# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. CAROL SHARPE** **PART** **52M**

***Justice***

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GORDON GRUBB,

Plaintiff,

- v -

CITY OF NEW YORK, OLIVEIRA CONTRACTING INC., EMPIRE CITY SUBWAY COMPANY (LIMITED), CONSOLIDATED EDISON COMPANY OF NEW YORK, NICO ASPHALT PAVING INC.,

Defendants.

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**INDEX NO.** 151101/2020

**MOTION DATE** 09/06/2024, 10/04/2024

**MOTION SEQ. NO.** 003 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 139, 140, 141, 142, 145

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 132, 133, 134, 135, 136, 137, 138, 143, 144

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

Upon the foregoing documents, Motion Sequences 3 and 4 are decided as follows:

Defendant The City of New York ("The City") seeks an Order granting summary judgment pursuant to CPLR §3212 (Motion Seq. 3). Written opposition was filed. Defendant Oliveira Construction Corp. ("Oliveira") seeks an Order deeming its summary judgment motion timely, dismissing the complaint and denying the crossclaim by The City (Motion Seq. 4). Written opposition was filed. The City's motion is granted, and Oliveira's motion is granted.

Plaintiff commenced this personal injury action on January 30, 2020, seeking damages for the injuries he sustained as a result of a trip and fall on March 18, 2019, due to a broken, cracked, uneven potholed crosswalk at the southern crosswalk of Madison Avenue and East 52nd Street, New York, New York. Issue was joined when Consolidated Edison Company of New York ("Con Ed"),

The City, Oliveira, and Empire City Subway Company Limited ("Empire") filed their respective answers. Empire commenced a third-party action against Nico Asphalt Paving Inc. ("Nico"), on July 22, 2020. Plaintiff thereafter filed a supplemental summons and complaint adding Nico as a defendant. All defendants filed their respective answers to the amended complaint. The parties thereafter executed Stipulations of Discontinuance against Empire, Nico, and Con Ed. The only remaining defendants are The City and Oliveira.

**Summary Judgment Motion by The City**

The City seeks dismissal of the complaint and crossclaims on the grounds that pursuant to Administrative Code of the City of New York §7-201 ("Admin Code §7-201"), it did not have written notice of any defect in the specific southern crosswalk where plaintiff claimed he fell, and that there is no evidence that The City caused or created the condition that caused plaintiff's injury.

In support of its motion, The City presented the deposition transcripts of various witnesses; photographs; affirmations of employees of the Department of Transportation ("DOT"); searches for prior written complaints; the affidavit of Anumon George, a DOT employee, and results of the segment search he conducted for work done in the area of Madison Avenue and East 52nd Street from March 18, 2017, to March 18, 2019, as well as a supplemental search conducted on August 7, 2024; maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. ("Big Apple Map"); service requests; and service records.

The City produced Stacey Williams, a DOT Record Searcher and Testifier, who testified at a deposition using the segment search done by Anumon George, among other records that DOT was issued Permit Number, M15201713A82 [*sic*], on April 13, 2017, valid until April 21, 2017, for inhouse road repair maintenance, i.e., resurfacing, at Madison Avenue and East 52nd Street. DOT

was also issued Permit Number M152018158-843, valid from June 11, 2018, to June 22, 2018, for road resurfacing at Madison Avenue and East 52nd Street.

Ms. Williams also testified regarding permits that were issued to Empire and Oliveira. Permit Number M12018150-A93 was issued to Empire on May 30, 2018, valid until June 28, 2018, to cut the roadway on the west side of Madison Avenue between East 51st and East 52nd Streets. Permit Number M012018205-A74 was issued to Oliveira on July 24, 2018, valid until October 5, 2018, for a sidewalk reconstruction contract with permission to open the roadway and/or sidewalk at Madison Avenue and East 52nd Street. Oliveira was issued another permit, Permit Number M01-2018232-A37, on August 20, 2018, valid until October 5, 2018, for sidewalk reconstruction contracts with permission to open the roadway and/or sidewalk at Madison Avenue and East 52nd Street.

Ms. Williams was also questioned about certain records documenting the various citizens who called 311 on various dates to report certain defects in the roadway and crosswalk at Madison Avenue and East 52nd Street that could have caused someone to fall. On September 19, 2018, a person complained of a seven- to eight-foot-wide hole, about one foot deep, at the eastern crosswalk of Madison Avenue and East 52nd Street. The matter was referred to the New York City Department of Environmental Protection ("DEP"). On October 4, 2018, a person reported a deep hole in the crosswalk at Madison Avenue and East 52nd Street that did not have a top. That complaint was also referred to the DEP. On October 17, 2018, a person reported a foot-long hole on the eastern side of Madison Avenue and East 52nd Street, which was also referred to the DEP. On October 24, 2018, a person reported a hole in the street at Madison Avenue and East 52nd Street which was inspected and referred to the DEP. On November 1, 2018, a person reported a six-inch hole that was getting larger in the crosswalk at Madison Avenue and East 52nd Street. It too was inspected and referred to the DEP. On December 3, 2018, a person made a complaint to 311 about a six-inch collapsed area,

about 34 inches in diameter, that was one inch below the roadway at Madison Ave and East 52nd Street. It was also reported to the DEP. A similar report was made to 311 on December 10, 2018, and the reporting person uploaded 2 photos to 311's website. A complaint was made on December 18, 2018, about a hole in the street at Madison Avenue and East 52nd Street. A referral was made to the DEP following an inspection. The internal agency notes reported a six-inch area collapse. On December 19, 2018, another report was made to 311 and that person indicated that the cave-in was so deep someone's foot could get stuck in it and cause a fall. This report was also referred to the DEP.

Ms. Williams also testified about certain defect reports at and around Madison Avenue and East 52nd Street. Defect number DN2017311005, which was generated and closed on November 5, 2017, concerned a pothole at 477 Madison Avenue, between East 51st and East 52nd Streets. Defect number DN2018225014 was generated on August 12, 2018, regarding a pothole on Madison Avenue between East 51st and East 52nd Streets, to which a crew responded on August 13, 2018, and reported that no defect was found. Defect number DN2018353006 was reported on December 19, 2018, at 485 Madison Avenue between East 51st and East 52nd Streets, to which a crew responded, and it was closed out of the system the next day. A second defect number was generated on December 19, 2018, DN2018254013, giving the location of the defect as 485 Madison Avenue between East 51st and East 52nd Streets, but it was closed the next day. On November 30, 2018, a person reported to 311 that there was a five-inch-wide cave at the eastside crosswalk of Madison Avenue and East 52nd Street. Ms. Williams testified that on April 27, 2018, a document was served on DOT relating to defects at 466 to 488 Madison Avenue, as well as two other documents that were served on DOT, but she did not know where those documents came from.

Ms. Williams produced, but could not interpret, the Big Apple Maps which are kept in the files of the Office of Construction Mitigation and Coordination ("OCMC"). Ms. Williams also testified about the various permits granted to various entities for work to be completed, for example, a permit issued to Con Ed on March 26, 2017, to open the roadway to cure concrete, and a permit issued to Empire to build conduits on March 29, 2017.

Among the exhibits submitted by The City are records of the work done at 477 Madison Avenue between East 51st and East 52nd Streets on August 29, 2017, and November 6, 2017. The documents also show that pothole repair was done on December 20, 2018, at 485 Madison Avenue at East 52nd Street.

The City submitted an affirmation by Yelena Pasynkova, an employee of the DOT in the Division of Roadway Repair and Maintenance ("RRM") (NYSCEF Doc. #127), who described the DOT records of reports relating to various defect numbers. Defect numbers DM2017091043 and DM2017235005 were pothole reports generated from 311 that were repaired in 2017. Defect number DM2018135021 was a pothole report generated upon DOT's inspection on May 14, 2018, which was repaired and closed on May 15, 2018. Defect number DM2018225014 was a pothole report generated on August 12, 2018, for the area on Madison Avenue from East 51st to East 52nd Street, which was closed on August 13, 2018, as no defect was found by the responding pothole crew. Defect number DM2018268004 was a pothole report generated by a person who contacted 311 on September 25, 2018, but that report was closed on October 2, 2018, as it was found to have been restored. Defect number DM2018274011 was a pothole report from the public, which was generated on October 1, 2018, and marked as a duplicate work order on October 2, 2018. Defect number DM2018318010 was generated on November 14, 2018, by a 311 report from the public about a hole six inches deep and six inches wide, but was closed on November 23, 2018, when the defect was

not found. Defect number DM2018330017 was generated on November 26, 2018, after an online report from the public about a street cave-in in the eastside crosswalk of Madison Avenue and East 52nd Street. It was referred to the Highway Inspection and Quality Assurance unit of the DOT. Defect numbers DM2018330018, DM2018330019 (which noted that someone was injured in the pothole), and DM2018330020 were duplicate 311 complaints created online also on November 26, 2018. Defect number DM2018353006 was generated on December 19, 2018, by a member of the public reporting an issue on Madison Avenue between East 51st and East 52nd Streets, which was repaired and closed on December 20, 2018. Defect number DM2018354013 was generated on December 19, 2018, for a defect on Madison Avenue between East 51st and East 52nd Street, which was repaired and closed on December 20, 2018.

