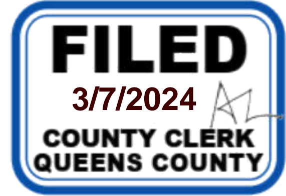
Torres v City of New York
2024 NY Slip Op 35030(U)
March 7, 2024
Supreme Court, Queens County
Docket Number: Index No. 702804/20
Judge: Kevin J. Kerrigan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

file:///LRB-ALB-FS1/Vol1/ecourts/Process/covers/NYSUP.07028042020.QUEENS.001.LBLX036_TO.html[05/13/2026 3:49:28 PM]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

---------------------------------------X

Raquel Torres,

Plaintiff,

- against -

The City of New York,

Defendant.

---------------------------------------X

Index Number: 702804/20

Motion Date: 3/4/24

Motion Seq. No.: 1

The following papers numbered E21-E38 & E40-E49 read on this motion by Defendant for summary judgment or in the alternative, vacating the note of issue and certificate of readiness.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.............	E21-38
Affirmation in Opposition-Exhibits................	E40-46
Reply-Exhibit.....................................	E47-49

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendant for summary judgment or in the alternative, vacating the note of issue and certificate of readiness is granted.

Plaintiff allegedly sustained injuries when she tripped and fell on the roadway at or near the intersection of 27th Street and Queens Plaza North in Queens County on July 27, 2019.

The City moves for summary judgment on the grounds that it did not have prior written notice of the alleged defect pursuant to Section 7-201 of the New York City Administrative Code, nor did it cause or create the defect or obtain a special use of the location.

Plaintiff testified at a 50-h hearing and at a deposition. She stated that her accident occurred as she was crossing 27th Street. As Plaintiff took a step off of the curb, her left foot made

contact with a pothole, causing her to fall to the ground. The subject pothole was situated next to a sewer grate, or catch basin. She did not observe it prior to the fall because it was covered with leaves and debris. A photograph annexed to the notice of claim demonstrates where Plaintiff fell indicated by a circular marking. It confirms that Plaintiff's accident occurred within the cross walk of the subject intersection, near the corner, and adjacent to the sewer drain.

Omar Codling testified on behalf of the New York City Department of Transportation (DOT). Codling conducted a search for DOT records for the intersection of 27th Street and Queens Plaza North for the time period of July 27, 2017 to July 27, 2019. The search revealed two maintenance repair orders, one "gangsheet" for roadway defects, one handwritten gangsheet, and one Big Apple Map and Legend. Per Codling, a maintenance and repair order indicates a given defect and triggers the creation of a gangsheet. The gangsheet provides the attendance record and the work assignment for the crew that repairs the defect. The gangsheet will include the location the crew went to, arrival time, departure time, and the category of the pothole repaired. Both maintenance and repair records here were for the subject intersection and indicate that a crew went to the location on October 30, 2018 and repaired both potholes. Several additional maintenance and repair orders were produced and testified to. One repair order was dated September 25, 2018. Codling testified that it referred to a pothole reported on September 24, 2018 at the location of 27th Street between 41st Avenue and Queens Plaza North. The defect was "closed," or repaired, on September 28, 2018. The next repair order was for the location of 41-30 27th Street between 41st Avenue and Queens Plaza North dated March 10, 2019. The records reflect that a crew filled ten potholes at that location on March 12, 2019. The next repair order was for the location of 27th Street between 41st Avenue and Queens Plaza North dated June 25, 2019. The defect was repaired on June 26, 2019. The next repair order was for the location of 41-23 27th Street dated June 27, 2019. The crew went to the location on June 28, 2019 and reported that no defect was found. The next repair order was for the location of 41-14 27th Street between 41st Avenue and Queens Plaza North. It was referred to the Highway Inspections Quality Assurance Unit (HIQA). The next repair order was for a street cave-in at location of 41-12 27th Street. The defect was marked "roadway maintenance." Codling testified that a complaint was produced as a result of the search. It was dated September 14, 2017 and complained of a broken curb at 27-01 Queens Plaza North.

