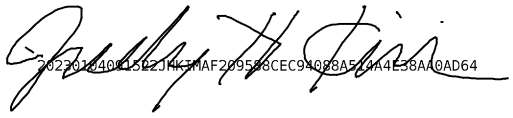
Accordingly, it is

ORDERED that the City of New York and the New York City Department of Transportation's motion for summary judgment is granted and this action is hereby dismissed in its entirety; and it is further

ORDERED that within twenty days from the date of this decision and order, counsel for the City of New York shall serve a copy of this order with notice of entry on plaintiff as well as on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly; 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 this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



1/4/2023
DATE

HON. JUDY H. KIM, J.S.C.

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