SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ALTAGRACIA ROJAS, EUFEMIO ROJAS

Plaintiffs,

- v -

THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 158015/2018

MOTION DATE 08/25/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

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

In the underlying action, plaintiff ALTAGRACIA ROJAS alleges that on May 8, 2018, she tripped and fell due to a pothole or cave-in in the northern crosswalk at the intersection of West 180th Street and Broadway in New York, NY.[1]

Defendant The City of New York (the "City") seeks an order, pursuant to Civil Practice Law and Rules 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 receive prior written notice of the defect that allegedly caused plaintiff ALTAGRACIA ROJAS' accident.

[1] Plaintiff Eufemio Rojas is the spouse of Altagracia Rojas, and alleges, *inter alia*, that he has been deprived of the services of his wife and her care, protection, consideration, companionship, aid, solace and society, and has been required to remain at home for long periods of time, denying himself to friends and relatives.

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]).

Arguments Made by the Parties

The City argues that summary judgment should be granted in its favor, because the City did not have prior written notice of the alleged defective condition, pursuant to Administrative Code 7-201, and that the City did not cause and create an immediately dangerous condition for which it may be held liable.

In support of these arguments, the City submitted, *inter alia*, three sworn affidavits. The first affidavit was from Lorenzo Bucca (NYSCEF Doc. No. 73), a paralegal conducting record searches for the Department of Transportation for the City of New York ("DOT"), who personally conducted: (i) 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, contracts, maintenance and repair orders, complaints, gangsheets for roadway work, milling and resurfacing records, and Big Apple Maps for the roadway located at Broadway between West 180th Street and West 181 Street, County, City and State of New York, for a period of two years prior to and including May 8, 2018, the date upon which the plaintiff claims to have been injured; and (ii) a review of the Big Apple Maps for an area that included the above referenced location.

The second affidavit was from Joyce Edgehill, who is employed by the DOT in the Manhattan Street Maintenance Division of Roadway Repair and Maintenance as an Administrative Manager, and who reviewed maintenance and repair records (also known as a "FITS" report) for defect numbers DM2016295006, DM2016338006, DM2017022010, and DM2017189010. The third affidavit is from Nicholas Iannuzzelli, who is employed by the DOT in the Division of Roadway Repair and Maintenance as a Supervisor Highway Repairer of the Jolt Elimination Team Emergency Response Unit, and who personally reviewed the FITS reports for defect number DM2017177017. The City argues that the results of these searches show that the City did not have any prior written notice of the subject defect.

In opposition, plaintiffs argue that in this case, prior written notice was not necessary, because "there exists a glaring exception to the prior written notice standard" insofar as the City had actual and constructive knowledge of the defect in this case. Specifically, plaintiffs submitted photos of the accident location that they claim show the defect was visible in May 2016 (NYSCEF Doc. No. 83) and visible in November 2016 (NYSCEF Doc. No. 84). Therefore, plaintiffs argue, the defect was visible during the intervening months between May 2016 and November 2016. Plaintiffs argue that the transcript of City inspector Kenmore Husbands (NYSCEF Doc. No. 76) shows that Mr. Husbands inspected the subject location on June 20, 2016 and August 16, 2016, when the defect was present and visible, and the City failed to act. Plaintiffs argue, "There is no difference between this proof, and actual written notice, received by an employee of the Department of Transportation who took no action in response."

In Reply, the City argues that plaintiffs misunderstand the law, and that there does not exist any actual or constrictive notice exception. The City cites a plethora of First Department cases to support their arguments (including, *inter alia*, some of the cases discussed below).

Conclusions of Law

City's Prima Facie Case

With respect to the central issue of prior written notice, Section 7-201 [c][2] of the Administrative Code of the City of New York (also known as the "Pothole Law") provides, in relevant part:

> 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.

Further, pursuant to the New York Court of Appeals in Katz v City of New York, 87 NY2d 241 (N.Y. Ct. of Appeals 1995:

> As recognized by plaintiff, prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City [emphasis added] [...]. The failure to demonstrate prior written notice leaves plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying a defective sidewalk. Because this prior written notice provision is a limited waiver of sovereign immunity, in derogation of common law, it is strictly construed.

Here, as noted above, plaintiffs do not dispute that the City did not receive prior written notice of the subject defect. 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"]).

Burden Shifts

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].

Actual or Constructive Notice

Plaintiffs' sole argument is that the City had actual and constructive knowledge of the defect in this case, and that plaintiffs, therefore, did not have to give prior written notice. This argument is contrary to the relevant caselaw, which clearly provides that having actual or constructive knowledge is not an exception to the requirement set forth in 7-201 of the Administrative Code. *See, e.g.* Tucker v City of New York, 84 AD3d 640 (1st Dept 2011) ("Given the applicability of the Pothole Law, the lack of prior written notice of the alleged defect, and the absence of any evidence that the City created the alleged defect through an affirmative act of negligence or made a special use of the subject tree well, the City may not be held liable even if it had actual or constructive notice of the alleged defect"); Walker v City of New York, 34 AD3d

226 (1st Dept 2006) ("Plaintiff's claim that the City had actual notice of the alleged defect is [...] unavailing. There is no actual notice exception to the prior written notice requirement"): Campisi v Bronx Water & Sewer Serv., Inc., 1 AD3d 166 (1st Dept 2003) ("There is no evidence that the City created the defective condition. Accordingly, that exception to the requirement of prior written notice does not apply. Neither actual nor constructive notice of the defect may substitute for prior written notice"); Hued v City of New York, 170 AD3d 571 (1st Dept 2019) ("neither actual nor constructive notice of the defect may substitute for prior written notice").

Finally, the court notes that plaintiffs only cited a single First Department case, Bernstein v City of New York, 221 AD2d 214 (1st Dept 1995), in support of their arguments that actual notice is an exception to Section 7-201. However, a review of this case shows that the *Bernstein* court's reference to "actual knowledge" referred to the existence of a *written report*. Specifically, the *Bernstein* court held: "Defendant's motion was properly denied. Here, defendant had actual knowledge of the defective bridge condition that caused the decedent's death *by reason of the written report of the Department of Transportation's inspector* that had noted the defect seven days earlier [emphasis added]." Accordingly, this case does not support plaintiffs' argument with respect to actual notice.

Given the above, this court finds that plaintiffs have failed to meet their burden in establishing an exception to the prior written notice requirement, and accordingly failed to establish the existence of material issues of fact which require a trial of the action.

Conclusion

For the reasons cited above, it is hereby:

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

ORDERED that this Complaint is dismissed against the City; and it is further

ORDERED that this action is closed.

10/10/2023
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