SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY, J.S.C. PART 5

ASHLEE MERRILL
Plaintiff

- v -

THE CITY OF NEW YORK and E.E. CRUZ &
TULLY CONSTRUCTION COMPANY
Defendants

INDEX NO. 155587/2015

MOT. DATE July 11, 2017

MOT. SEQ. NO. 004

The following papers were read on this motion for Summary Judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A through K	ECFS DOC No(s). 1-11
Notice of Cross-Motion/Answering Affidavits — Exhibits A through M	ECFS DOC No(s). 1-18
Affirmation in Opposition Exhibits 1 through 6	ECFS DOC No(s). 1-19
Replying Affidavits Exhibits A through B	ECFS DOC No(s). 1-10; 1-10

In Motion Sequence No. 004 Defendant E.E. Cruz & Tully Construction Company, (hereinafter "Cruz") seeks an order pursuant to CPLR §3212 for summary judgment, dismissing the complaint and all cross-claims; Defendant the City of New York (hereinafter "City") cross moves, seeking an order pursuant to CPLR §3212 for summary judgment, dismissing the amended complaint and all cross-claims. Plaintiff opposes the motions. The motion and cross motion are consolidated for decision.

FACTUAL BACKGROUND and CONTENTIONS

In this personal injury action, plaintiff alleges that she was injured on March 17, 2015, when she tripped and fell while walking southbound on 102nd Street at the intersection of Second Avenue, due to two potholes in the street. Plaintiff alleges that defendants were negligent in causing a defective condition to exist in the area where the accident occurred without any signs or warnings thereat. (Paliseno Aff., Ex. A and B; Papandrew Aff., Ex. A and B). According to plaintiff's testimony, the accident happened as she was crossing East 102nd Street; the pothole is on the corner of East 102nd Street. (Paliseno Aff. Ex. F, p. 10, line 22; p. 11, lines 9, 13-15). During her 50-h hearing, and during her deposition, plaintiff reviewed several photographs depicting the location of the accident and marked the photographs, identifying where she tripped and fell. (Papandrew Aff. Ex. I; Paliseno Aff. Ex.D). It is undisputed that plaintiff fell while she was walking on the roadway, east of the crosswalk on East 102nd Street in the southbound direction.

Defendant Cruz is a construction company which is a member of E.E. Cruz & Tully Construction Company Joint Venture for the Second Avenue subway. (Paliseno Aff., Ex. C). Cruz' business involves moving utilities and building train stations and was hired to perform construction pertaining to the Second Avenue subway station. (Id.). Jean Dorceus, is employed by Cruz as the site safety coordinator responsible for "safety matters on the project, training and safety, orientation for new employees writing safe work plans, and making accident reports for any injuries." (Id. at ¶ 2).

According to the deposition testimony and affidavit of Mr. Dorceus, Cruz did not do any utility relocation work on East 102nd Street between Second and First Avenues. (Id. at ¶5; Ex. H). Mr. Dorceus also reviewed permits that were issued to Cruz by the New York City Department of Transportation ("DOT") and reviewed the photographs which identify the location of plaintiff's alleged accident. Based on that review, Cruz has established that it did not perform any work, nor direct any contractor to perform any work at the subject location. According to Mr. Dorceus, "[t]his area fell outside of the

scope of the work that E.E. Cruz/Tully Joint Venture was hired to perform." (Paliseno Aff., Ex. C, ¶6). Mr. Dorceus testified that on or before the date of the subject incident, Cruz worked primarily underground, but some above ground utility work was done between 101st Street and 91st Street. (Paliseno Aff., Ex. H, p. 36-37). Mr. Dorceus was unequivocal when he testified that no work was done on 102nd Street "by anybody from our company or subs." (Id. at p. 39, lines 4-7).

Rather, Cruz set up a work zone on the west side of Second Avenue running between East 102nd Street and East 101st Street, which Mr. Dorceus described as a "lay-up area" and "offices in Conex boxes or containers" which were used for loading, unloading and for the storage of containers. (Paliseno Aff., Ex. H, pp. 39-42; Ex. C, ¶4; Ex. C(b)). Based on the documentary evidence and Mr. Dorceus' testimony, Cruz contends that it has established *prima facie* entitlement to summary judgment as the evidence demonstrates that it did not perform any digging, excavation or backfilling on the roadway that could have caused or created the potholes where plaintiff fell.

