[* 1]

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Justice

David R. Hagin

-v-

City of New York

INDEX NO. 116990/06

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

E 4/10/12 ac

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH [illegible] ORDER

FILED

APR 10 2012

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/9/12

APR 09 2012

BARBARA JAFFE J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

---x

DAVID R. HOGIN AND KAREN M. HOGIN,

Plaintiff,

-against-

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, NICO ASPHALT, INC., AND MANETTA INDUSTRIES, INC.,

Defendants.

---x

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

NICO ASPHALT, INC., AND MANETTA INDUSTRIES, INC.,

Third-Party Defendants.

---x

Index No. 116990/06

Motion Subm.: 1/17/12
Motion Seq. No.: 003

DECISION & ORDER

Third-Party Index No. 590452/07

BARBARA JAFFE, JSC:

For plaintiffs:
John Downing, Jr., Esq.
Downing & Peck, P.C.
17 Battery Pl., Ste. 709
New York, NY 10004
212-514-9190

For City:
Stacy L. Cohen, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007-2601
212-788-0609

By order to show cause dated December 20, 2011, plaintiffs move for leave to renew and/or reargue my decision and order dated October 31, 2011 in which I granted defendant City's

motion for summary judgment and dismissed the complaint against it and denied plaintiffs' motion to strike or compel. City opposes.

I. BACKGROUND

As set forth in the prior order, on August 11, 2005 plaintiff David R. Hogin was allegedly injured when he tripped and fell in a hole in the crosswalk at the intersection of Central Park South/West 59th Street and Seventh Avenue in Manhattan. In dismissing the complaint against City, I found as follows:

> Here, City established, *prima facie*, that it received no prior written notice of the sinkhole on which plaintiff allegedly tripped as the [Department of Transportation (DOT)] records relate only to potholes which were repaired before plaintiff's accident, and the [Department of Environmental Protection (DEP)] record related to a sinkhole reflects that DEP inspected the area and found no sinkhole. There is also no evidence demonstrating that the alleged hydrant leaks caused or were related to the sinkhole.
>
> Plaintiff failed to offer any evidence showing that City performed work that immediately resulted in the creation of the sinkhole. Rather, they argue that City's failure to inspect the area and/or to discover or repair sufficiently any leaks under the street caused the sinkhole. Not only is their claim purely speculative, but a claim of negligent inspection or failure to repair does not establish that City affirmatively created the defect. (*See Vega v City of New York*, 2011 WL 4835685, 2011 NY Slip Op 07161 [1st Dept] [City's failure to perform permanent repair of roadway defect not affirmative act of negligence]; *Farrell v City of New York*, 49 AD3d 806 [2d Dept 2008] [failure to maintain or repair roadway constitutes act of omission rather than affirmative negligence]; *Silva v City of New York*, 17 AD3d 566 [2d Dept 2005], *lv denied* 5 NY3d 705 [failure to repair water main does not establish that City created defect]). Plaintiffs have thus failed to demonstrate that any triable issues exist as to whether City affirmatively created the sinkhole . . .
>
> In light of this result, and as none of the records or witnesses that plaintiffs seek pertain to the issue of prior written notice or the creation of the sinkhole, plaintiffs' motion to strike or compel is denied.

II. CONTENTIONS

Plaintiffs argue that I overlooked testimony from a DEP employee that water leaking from hydrants causes sinkholes such as the one at issue, and that I also overlooked the extensive

discovery owed by City which was relevant to their motion. Plaintiffs also move for leave to renew based on a newspaper article, dated September 12, 2011, in which the author discusses DOT's alleged failure to report sinkholes to the DEP or to repair them, and assert that it creates a triable issue as to whether City failed to make repairs to the sinkhole at issue. (Affirmation of John M. Downing Jr., Esq., dated Dec. 14, 2011).

City denies that I overlooked any evidence, and asserts that the newspaper article is inadmissible hearsay. (Affirmation of Stacy L. Cohen, ACC, dated Jan. 10, 2012).

In reply, plaintiffs contend that the discovery sought by them would demonstrate that City ignored and neglected to repair leaks from the hydrants which caused the sinkhole, and that the article is admissible as they are offering it to show that further discovery is needed and not for its truth. (Reply Affirmation, dated Jan. 16, 2012).

III. ANALYSIS

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221[d][2]). A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2], [3]). The determination as to whether the failure to present facts on a prior motion was sufficiently justified is discretionary. (*Mejia v Nanni*, 307 AD2d 870 [1st Dept 2003]).

Here, the DEP witness' testimony was addressed in the prior order. There, I observed

that the witness "had no personal knowledge as to whether water had been leaking from the hydrants or the cause of any alleged cave-in or pothole." Indeed, plaintiffs rely on testimony which shows only that leaking water could cause potholes. Thus, even if the testimony had been overlooked, it would not change the prior determination as it does not establish that, or raise a triable issue as to whether, a leaking hydrant at the location of plaintiff's accident caused the sinkhole in which plaintiff fell.

Similarly, I found that none of the discovery sought by plaintiffs was relevant to the issue of City's prior written notice or creation of the sinkhole. Plaintiffs do not address holdings that a failure to maintain or repair a defect is not an affirmative act sufficient to hold City liable. (*See eg Vega v City of New York*, 88 AD3d 497 [1st Dept 2011] [failure to act or repair not affirmative act for which City may be held liable]). Thus, it is irrelevant whether City failed to repair the alleged hydrant leaks, and in any event, plaintiffs' claim that leaks caused the sinkhole is speculative, conclusory, and unsupported by any evidence, expert or otherwise.

This is also not a matter where City has failed to provide discovery. Rather, City provided plaintiff with the results of a two-year search of both DOT and DEP records, along with handwritten gang sheets related to three pothole repairs, and produced a DOT employee to testify as to the records, another DOT employee to testify as to a particular pothole which DOT had repaired at the location, and a DEP employee to testify about his inspection of the location before plaintiff's accident.

Moreover, the newspaper article submitted by plaintiffs is inadmissible hearsay, and in any event, they do not explain its relevance to whether City had prior written notice or created the sinkhole. (*See P&N Tiffany Props., Inc. v Maron*, 16 AD3d 395 [2d Dept 2005], *lv denied* 5

NY3d 757 [court properly denied leave to renew as newspaper article was inadmissible and also conclusory and irrelevant]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for leave to renew and/or reargue is denied.

ENTER:

Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: April 9, 2012
New York, New York

APR 0 9 2012

FILED

APR 1 [illegible] 2012

COUNTY CLERK'S OFFICE
NEW YORK