The City submitted the affirmation of Mohammad Hoque, an employee of the DOT and Supervisor in RRM, who established that the pothole, defect number DM2017311005, reported in August 2017, was repaired by the DOT on November 5, 2017.

In opposition to The City's summary judgment motion, plaintiff submitted photographs, an expert report, and plaintiff's deposition. Plaintiff testified that he walked on the southside of East 52nd Street from Lexington Avenue to Madison Avenue, and while crossing Madison Avenue in the middle of the bus lane, a path he walks multiple weeks each month, six days per week, to his job, his foot got caught in a defective condition and he fell. The defect was described as being poorly filled in and not level.

Robert T. Fuchs, P.E., plaintiff's expert, stated in his affidavit that on April 23, 2019, he "inspected the marked pedestrian crosswalk that provides access between the east and west sides of Madison Avenue at the southern intersection with East 52nd Street," and found that "[t]he extensive cracked, broken, loose, and dislodged conditions affecting the patched pavement pose inherent

walking hazards whereby a pedestrian is at risk for tripping, stumbling, or having their foot become entrapped in the cavities and depressions." (NYSCEF Doc. #142, ¶7). He opined that based on the Google pictures "the patch had been performed sometime within the 6 month period prior to the accident. The extent of disintegration affecting the pavement at the patch is consistent with premature and rapid deterioration because the patch had been performed in an overall defective manner that made it at immediate risk for failure under normal use and service conditions." *Id.*

Both The City and plaintiff submitted Google photos of the crosswalk. The Google photo of the crosswalk that plaintiff submitted showed no defect in the crosswalk in August 2018 (NYSCEF Doc. #141). The Big Apple Map dated April 28, 2018 (NYSCEF Doc. #124, pg. 518), which reported "damaged Patchwork" in the street, is not applicable as the subsequent Google photo taken in August 2018 showed no damaged patchwork in the crosswalk. The patched crosswalk could be seen in the May 2019 photo. The Google photo submitted by The City did not show a patched crosswalk in the Google photo of October 2017 but showed a patch in the crosswalk in May 2019 (NYSCEF Doc. #129).

**Summary Judgment Motion by Oliveira**

Oliveira seeks leave to file a late summary judgment motion on the grounds that the records it needed for its motion, specifically, the supplemental search, were the same records The City submitted when it filed its summary judgment motion on the last day the defendants were able to file their such motions. CPLR §3212 (a) provides for service of a late summary judgment motion "with leave of the court on good cause shown." Oliveira has shown good cause as it was relying upon the records maintained and produced by The City, the keeper of such records. Oliveira did not have control of these records and could not access them until The City produced them in the supplemental search. Here, Oliveira's leave to file a late summary judgment motion is granted. In

any event, the Court has the authority to search the record and grant summary judgment to a non-moving party where the issue has been raised by a party. CPLR §3212 (b); *Horst v. Brown*, 72 A.D.3d 434, 900 N.Y.S.2d 13 (1st Dept. 2010) *appeal dismissed* 906 N.Y.S.2d 805, 933 N.E.2d 203 (2010); *N.H. Ins. Co. v. MF Glob., Inc.*, 108 A.D.3d 463, 970 N.Y.S.2d 16 (1st Dept. 2013).

In addition to the supplemental search of the roadway at Madison Avenue between East 51st and East 52nd Streets conducted by The City, Oliveira also relied on the affidavit of Luis Pereira, the Superintendent of Construction for Oliveira, who stated that the work Oliveira did along Madison Avenue did not involve asphalt work or paving but concerned concrete handicapped ramps on corners. He further stated that while Oliveira at times was issued permits for work in the area, the work was not always done (NYSCEF Doc. #135).

Plaintiff's opposition to Oliveira's summary judgment motion only addressed the issue of the lateness of the filing, but not the merit of the motion; that is, that Oliveira only worked on the handicapped ramps on the corners.