Based on the pleadings and plaintiff's 50-h testimony, the City directed the DOT to conduct a search for records maintained by DOT for the subject accident location, for a period of two years prior to and including March 17, 2015, the date of plaintiff's accident. (Papandrew Aff. Ex. K). Omar Codling, a DOT records searcher, appeared for a deposition and testified that DOT had conducted a search for permits, applications for permits, Corrective Action Requests (CARS), Notice of Violations (NOVS), Notification for Immediate Corrective Actions (NIICAS), inspections, in-house resurfacing records, maintenance and repair orders, complaints, gang sheets for roadway defects, gang sheets for milling and resurfacing records, special events reports, Big Apple Maps and legends. (Papandrew Aff. Ex. L).

The intersection search for East 102nd Street and 2nd Avenue revealed eight (8) permits, eight (8) hard copy permits, eight (8) applications for permits, one (l) Office of Construction Mitigation and Coordination file, one (1) CAR, six (6) inspections, two (2) maintenance and repair orders/records, five (5) complaints, two (2) Gang sheets for Roadway Defects, two (2) handwritten Gang sheets for Roadway Defects and (2) Big Apple Maps. (Papandrew Aff. Ex. M). These documents were produced during discovery pursuant to the Case Scheduling Order ("CSO").

Of the five complaints located in the intersection search, only two reference a pothole. One of the two complaints reference a pothole in the "crosswalk" and therefore, the City contends it is irrelevant as plaintiff testified she was not in the crosswalk at the time of her accident. The other complaint is dated ten months prior to the date of plaintiff s accident and references two potholes on East 102nd Street between First Avenue and Second Avenue. The City maintains that a review of the DOT records related to this complaint reveals one pothole was filled at the intersection of Second Avenue and 102nd Street on June 9, 2014, almost ten months prior to the subject incident. The other pothole was determined to be a "cave-in" located in front of 313 East 102nd Street, which is not the location of Plaintiff s accident, and thus the City argues is not relevant to resolution of the issues before the court.

Of the eight permits issued for roadway work at the intersection of East 102nd Street and Second Avenue none were issued to City agencies. Of the twelve permits issued for roadway work on East 102nd Street between Second Avenue and First Avenue, three were issued to the New York City Department of Environmental Protection (hereinafter "DEP"). (Id. at ¶ 5). The City points out that the permits issued to DEP were to repair a water condition and/or hydrant on East 102nd Street and not related to the subject condition - a pothole. The roadway segment search revealed twenty-two complaints, several of which referenced potholes. However, none were specifically noted as located at the intersection of East 102nd Street and Second Avenue, the location of plaintiff's accident. Moreover, each of these complaints has an associated work order indicating the referenced potholes were filled. (Papandrew Aff. Exs. K, L and M). As such, the City argues that the complaints do not establish prior written notice regarding the alleged defect.

Likewise, the City argues that the applicable search of DOT records revealed no records constituting prior written notice and a review of the Big Apple Maps revealed no relevant marks providing the City with the requisite written notice to hold it liable in damages for Plaintiff s injuries. The City maintains that the documentary evidence establishes, *prima facie*, that it is entitled to summary judgment as it did not have prior written notice of the alleged defective condition pursuant to New York City Administrative Code §7-201(c)(2), and it did not cause or create the alleged defective condition.

In opposition to defendants' motions for summary judgment, plaintiff contends that summary judgment is a drastic remedy and that there are issues of fact as to whether Cruz caused or created the potholes. In addition, plaintiff argues that she has presented issues of fact concerning whether the City had prior written notice of the alleged defective condition. Finally, plaintiff argues that factual issues have been presented concerning whether the City caused or created the pothole in question.

