

Klug v City of New York

2025 NY Slip Op 33405(U)

September 11, 2025

Supreme Court, New York County

Docket Number: Index No. 155115/2016

Judge: Ariel D. Chesler

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

PRESENT: HON. ARIEL D. CHESLER **PART** **62M**

Justice

-----X

LAURA KLUG

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 155115/2016

MOTION DATE 05/02/2025

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192

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

Upon the foregoing documents, it is

Defendant CITY OF NEW YORK (“the City”) moves for an order, pursuant to CPLR §3212, granting City summary judgment dismissing the complaint. Plaintiff opposes the motion. For the reasons stated herein, the motion is granted.

This is an action arising from personal injuries allegedly sustained by plaintiff on or about July 17, 2015, at approximately 5:30 p.m., while plaintiff was walking in the crosswalk from the southeast corner to the southwest corner of the intersection of Madison Avenue and East 45th Street, New York, New York (“subject location”), caused by an alleged pothole. Plaintiff commenced this action by filing a Summons and Complaint on or about June 17, 2016. The City served it’s Answer on or about July 6, 2016.

In support of this motion, the City contends the plaintiff’s Complaint and all cross-claims should be dismissed because the City did not receive prior written notice of the alleged defective condition as required by New York City Administrative Code § 7-201 (“§7-201”). The City

submits an Affirmation of Henry Williams, a Department of Transportation (“DOT”) employee wherein he affirms that he conducted a search of records pertaining to the subject location (*see* NYSCEF Doc. No. 178). He affirms the search revealed: : eighty-seven (87) permits, sixty-three (63) hardcopy permits, sixty-three (63) applications, zero (0) OCMC files, five (5) CARs, nine (9) NOVs, one (1) NICA, seventy-five (75) inspections, zero (0) contract information and/or in-house resurfacing records, one (1) maintenance and repair orders/records, two (2) complaints, one (1) gangsheet for roadway defects, one (1) handwritten gangsheet for roadway defects, zero (0) gangsheets for milling and resurfacing records, zero (0) handwritten gangsheets for milling and resurfacing records located, three (3) Office of Special Events reports, and one (1) Big Apple Map (*id.*)

However, the City argues that none of the above-mentioned records provide the City with prior written notice. The City attests that permits issued by the City do not constitute prior written notice, and as such, the eighty-seven (87) permits in both the intersection and roadway that the search revealed, do not constitute prior written notice of the condition alleged to have caused plaintiff’s accident. Moreover, the City claims the five (5) CARs, nine (9) NOVs, one (1) NICA, seventy-five (75) inspections, one (1) maintenance and repair orders/records in the intersection and roadway searches do not provide the City with prior written notice of the subject condition. Of the seventy-five (75) inspections, the City avers forty-seven (47) resulted in a pass, nine (9) remarked “work not done, permit expired,” one (1) remarked “work not started,” two (2) resulted in “LL14 Backfill Pass,” and (1) remarked “LL14 Blackfill Re-Scheduled” (*see* NYSCEF Docs. Nos. 174,175 and 176). As such, the City claims none of these inspections provide prior written notice because they resulted in a final passing condition or indicate no work was completed. Furthermore, the City asserts of the remaining fifteen (15) inspections, none

provide the City with prior written notice, as they relate to a different defect than a pothole or different location than where plaintiff's incident occurred.

In this same manner, the City argues none of the complaints and special events reports here provide prior written notice as both complaints are unrelated to the condition that is alleged to have caused plaintiff's injury. In addition, the City states the maintenance and repair order and related gangsheet refer to a condition at the intersection of East 45th Street and Madison Avenue, however, a response crew supervised by Highway Repair Wallace repaired all defective conditions at the location on March 11, 2014 (*see* NYSCEF Doc. No. 183, ¶¶ 4-5). Thus, the City contends this cannot provide prior written notice as it cannot be the same pothole as alleged to have caused plaintiff's accident because this defect was found to be repaired over one year prior to the alleged incident and marked "closed." The City argues that the Big Apple Map revealed in the DOT search also does not provide the City with prior written notice of the alleged condition as it does not reveal a pothole at the subject location where plaintiff's incident occurred.