Additionally, the City proffers the affidavit of DOT employee, Larissa Dubina. Dubina performed a search for DOT records at 27th Street between Queens Plaza North and 41st Avenue from July 27, 2017

to July 27, 2019. The search revealed 218 permits, 218 hardcopy permits, 218 applications, 4 OCMC files, 7 Corrective Action Requests (CAR), 8 Notices of Violation (NOV), 218 inspections, 8 maintenance and repair orders, 36 complaints, 11 gangsheets, and 10 handwritten gangsheets. Dubina also conducted a search of the intersection of 27th Street and Queens Plaza North for the same time period. The search revealed 2 maintenance and repair orders, 1 gangsheet, and 1 handwritten gangsheet. The search also revealed two Big Apple Maps, which were served on the City by the Big Apple Pothole and Sidewalk Corporation on May 30, 2003.

A search of DEP records was included as a part of the City's Response to the Preliminary Conference Order. It revealed 1 "customer service request" (CSR) and 7 work orders. Michael Cooper testified on behalf of the New York City Department of Environmental Protection (DEP). Cooper testified to DEP documents produced as the result of a records search. Cooper indicate that, per the CSR, on August 20, 2018, a DEP crew was sent to clean a catch basin at the subject location. The remaining documents appear to be inspections of catch basins and work orders to flush and clear clogged catch basins.

Pursuant to Administrative Code §7-201(c)(2), prior written notice is a condition precedent to maintaining an action against the City for damages relating to a street or sidewalk defect (see NYC Admin. Code §7-201; Katz v. City of New York, 87 N.Y.2d 241 [1995]; Quinn v. City of New York, 305 A.D.2d 570 [2d Dept. 2003]); Campisi v. Bronx Water & Sewer Service, Inc., 1 A.D.3d 166 [1st Dept. 2003]). Plaintiff must both plead and prove that the City had prior written notice of the condition, otherwise no liability may be imposed upon the municipality (see Hinton v. Village of Pulaski, 33 N.Y.3d 931 [2019]; Estrada v. City of New York, 273 A.D.2d 194 [2d Dept. 2000]; Quinn v. City of New York, supra). The only exceptions to the requirement of prior written notice are where the municipality created the defect or hazard through an affirmative act of negligence and where it made a special use of the area (see Amabile v. City of Buffalo, 93 NY 2d 471 [1999]).

The City contends that it is entitled to summary judgment because none of the records establish prior written notice of the complained of defect in the roadway at 27th Street at the Northwest corner of Queens Plaza North. The DEP records revealed one CSR for a clogged catch basin. The remaining records referred to catch basin inspections and repairs for clogged catch basins, and do not reference any defective street conditions surrounding the catch basins. The intersection search produced by the DOT revealed two potholes at the subject location, both of which were repaired on October 30, 2018. The lengthier segment search produced by the DOT

similarly did not reveal any evidence of prior written notice. None of the 218 inspections reference a defect at the Northwest corner of 27th Street and Queens Plaza North. The CARs issued were all issued to DEP and involved street cave-ins. Photographs annexed to the CARS demonstrate that the massive cave-in was situated in the middle of the block and was not the same defect which caused Plaintiff's accident. A review of the 36 complaints similarly do not provide any evidence of prior written notice. Eleven of the complaints related to the CARs issued for the cave-in, or other cave-ins not situated at Plaintiff's location of incident. Other complaints were for a broken curb, a cave-in where DOT found no cave-in existed upon inspection, and for contractors blocking the roadway. Eighteen of the complaints directly corresponded to maintenance and repair orders. Of the 18, nine were marked closed, or repaired. One was marked as a duplicate. One was not found upon inspection by DOT. Six were referred to HIQA and noted as cave-ins. One was referred to maintenance and also noted as a cave-in.

Plaintiff opposes the instant motion on five distinct grounds: (1) that §7-201(c) does not extend to sewer grates, (2) that the Big Apple Map provides prior written notice, (3) that the City obtained a special use of the area, (4) the photographs establish that the City created the subject condition, and (5) the DEP and DOT records constitute an "acknowledgment."

Section 7-201 provides that prior written notice is required for injuries alleged as a result of damage to a "street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part of portion of any of the forgoing including any encumbrances thereon or attachments thereto" (see NYC Admin. Code §7-201[c]). Plaintiff's contention that prior written notice does not apply here because the pothole is adjacent to a sewer grate is misplaced.