STANDARD OF REVIEW/ANALYSIS

When deciding a summary judgement motion, the Court's role is solely to determine if there are any triable issues of fact, not to determine the merits of any such issues. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 NYS2d 316 (1985). The Court must view the evidence in the light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Sosa v. 46th St. Dev. LLC,* 101 AD3d 490, 492, 955 NYS2d 589 (1st Dept. 2012). If there is any doubt as to the existence of a triable fact, the motion for summary judgement must be denied. CPLR §3212[b]; *Grossman v. Amalgamated Housing Corp.*, 298 AD2d 224, 226, 750 NYS2d 1 (1st Dept. 2002).

A party opposing a motion for summary judgment may not rely upon conclusory allegations, but must present evidentiary facts sufficient to raise a triable issue of fact. *Mallad Construction Corp. v. County Federal Savings & Loan Assoc.*, 32 N.Y.2d 285, 290 (1973); *Tobron Office Furniture Corp. v King World Productions,* 161 A.D.2d 355,356 (lst Dept. 1990) (the opponent of a motion for summary judgment must assemble, lay bare and reveal his proofs; merely setting forth factual or legal conclusions is not sufficient); *Polanco v. City of New* 244 AD2d 322 (2d Dept. 1997) ("a shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment"). The opposing party has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. *Zuckerman* v. *City of New York,* 49 NY2d 557, 562 (1980).

In opposing Cruz' motion, plaintiff argues, without citation to any proof or documentary evidence, that the containers in the Cruz work zone "held heavy equipment that would likewise need to be transported to and from said location, thus constantly passing by the roadway where Plaintiff's accident occurred, causing and/or contributing to the hazardous condition that caused Plaintiff to become injured." (Mule Aff. in Opp., ¶30). Given the uncontradicted testimony of Mr. Dorceus which establishes that Cruz did not perform any digging, excavation or backfilling on the roadway that could have caused or created the potholes where plaintiff fell, plaintiff has simply failed to meet her burden to defeat summary judgment; "a shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment". *Polanco v. City of New,* 244 AD2d 322 (2d Dept. 1997).

Plaintiff also attempts to mischaracterize the scope of Cruz' work in the subject location and in opposition to Cruz' motion submits a permit application review for "Second Ave Subway Construction", a permit issued to Cruz to open the roadway/sidewalk on 2nd Avenue East and 102nd Street for the purpose of "Second Ave Subway Construction", and a work map purportedly depicting "water main work –

phase 1". (Mule Aff. in Opp., Exs. 1, 2, and 3). Plaintiff does not offer any deposition testimony or expert affidavit explaining these documents or authenticating them as relevant to the issues before the court. As such, these documents are insufficient to defeat summary judgment. *Zuckerman* v. *City of New York*, 49 NY2d 557, 562 (1980). Moreover, as Cruz argues, plaintiff had the opportunity to depose Mr. Dorceus and did not show Mr. Dorceus any of these documents during that deposition, nor did plaintiff inquire of Mr. Dorceus relative to the numerous permits and documents produced by the City in this action. Finally, as Cruz points out, the documents relied on by plaintiff to create an issue of fact with respect to Cruz' potential liability, have no relevance to the accident location at issue here.

Plaintiff's attempts to create an issue of fact by pointing to documents that have no relevance to Cruz' work in the subject location and claiming that the movement of Cruz' containers and equipment may have created the alleged potholes depicted in the photographs and identified by plaintiff, without any expert proof or documentary evidence, are simply insufficient to defeat Cruz' motion for summary judgment. Plaintiff has not sustained her burden to come forward with proof which would permit a reasonable fact-finder to reach the conclusion that Cruz performed any work in the area where plaintiff tripped and fell. Absent such a showing the court must grant Cruz' motion for summary judgment.

In order to hold the City liable, plaintiff must plead and prove compliance with Administrative Code §7-201 and demonstrate that the City had prior written notice of the allegedly defective condition and plaintiff's failure to do so requires dismissal of the complaint. *Elstein v. City of New York*, 209 AD2d 186 (1st Dept. 1994). As the Court of Appeals has recognized, prior written notice statutes are always strictly construed, and unless a party can demonstrate that a municipality failed to remedy a defect within a reasonable time of receiving written notice, the "municipality is excused from liability absent proof of prior written notice or an exception thereto [citations omitted]." *Poirier v. City of Schenectady*, 85 NY2d 310, 313 (1995). The Court in *Poirier* observed the practical reality of limiting municipal liability in this way, noting that municipal officials are not aware of every dangerous condition that may exist on a public street or walkway and thus liability to repair the defect can only be imposed after receipt of written notice of the defect. Id., 85 NY2d at 314.

Once the City meets its burden demonstrating that there was no prior written notice of the alleged defect, the burden then shifts to the party opposing the motion to demonstrate "the applicability of one of two recognized exceptions to the [prior written notice requirement] – 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." *Ortiz v. City of New York*, 67 AD3d 21, 27 (1st Dept. 2009), *rev'd* 14 NY3d 779 (2010) (reversing the First Department, finding no triable issue of fact exists "as to whether the City created a dangerous condition that caused plaintiff's injuries.").

Plaintiff argues the City's motion must be denied as there is a question of fact as to whether the City received prior written notice of the alleged defective condition. Plaintiff argues that she has complied with New York City Administrative Code §7-201, claiming the City knew about the trip hazard but never fixed it. Plaintiff contends that a FITS (Field Information Tracking System) report and subsequent work order generated by the New York City Department of Transportation (hereinafter "DOT") to repair the pothole at the subject location, establishes actual notice and cites *Bruni v. City of New York*, 2 NY2d 319 (2008), in support of her contention that "actual notice" is sufficient to establish prior written notice to the City as required by § 7-201. (Mule Aff. in Opp., Exs. 4 and 5). Plaintiff's arguments are misplaced and ignores well established caselaw and the documentary evidence submitted in support of the City's cross motion.

As the City argues, New York Courts have consistently held citizen complaints (i.e., FITS reports submitted by plaintiff in opposition to the City's motion) received by telephone and reduced to writing by the City do not constitute prior written notice. The New York Court of Appeals in *Gorman v.*

Town of Huntington, 12 N.Y.3d 275, 280 (2009) instructed, "nor can a verbal or telephonic communication to a municipal body that is reduced to writing satisfy, a prior written notice requirement." *Lopez v. Gonzalez*, 44 A.D.3d 1012 (2d Dep't 2007) is analogous to the matter herein.

In *Lopez*, the City received citizen complaints of the alleged defect which plaintiff claimed caused his accident and subsequently issued repair work orders. Id. The complained of conditions were repaired by the City prior to the date of plaintiff s accident. Id. The court held "contrary to the plaintiff's contention, neither the citizen complaints nor the prior written repair orders constituted written notice of those prior defects." Id. The court further opined "to the extent that the plaintiff contends that the prior defects provided the City with actual and/or constructive notice of the subject defect, such notice does not obviate the statutory requirement of written notice." Id. at 1013.

Moreover, plaintiff's reliance on *Bruni v. City of New York,* supra, does not support her contention that she has complied with the prior written notice requirement of §7-201. Unlike the inspection report and work order in *Bruni*, the FITS report relied on by plaintiff, was not created as a result of an inspection by the DOT. Rather, as the City correctly points out, the DOT created the FITS document as the result of a telephone call received via the City's 311 telephone complaint system. The work order, plaintiff's Exhibit 5, resulted from the telephonic complaint which was reduced to writing. The work order was not, as in *Bruni*, produced as a result of an inspection by the DOT, and as such is insufficient to satisfy the prior written notice requirement. *Gorman v. Town of Huntington*, 12 N.Y.3d 275, 280 (2009).

Plaintiff also argues that the Big Apple Maps produced by the City, establish prior written notice, contending that marks on the Big Apple Map "reasonably encompassed" the alleged defect which caused plaintiff's accident even though these marks are not in the "same location and different in character from what was noted on the Big Apple Map." (Mule Aff. in Opp., ¶39; Papandrew Aff. Ex. K). Plaintiff cites *Weinreb v. City of New York,* 192AD2d 596,598 (2d Dept. 1993) to support her contention that Big Apple Maps that incorrectly designate property with the wrong address, "give the City notice since the map reasonably apprised the City of the defect". (Mule Aff. in Opp., ¶37).

As the City correctly argues however, the instant matter is distinguishable from *Weinreb*. Here, plaintiff tripped and fell on a condition in the roadway not on the sidewalk. Further, plaintiff identified the alleged defective condition as being outside of the pedestrian crosswalk. (Papandrew Aff. Ex. H, p. 26, lines 10-14). A review of the legend for the Big Apple Map reveals there are no markings that pertain to the roadway, outside of the crosswalk. As such, plaintiff s argument that the Big Apple Maps establish prior written notice to the City of the pothole in question, is without merit.

As plaintiff's accident occurred in the roadway outside of the crosswalk, the Big Apple Maps cannot serve as notice to the City. Review of the Big Apple Maps revealed no relevant marks that would provide the City with the requisite written notice to hold it liable for plaintiff s alleged injuries. *Frank v. City of New York,* 240 A.D.2d 198 (1st Dep't 1997); *Katz* v. *City of New York* 87 N.Y.2d 241, 243 (1995). In order to be held liable, the City must have received prior written notice of the specific defect involved, and not merely a similar condition. *Belmonte v. Metro Life Ins. Co*., 759 N.Y.S.2d 38 (1st Dep't 2003).

As plaintiff has failed to meet her burden to establish that the City had prior written notice of the pothole, she attempts to demonstrate that her claim falls within one of the exceptions to §7-201, claiming that the City affirmatively created the alleged defective condition. (Mule Aff. in Opp., Ex. 6). Plaintiff argues that the City has misrepresented the evidentiary facts by arguing that the potholes identified in the DOT records are not relevant because the documents demonstrate that one was filled, and the other was determined to be a "cave-in" not near the accident location. (Papandrew Aff. Exs. K, L and M). Plaintiff attempts to utilize the DOT records to establish a question of fact concerning whether the City

caused or created the alleged defect. Again, plaintiff's argument is misplaced and based on an incorrect reading of the documentary evidence submitted in support of the City's cross motion.

Plaintiff states Defect No. DM201439031, relating to potholes located at Second Avenue and East 102nd Street, indicates "EXCAVATION NOT COMPLETE" for the specified defect number. Plaintiff claims the designation EXCAVATION NOT COMPLETE logically suggests that the potholes corresponding to Defect No. DM201439031 were not fully repaired on 619114, accusing the City of misrepresenting the document. However, as the City explains, a proper reading of the document demonstrates that the description, (EXN) EXCAVATION NOT COMPLETE, is part of an identification key describing actions which occur in response to a specific defect number. The column in the middle of the Manhattan Street Maintenance report, entitled "Action ID," contains an abbreviated description taken from the "Action ID Descriptions" column on the far-right side of the report which describes the abbreviation.

The City goes on to explain that the Action ID column for Defect No. DM20143901 contains the letters "XCL" indicating DEFECT CLOSED at the subject location. Plaintiff mistakenly reads the Action ID Description of (EXN) EXCAVATION NOT COMPLETE as being associated with Defect No. DM20143901when in fact, that phrase is part of the document identification key and unassociated with the specific defect number by which it happens to appear. Therefore, Plaintiff's assertion that the City falsely represented the evidentiary evidence is without merit. The evidentiary documentation supports the City's contention it did not receive prior written notice of the alleged defective condition pursuant to § 7-201. Further, although not its burden to do so, the City has demonstrated it did not cause or create the alleged defective condition. *Ortiz v. City of New York,* 67 AD3d 21, 27 (1st Dept. 2009), *rev'd* 14 NY3d 779 (2010). Accordingly, the City has met its burden and has established its entitlement to judgment as a matter of law.

CONCLUSION

ORDERED, that Defendant E.E. Cruz & Tully Construction Company's motion for summary judgment, Sequence No. 004, seeking dismissal of all claims and cross claims asserted against it, is granted in its entirety and the complaint is dismissed without costs; and it is further

ORDERED, that Defendant the City of New York's cross-motion for summary judgment, Sequence No. 004, seeking dismissal of all claims and cross claims asserted against it, is granted in its entirety and the amended complaint is dismissed without costs and disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

SO ORDERED:

Dated: August 10, 2017
New York, New York

HON.W. FRANC PERRY, J.S.C.

1. Check one: ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☑ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**