**Discussion**

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v. Waisman,* 39 A.D.3d 303, 306, 833 N.Y.S.2d 89 (1st Dept. 2007), *citing Winegrad v. New York Univ. Med. Center,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v Prospect Hosp.,* 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986). If the proponent makes the required *prima facie* showing, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial. CPLR §3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d

557 (1980); *Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 733 N.E.2d 203, 711 N.Y.S.2d 131 (2000).

"It is well established that summary judgment may not be granted whenever the pleadings raise clear, well-defined and genuine issues." *Falk v. Goodman*, 7 N.Y.2d 87, 89, 163 N.E.2d 871, 195 N.Y.S.2d 645 (1959). Upon a motion for summary judgment, the role of the court is issue finding, not issue determination. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240, 942 N.Y.S.2d 13 (2012); *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957); *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322 (1st Dept. 1947). The motion should be denied where different conclusions can reasonably be drawn from the evidence. *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992). All of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor. *Udoh v. Inwood Gardens, Inc.*, 70 A.D.3d 563, 897 N.Y.S.2d 12 (1st Dept. 2010). Issues of credibility are to be resolved at trial, not by summary judgment. *Castillo v. New York City Tr. Auth.*, 69 A.D.3d 487, 891 N.Y.S.2d 645 (1st Dept. 2010).

Admin Code §7-201(c)2 provides in pertinent part that

> No civil action shall be maintained against the city…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.

Admin Code §7-201(c)4 further provides that "[w]ritten acknowledgement shall be given by the department of transportation of all notices received by it." The acknowledgement requirement is sufficient to satisfy the Pothole Law where "[an]other agency is performing the function (normally performed by DOT) of remedying an unsafe condition in the roadway",… and "a written statement showing that the city agency responsible for repairing a condition had first-hand knowledge both of the existence and the dangerous nature of the condition…" *Bruni v. City of N.Y.*, 2 N.Y.3d 319, 325, 778 N.Y.S.2d 757, 811 N.E.2d 19 (2004); *Id.*

The City has the initial burden of establishing that it did not have prior written notice of a defect. *See*, *Yarborough v. City of N.Y.*, 10 N.Y.3d 726, 853 N.Y.S.2d 261, 882 N.E.2d 873 (2008). "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." *Katz v. City of New York*, 87 N.Y.2d 241, 243, 661 N.E.2d 1374, 638 N.Y.S.2d 593 (1995). "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 [internal citation omitted]." *Id.* Prior written notice can be satisfied through the maps prepared by Big Apple, *Id*; "[h]owever, verbal or telephonic communication to a municipal body that is reduced to writing does not satisfy the prior written notice requirement, even if the writing includes a service report." *Carney v. City of N.Y.*, 232 A.D.3d 535, 536, 222 N.Y.S.3d 52 (1st Dept 2024); *Harvey v. Henry 85 LLC*, 171 A.D.3d 531, 98 N.Y.S.3d 75 (1st Dept 2019), *lv. denied*, 33 N.Y.3d 911, 107 N.Y.S.3d 269, 131 N.E.3d 278 (2019)("service report that was the result of a verbal or telephonic communication received through the City's 311 system, is insufficient to raise an issue of fact as to prior written notice."); *Stoller v. City of N.Y.*, 126 A.D.3d 452, 2015 NY Slip Op 01876, 2 N.Y.S.3d 357 (1st

Dept. 2015)("records of citizen reports of two potholes in the area and FITS reports of repairs made to potholes in front of a building on Canal Street did not provide the City with prior written notice of the particular defect in the crosswalk where plaintiff fell"); *Kapilevich v. City of N.Y.*, 103 A.D.3d 548, 960 N.Y.S.2d 39 (1st. Dept 2013). "[P]ermits issued to other parties do not show notice of the defective condition." *Haulsey v. City of N.Y.*, 123 A.D.3d 606, 607, 999 N.Y.S.2d 400 (1st Dept 2014). Here, The City established that it did not have prior written notice of the defect that caused plaintiff's accident as is required by Admin Code §7-201(c)2 as none of the reports received and produced during the various searches satisfied the writing requirement.

Where The City establishes that it lacked prior written notice under the Admin Code §7-201(c)2, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the prior written notice law: "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." *Yarborough*, 10 N.Y.3d at 728. The affirmative negligence in creating the defect is "limited to work by The City that immediately results in the existence of a dangerous condition." *Bielecki v. City of N.Y.*, 14 A.D.3d 301, 788 N.Y.S.2d 67 (1st Dept. 2005); *Oboler v. City of N.Y.*, 8 N.Y.3d 888, 890, 832 N.Y.S.2d 871, 864 N.E.2d 1270 (2007)(summary judgment granted where "plaintiff presented no evidence of who last repaved this section of the roadway before the accident, when any such work may have been carried out, or the condition of the asphalt abutting the manhole cover immediately after any such resurfacing."). The repair must be close in time to have created the "immediate" dangerous condition. *See*, *Trentman v. City of N.Y.*, 162 A.D.3d 559, 559-560, 80 N.Y.S.3d 225 (1st Dept. 2018)(summary judgment granted where "evidence that defendant repaired a defect several months before plaintiff's accident does not provide a basis for an inference that the repair resulted in an immediately hazardous condition."); *Civic v. City of N.Y.*, 215 A.D.3d 445, 446,

188 N.Y.S.3d 12 (1st Dept. 2023)("Plaintiff's claim that the City's alleged negligent repair of a defect at the location several months before the incident resulted in an immediate hazardous condition was speculative."). That "the defendant repaired a defect three months prior to the subject accident in the general vicinity of the plaintiff's fall does not provide a basis for an inference that the repair immediately resulted in the existence of a dangerous condition." *Smith v. City of New York*, 228 A.D.3d 472, 473, 213 N.Y.S.3d 302 (1st Dept. 2024)

Plaintiff's expert opined that the repair was done within the past six months based on the Google picture. "The plaintiff's assertion that the defendant performed asphalt repair work at the location of the alleged defect—based solely on Google Street View images depicting the area over time—was inherently speculative." *Goodman v. City of N.Y.*, 230 A.D.3d 1115, 1117, 219 N.Y.S.3d 340 (2nd Dept. 2024). Plaintiff failed to present any evidence that the repair was improperly done or that the improperly done repairs immediately cause the defected condition. *See*, *Thompson v. City of N.Y.*, 172 A.D.3d 485, 2019 NY Slip Op 03674, 99 N.Y.S.3d 312 (1st Dept. 2019)("Even if defendant had applied a cold patch, and only temporarily cured the condition, plaintiff has offered no evidence that doing so was inadequate, or that such allegedly inadequate repairs immediately resulted in the dangerous condition that caused his accident."). Summary judgment is granted where the condition that caused plaintiff's injury developed over time. *See*, *Bania v. City of N.Y.*, 157 A.D.3d 612, 2018 NY Slip Op 00470, 70 N.Y.S.3d 183 (1st Dept. 2019); *Yarborough*, 10 N.Y.3d at 728 (summary judgment granted where "plaintiff's expert found that the deterioration of the asphalt patch--the condition that caused plaintiff's injury--developed over time with environmental wear and tear."); *Speach v. Consol. Edison Co. of N.Y., Inc.*, 52 A.D.3d 404, 860 N.Y.S.2d 99 (1st Dept. 2008)(complaint dismissed where "the condition that caused plaintiff's fall developed over time."); *Bielecki*, 14 A.D.3d at 301.

Here, plaintiff failed to establish a triable issue of material fact as to whether The City created the defective condition. Plaintiff's expert's use of the Google photo taken in August 2018 to establish that the repair was done within the last six months is speculative and does not establish that the repair made by The City immediately created a dangerous condition. Furthermore, Plaintiff's expert affidavit established that the defect developed over time.

Accordingly, it is hereby:

**ORDERED**, that the summary judgment motion filed by The City (Motion Seq. 3) is granted in its entirety; it is further

**ORDERED**, that the summary judgment motion filed by Oliveira (Motion Seq. 4) is granted in its entirety; it is further

**ORDERED**, that the amended complaint and any crossclaims are dismissed against The City and Oliveira; it is further

**ORDERED**, that, as no defendants remain, this matter is discontinued with prejudice; and it is further

**ORDERED**, that Oliveira shall serve a copy of this Decision and Order with Notice of Entry upon all parties within fifteen (15) days of the date herein and file proof of said service.

This constitutes the Decision and Order of the Court.

ENTER:

May 12, 2025
DATE

HON. CAROL SHARPE, J.S.C.

HON. CAROL SHARPE
J.S.C.

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| CHECK ONE: | X | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
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