The cases cited to by Plaintiff are not on point. None of the cases involve an individual who tripped and fell on a sidewalk or roadway where an appurtenance was situated adjacent to the pothole which caused the fall. In Doremus, the municipality failed to repair a street sign, which ultimately caused a motor vehicle accident (see Doremus v. Lynbrook, 18 N.Y.2d 362 [1966]); In Flynn, the court found that a fallen signpost was not a defect that required prior written notice because it was not situated in the sidewalk (see Flynn v. North Hempstead, 114 Misc.2d 125 [NY Sup Ct Nassau County 1982]). In DiLorenzo, the plaintiff stepped directly onto a sewer grate, which broke, causing the plaintiff to fall (see Di Lorenzo v. Endicott, 70 Misc.2d 159 [NY Sup Ct Broome Country 1972]). The defect in Di Lorenzo was the actual sewer grate (see id.). In Appelbaum, the plaintiff tripped on a metal cover which was used for water supply installation (see Appelbaum v. Long

Beach, 190 N.Y.S.2d 197 [2d Dept. 1959]). In Horbert, the plaintiff's foot got caught in a catch basin (see Horbert v. Islip, 283 A.D. 661 [2d Dept. 1954]). In Schware, the plaintiff tripped and fell over a metal plate that was placed on top of the sidewalk and was not a part of the sidewalk (see Schware v. East Rockaway, 95 A.D.2d 802 [2d Dept. 1983]).

Here, the Plaintiff clearly testified that the pothole was situated within the roadway and immediately adjacent to the sewer. She repeatedly attributes her fall to the pothole, and never once attributes it to the sewer grate. Unlike the cases cited to by Plaintiff, the mode of injury was not the appurtenance itself. In Oboler, the Court of Appeals applied the so-called pothole law where the Plaintiff tripped on the "ridge of asphalt" encircling a depressed manhole cover(see Oboler v. City of New York, 8 N.Y.3d 888 [1988]. In Adams, the Appellate Division, Second Department, applied the pothole law when a plaintiff fell on a depression adjacent to a sewer grate (see Adams v. City of Poughkeepsie, 296 A.D.2d 468 [2d Dept. 2002]. Moreover, even if the Plaintiff did trip and fall on the sewer grate, the Second Department has applied the pothole law in those instances, notwithstanding the Supreme Court, Broome County Di Lorenzo decision cited supra (see Torres v. Inc. Vil of Rockville Ctr., 195 A.D.3d 974 [2d Dept. 2021]; Charles v. City of Long Beach, 136 A.D.3d 634 [2d Dept. 2016]; Pennamen v. Town of Babylon, 86 A.D.3d 599 [2d Dept. 2011]; Filaski-Fitzgerald v. Town of Huntington, 18 A.D.3d 603 [2d Dept. 2005].

The second argument by which the Plaintiff opposes the motion is based on the Big Apple Map. The Big Apple Map does not raise a question of fact sufficient to defeat summary judgment here. Plaintiff clearly testified that she fell in the roadway. The Big Apple Map legend does not generally provide any markings for roadway defects. Indeed, the legend solely encompasses defects on sidewalks, curbs, and crosswalks. A review of the legend and the map very clearly establishes that there is no marking for a crosswalk defect at the subject location. The legend provides that a square marking indicates a defect in a crosswalk. A marking depicting a line with two squares at each end indicates an extended section of defects within the crosswalk. No such markings are contained on the relevant portion of the map.

The third argument by which the Plaintiff opposes the motion is based on the doctrine of special use. Plaintiff contends that since the sewer grate is a part of the City's infrastructure and therefore the sewer grate and the 12-inch surrounding area constitutes a special use.

At the outset, Plaintiff failed to allege special use in her

notice of claim, complaint, or bill of particulars. Thus, she is barred from relying on the doctrine for the first time in opposition to the City's motion (see Taustine v. Inc. Vil. Of Lindenhurst, 158 A.D.3d 785 [2d Dept. 2018]).