The City also argues that there is no evidence to establish the City immediately caused or created the defective condition that allegedly caused plaintiff's injuries, and therefore, is entitled to summary judgment.

In opposition, plaintiff argues that there is a question of fact as the City's records reveal there were numerous dangerous conditions at the subject location. Plaintiff argues that the City's records show that the area around, and including, the intersection of Madison Avenue and East 45th Street was full of defective and dangerous conditions (*see* NYSCEF Doc. Nos. 174-177).

Plaintiff contends that the Big Apple Map demonstrates that the southeast corner of the intersection at the subject location had a broken, misaligned or uneven curb, and there was a large section of broken sidewalk just past the southwest corner, and there is an even larger section of broken curb just past the southwest corner (*see* NYSCF Doc. No. 178, p. 261). Further, plaintiff argues the Big Apple Map reveals a black circle in the area where plaintiff fell. (*id.*). In addition, plaintiff also argues that the City's records demonstrate that there was a substantial amount of repair work that had occurred proximate to the location of plaintiff's incident (*see* NYSCEF Doc. Nos. 174-177). Specifically, plaintiff points to the record which states that a trench sunken in crosswalk at the intersection in the crosswalk at Madison Ave and East 45th Street was repaired on July 24, 2014 (*see* NYSCEF Doc. No. 174, p.261). Plaintiff also points to the EBT testimony of Greogy Harris, the supervisor for highway repairs, who testified that when the crew was assigned to look at the trench sunken in crosswalk and that location, they picked up fourteen potholes" (*see* NYSCEF Doc. No. 182, P. 29). Plaintiff argues that the testimony of Mr. Harris and the City's documentary evidence are in accord with the photographic evidence of the dangerous condition (*see* NYSCEF Doc. No. 185). Plaintiff asserts the photographic evidence conclusively demonstrates that there was a differently colored rectangular section of crosswalk suggestive of repair work (*id.*) and the condition appears to be connected to the dangerous hole that caused plaintiff's injuries.

Lastly, plaintiff argues that the City failed to submit any evidence by someone with personal knowledge or expertise that the repairs were properly performed and could not have immediately resulted in the subject condition that caused plaintiff's accident.

In reply, the City argues as plaintiff alleges that a pothole in the roadway at the subject location caused her incident, any notice of an alleged defective curb or sidewalk cannot provide

the City with notice of the specific defect which allegedly caused plaintiff's injury. The City also points to the Big Apple Map key and states that crosswalk defects are represented by squares, and as there are no squares on the Big Apple Map in the exact location of plaintiff's incident, the Big Apple Map does not provide the City with prior written notice. Moreover, the City argues that, as demonstrated by the Sanborn Map Legend, the filled in black circles on the Big Apple Map plaintiff refers to in her opposition papers are representative of fire hydrants (*see* NYSCEF Doc. No. 184). In response to plaintiff's argument that the City had notice of a sunken trench at the subject location where plaintiff fell, the City argues that this would not give it notice as the "defect repaired" was marked as "done" and the proposed repair date was July 24, 2014, a year before plaintiff's accident. Furthermore, the City asserts any testimony from Mr. Harris that additional potholes were found during the repair work on July 24, 2014, still does not give the City notice as all potholes at the subject location were repaired in 2014, and plaintiff's alleged incident occurred in 2015. As such, the City argues there is no evidence that it had notice of any potholes in existence on the date of plaintiff's alleged incident.

The City states that the burden is on plaintiff to come forward with evidence in admissible form to show that an issue of fact exists, which the plaintiff failed to do as the City showed in its motion that it did not cause or create the alleged condition. The City argues that plaintiff's argument that the photographs of a "different colored rectangular section of the crosswalk" suggest work was done by the City is speculative and fails to rebut the City's entitlement to summary judgment.

