SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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RENEE VELKOFF

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 152452/2017

MOTION DATE 04/07/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53

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

In the Complaint, plaintiff claims that on or about March 30, 2016, at approximately 8:00 AM, in front of the premises known and designated as Gramercy Arts High School, 40 Irving Place, in the County, City and State of New York, plaintiff "was caused to trip and fall and be precipitated to the ground while walking in said area as a result of a dangerous, hazardous, and uneven sidewalk, causing plaintiff to sustain serious personal injury." At plaintiff's 50-h hearing held on November 10, 2016, plaintiff testified that there existed a tree well, and she "hit the tree well and fell onto the ground" (transcript at NYSCEF Doc. No. 42). At plaintiff's EBT, held on March 9, 2018, plaintiff testified that she "stepped into a tree well, but not realizing that the surface was uneven, and my foot rolled and I fell down hard on the edge of the sidewalk," and that difference in depth between the ground of the tree well and the ground of the sidewalk was "maybe three, four inches" (transcript at NYSCEF Doc.No. 43).

Now pending before the court is a motion where defendant THE CITY OF NEW YORK (the "City") seeks an order, pursuant to Civil Procter Law and Rules ("CPLR") 3211, dismissing the Complaint for failing to state a meritorious cause of action, and/or CPLR 3212, granting summary judgment to the City on the grounds that, pursuant to 7-201 of the Administrative Code of the City of New York, the City did not have prior written notice of the defect that allegedly caused Plaintiff's accident.

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

The City argues that plaintiff failed to state a cause of action pursuant to CPLR 3211(a)(7), as she failed to assert in the Notice of Claim ("NOC") that the City had prior written notice of the subject defect, namely a mis-leveled tree well, and that plaintiff failed to assert that the City caused or created the alleged defect. The City argues that it is well-settled that a plaintiff has the burden of pleading and proving that the City had prior written notice of the allegedly defective condition, and that plaintiff's failure to do so requires dismissal of the complaint.

The City also argues that plaintiff cannot now move for leave to serve a late or amended NOC or Complaint, because the statute of limitations (the "SOL") has expired, and the court's discretion to extend the time for plaintiff to file an amended NOC is limited to the one year and ninety-day period in which to commence an action. The City further argues that plaintiff cannot now assert new theories of liability against the City by amendment of the NOC and Summons and Complaint, because such amendments would be substantive in nature and therefore cannot be made once the SOL has expired.

In support of these arguments, the City submits, *inter alia*, three sworn affidavits: The first is an Affidavit by Larisa Dubina (NYSCEF Doc. No. 45), who is employed by the Department of Transportation of the City of New York, and who personally conducted a search in the pertinent electronic databases and identified and requested a search for corresponding paper records of permits, applications for permits, OCMC files, CARs, NOVs, NICAs, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, and Big Apple Maps for the sidewalk located at Irving Place between East 16th Street and East 17th Street in the County, City, and State of New York. This search encompassed a period of two years prior to and including March 30, 2016, the date upon which the plaintiff claims to have been injured.

The second is an Affidavit by Yelena Bogdanova (NYSCEF Doc. No. 46), who is employed as an Assistant Records Officer by the Department of Parks and Recreation of the City of New York in the Office of the General Counsel, and who personally conducted a search for installation records, which include complaints, Commissioner Correspondence, service requests, inspections, work orders, permits and permit applications for the location of 40 Irving Place in the County, City, and State of New York, for two years prior to and including March 30, 2016.

The third is an Affidavit by Sharon Lai (NYSCEF Doc. No. 46), who is employed as an Assistant Records Officer by the Department of Parks & Recreation of the City of New York in the Office of the General Counsel, and who personally conducted a search for complaints. service requests, inspections, work orders, images, Commissioner and Borough Commissioner Correspondence, handwritten inspections, inspection forms, Daily Work Sheets, Borough Forestry contract records, Tree Failure Incident Data Collection Forms, permit applications and permits, for the location at 40 Irving Place in the County, City, and State of New York for two years prior to and including March 30, 2016. The City argues that the results of these searches show that the City had no prior written notice of the allegedly defective condition, and the City did not cause or create the alleged defect.

In opposition, plaintiff does not dispute that the City was not given prior written notice of the subject defect. However, plaintiff argues that prior written notice was not necessary because the City, through an affirmative act or special use, caused or created the defect, and the cause and create theory of liability is an exception to the prior written notice requirement. Specifically, plaintiff argues that the City owns Gramercy Arts High School, the school in front of which plaintiff fell, and there was ongoing construction taking place at the school that included work on

the sidewalk in front of the school. Plaintiff argues that the City has not met its burden in proving that the City did not cause or create the defect. Plaintiff argues:

> 8. […] However, the City does not explain why there was scaffolding or work being performed in front of and at 40 Irving Place, New York, NY 10003, to wit: Gramercy Arts High School.
>
> 9. The City offers no direct evidence from any witness that affirmatively states that the City or any contractor it hired did not perform any work, maintenance or repair on the subject sidewalk / tree wall on or before the date of the accident. The City offers no direct evidence from any witness that affirmatively states when the City or contractor it hired last performed any work, maintenance or repair on the subject sidewalk/tree wall on or before the date of the accident. As a result, the City has not met its burden to establish with respect to whether the City caused or created the alleged defect.
>
> 10. […] Surely the City on the instant motion had a duty to demonstrate when they or a contractor they hired last did work at the subject location, at a minimum, the City has not demonstrated that the City or a contractor it hired did not cause or create the condition […]
>
> 11. The City's submission of permits, complaints etc. as well City representative Affidavit(s) do not explain why there are no records of the work being performed at the subject location at the time of the accident. In fact the Affidavit(s) are most notable for what they don't state. They don't state when, or whether, the City or a contractor they hired last performed work at the subject sidewalk/ tree well. They is nothing more than record certification, at best.

The City also submitted a sworn Affidavit from plaintiff (NYSCEF Doc. No. 52) that states, in part:

> 3. At the time I arrived at the school, many students were located outside the school and on the sidewalk in front of the school due to a fire drill.
>
> 4. Prior to that time there was construction activity going at the school that included the erection of scaffolding and work on the sidewalk in front of the school. This activity was going on for month(s) prior to my accident. I do not know the name of the contractor doing the work.

Conclusions of Law

It is undisputed on this record that the City did not receive prior written notice of the subject defect, namely a mis-levelled tree well. Accordingly, the City has set forth a *prima facie* case for summary judgment (*see* Dunn v City of New York, 206 AD3d 403 [1st Dept 2022] ["The City established its *prima facie* entitlement to summary judgment by submitting proof establishing that it did not have notice of the allegedly defective condition"]). Accordingly, the burden now shifts to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

Plaintiff's primary argument is that the City must prove that it did not cause or create the defective condition. This argument is patently incorrect, as the relevant caselaw makes it clear that once a municipality establishes that it lacked prior written notice, the burden shifts to the plaintiff to demonstrate that the municipality affirmatively created the defect. *See, e.g.* Yarborough v City of New York, 10 NY3d 726 (Ct. of Appeals 2008), "Where the City establishes that it lacked prior written notice […], ***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"; Dunn, *(supra)* "The City established its *prima facie* entitlement to summary judgment […]. As a result, ***the burden shifted*** to plaintiff to establish one of the exceptions to the notice requirement – here, that the City affirmatively created the defect through an act of negligence or did roadwork that would have resulted in an immediately apparent dangerous condition") [emphasis added]. Therefore, the burden here is not on the City, but on plaintiff herself, to demonstrate that the City affirmatively created the defect through an act of negligence.

This court finds that plaintiff has failed to meet this burden. First, plaintiff does not dispute the validity of the City's searches, which the City argues show that neither the City nor its contractors were conducting work at the subject location in the two years prior to and including the date of plaintiff's accident.

Second, the Affidavit that plaintiff submitted in this motion sequence states that "there was construction activity going at the school." However, a review of the file shows that at the 50-h hearing, plaintiff testified that although she had observed scaffolding around the school, she did not know whether construction activity was occurring, and she had never observed such activity taking place. Specifically, plaintiff testified as follows:

> Q. Were they doing work on the Washington Irving building?
> A. Not that was evident.
> Q. Were they doing any internal construction in the school?
> A. It's possible. Due to the fact that I teach on the 7th floor, I don't get to other floors. I am unaware of what would be happening on other floors.
> Q. Do you remember seeing external work on the building?
> A. No, I don't.

(*See* pages 10-11 of transcript at NYSCEF Doc. No. 42).

Similarly, at the EBT, plaintiff testified that she had observed scaffolding but made no mention whatsoever that she ever observed any construction activity to have occurred.

Third, aside from her own Affidavit, plaintiff submits no other documentary or testimonial evidence to support her contention that the City caused or created the defect. Notably, plaintiff had ample time to gather such evidence, as the Complaint in this case was filed over six years ago, on March 15, 2017, and earlier this year, on February 9, 2023, plaintiff filed a Note of Issue certifying that all discovery was complete and that the case is ready for trial (NYSCEF Doc. No. 29).

Finally, it is undisputed on this record that plaintiff never alleged in her pleadings that the alleged defect was affirmatively caused or created by the City, and plaintiff cannot amend the pleadings now, after the SOL has expired.

This court finds that plaintiff's argument that the City created the defect, amounts to the "mere conclusions, expressions of hope or unsubstantiated allegations" that the Court of Appeals has ruled iss insufficient to create an issue of fact to defeat a *prima facie* case for summary judgment.

Conclusions

Given the above, it is hereby:

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

ORDERED that this complaint is dismissed.

8/9/2023	
DATE	**J. MACHELLE SWEETING, 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**