Even assuming, arguendo, that the Plaintiff had properly plead the doctrine of special use, it does not apply here. The Second Department has consistently held that a catch basin does not fall into the special use exception to the prior written notice requirement (see Ramos v. City of New York, 55 A.D.3d 896 [2d Dept. 2008]; Braunstein v. County of Nassau, 294 A.D.2d 323 [2d Dept. 2002]; Barnes v. City of Mount Vernon, 245 A.D.2d 407 [2d Dept. 1997]; Ocasio v City of Middletown (148 A.D.2d 431 [2d Dept. 1989]). In Ocasio, the Second Department affirmed the denial of the municipality's motion for summary judgment where the plaintiff fell in a hole created by a missing manhole cover in the street, holding that since the evidence established that the manhole furnished access to underground storm sewer drains, it constituted a special use obviating the prior written notice requirement. In contrast, the Second Department determined in Braunstein that a sewer catch basin grating in the street did not constitute a special use "as its drainage function provided proper maintenance of a safe roadway and served no municipal function inuring to the special benefit of the Town" (see Braunstein v County of Nassau (294 A.D.2d 323, 323 [2d Dept. 2002]); see also Vise v County of Suffolk, 207 A.D.2d 341 [2d Dept. 1994]; Barnes v City of Mount Vernon, 245 A.D.2d 407 [2d Dept. 1997]). The rule, or principle, that is clear from these cases is that a structure or hardware that is installed in the street by the City constitutes a special use that imparts a special benefit to the City only if it is not an integral part of the functioning of the roadway itself as a concourse for public transportation and does not directly relate to the public's use of the roadway. In Braunstein, Vise and Barnes, the sewer grate was installed for the specific purpose of allowing rain water to drain into the storm sewer. Thus, the sewer grate was integral to the functioning of the roadway itself and the public's use of the roadway, and did not constitute a special use. Accordingly, the contention that the City obtained a special use of the area here, which obviates the prior written notice requirement, is without merit.

The fourth argument by which the Plaintiff opposes the motion is based on the annexed photographs of the alleged defective condition. The contention that the photographs establish that the City created the subject defect is an entirely conclusory and speculative argument which Plaintiff failed to support with a shred of evidence (see Cruz v. Otis Elevator Co., 238 A.D.2d 540 [2d Dept. 1997]; Wright v. Morozinis, 220 A.D.2d 496 [2d Dept. 1995]).

The fifth argument by which the Plaintiff opposes the motion is based on DEP and DOT's purported acknowledgment. The argument that the DEP and DOT records constitute an "acknowledgment" of the alleged defect is without merit. The term "acknowledgment" contained within §7-201 specifies that not only must notice of the defect be in writing, but the written notice must be acknowledged by the municipality (see NYC Admin Code §7-201[c]). Despite Plaintiff's contention, the Bruni case is not on point with the instant matter. Indeed, in Bruni, the documents established that the City had first-hand knowledge of the defect (see Bruni v. City of New York, 2 N.Y.3d 319 [2004]). In that case there was a complaint forwarded to a DEP supervisor, who personally inspected the location and documented the defect in an intra-department document (see id.). The lower court found that the intra-department document was not prior written notice because there was a lack of acknowledgment (see id.). The Court of Appeals found that the fact that DEP had first-hand knowledge of the defect was sufficient to establish acknowledgment (see id.). The Court is at a loss to understand how the cases are similar, as there is no relevant document here that addressed the specific alleged defect. Nor is acknowledgment an issue. Plaintiff merely speculates that since the records produced by the City were voluminous, the City must have had knowledge of the defect. However, a review of the same voluminous records by this Court ultimately concludes that is not the case. The fact that DOT and DEP were in the vicinity, even days before the accident, is not evidence of notice or acknowledgment. Unlike in Bruni, where there was evidence in the form of an intra-department work order that a DEP employee inspected the specific location and documented the actual defect. Nothing of the sort occurred here.

Only after the City establishes that it did not have prior written notice of the condition does "the burden shift to the plaintiff to demonstrate the applicability of one of the two recognized exceptions to the rule" (Yarborough v City of New York, 10 NY 3d 726 [2008]). In addition to the analysis supra, the Court finds that the City has established that it did not cause or create the defective condition, nor did it make special use of the area. None of the permits produced in either of the DOT searches were issued to City agencies. There was similarly no records produced by DEP that it performed any work to the roadway or surrounding area of any of the catch basins identified in those records. The records merely indicated that catch basins were inspected and clogged catch basins were cleared and flushed. Moreover, even if there was some evidence that the City performed work at the subject location, "the affirmative negligence exception to the notice requirement [is] limited to work by the City that immediately results in the existence of a dangerous condition" (Oboler v. City of New York, 8

N.Y.3d 888, 889, quoting Bielecki v. City of New York, 14 A.D.3d 301 [1st Dept. 2005]) rather than a condition that develops over time. Plaintiff merely put forth speculative arguments that the City must have performed work at the subject location. However, even if true, Plaintiff had the burden to show that the work immediately resulted in the alleged condition; she failed to do so.

Accordingly, the motion is granted and the complaint is dismissed. As a result, the alternative branch of the motion is moot. Defendants may enter judgment accordingly.

Serve a copy of this order with notice of entry without undue delay.

Dated: March 7, 2024

KEVIN J. KERRIGAN, J.S.C.