ANALYSIS

The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v. New York Univ. Med., Ctr.*, 64 NY2d 851 [1985]). "The proponent of 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” (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 323 [1986]). Once the movant has satisfied this standard, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Kaufman V. Silver*, 90 NY2d 204 [1997]). In order to defeat a motion for summary judgment, the opposing party must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Elstein v. City of New York*, 209 A.D.2d 186 ([1st Dept 1994])). Mere conclusions, unsubstantiated allegations or assertions are insufficient to create an issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Section 7-201 of the Administrative Code of the City of New York (hereinafter “§ 7-201”) limits the City’s duty of care over municipal streets and sidewalks by imposing liability only for the defects where the City had actual notice of the specific defect in the specified location. There are two exceptions to this 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” (*Yarborough v. City of New York*, 10 NY3d 726, 728 [2008]). For the City to be liable under the “cause and create” exception, the affirmative negligence must “immediately result in the dangerous condition” (*id.*; *see also Oboler v. City of New York*, 8 NY3d 888, 890 [2007]). “Where the City establishes that it lacked prior written notice under the Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule” (*Yarborough*, 10 NY3d at 728).

“Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc., and filed with the Department of Transportation serve as prior written notice of defective conditions

depicted herein” (*id.*). However, “the awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident” (*Roldan v. City of New York*, 36 AD3d 484 [1st Dept 2007]).

Here, the City has met its prima facie burden. None of the permits revealed in the DOT search provide prior written notice, as it is well-settled law that permits do not constitute prior written notice (*see Meltzer v. City of New York*, 156 AD2d 134 [1st Dept 1989]; *Bolanos v. City of New York*, 29 AD3d 455, 456 [1st Dept 2016] [holding permits issued by the City do not establish that the City had “prior actual or written notice of a dangerous condition in the roadway where plaintiff was injured”]). Additionally, the CARs, NOVs, NICAs, inspections, complaints, and special events reports do not provide the City with notice as they were either for a different defect than what plaintiff alleges caused her incident, at a different location, or marked repaired before plaintiff’s accident (*D’Onofrio v. City of New York*, 11 NY3d 581, 586 [2008]; *Belmonte v. Metro Life Ins. Co.*, 759 N.Y.S.2d38 [1st Dept 2003]; *see Batts v. City of New York*, 93 A.D3d 425 (1st Dept 2012); *see also Lopez v. Gonzalez*, 44 AD3d 1012 [2d Dept 2007] [“[C]ontrary to the plaintiffs contention, neither the citizen complaints nor the prior written repair orders constitute written notice" of the defects]).

Furthermore, the maintenance and repair orders/records, or gangsheets for the roadway defects do not provide the City with notice of the alleged defective condition (*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]; *see also Lopez*, 44 AD3d at 1013 [“Even if the City had been provided with written

notice of those prior defects, the plaintiff failed to present any evidence that the City received prior written notice of the subject defect following the repair”]).

The Big Apple Map also fails to provide the City with prior written notice, as there are no markings that indicate a pothole in the area where plaintiff alleges her accident occurred (*Roldan*, 36 AD3d at 434; *D’Onofrio*, 11 NY3d at 585 [“Since the defect shown on the Big Apple Map was not the one on which the claim...was based, the lower courts in the case correctly set aside verdict and entered judgment in the City’s favor”]).

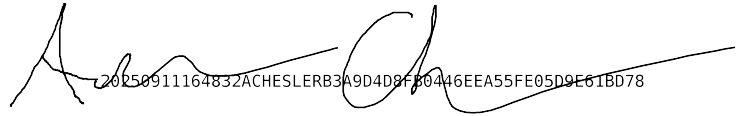
In sum, the facts and record evidence presented, including sworn testimony and photographs, establish that the City had no prior written notice of the dangerous condition. In turn, plaintiff has not met the burden to show the City caused or created the condition alleged to have caused the incident (*Trentman v. City of New York*, 162 AD3d 559, 559-560 [1st Dept 2018] [“Evidence that defendant repaired a defect several months before plaintiff’s accident does not provide inference that the repair resulted in an immediately hazardous condition”]; *see also Civic v. City of New York*, 215 AD3d 445, 446 [1st Dept 2023] [“Plaintiff’s claim that the City’s alleged negligent repair of a defect at the location several months before he incident resulted in an immediate hazardous condition was speculative”]).

Accordingly, it is hereby,

ORDERED that City’s motion for summary judgment is granted and the case against City is therefore dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.


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9/11/2025
DATE

ARIEL D. CHESLER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: