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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 101499/2011
LEITNER, KAREN
VS.
304 ASSOCIATES
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT Cal. #43

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED

JUL 26 2013

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 7-23-13
JUL 23 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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

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

----------X

KAREN LEITNER and ARTHUR LEITNER,

Plaintiffs,

DECISION/ORDER
Index No. 101499/2011
Seq. No. 001

-against-

304 ASSOCIATES LLC, CENTRAL PARKING SYSTEMS OF NEW YORK, INC. and CITY OF NEW YORK,

Defendants.

----------X

KAREN LEITNER and ARTHER LEITNER,

Plaintiffs,

Seq. No. 002

-against-

304 ASSOCIATES, LLC, CENTRAL PARKING SYSTEMS OF NEW YORK, INC., and CITY OF NEW YORK,

Defendants.

----------X

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED (For both sequences)
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3.....
REPLYING AFFIDAVITS.....	.....4.....
EXHIBITS.....	.....
OTHER.....(memoranda of law).....	.....5-6.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

First, it is important to note that in Sequence No. 001, defendant 304 Associates, LLC's motion dismissing plaintiff's claims and defendant's co-defendants' cross-claims against it was granted by this Court on February 19, 2013. Thus, the remaining co-defendants in the instant action are the City of New York, ("the City") and Central Parking System of New York, ("Central").

In Sequence No. 001, the City moves for an Order pursuant to CPLR§ 3211(a)(7), dismissing the complaint against the City, or in the alternative, pursuant to CPLR§3212 granting summary judgment to the City, dismissing the complaint. Plaintiff opposes.

Factual and procedural background:

This is an action wherein plaintiff Karen Leitner seeks monetary damages for personal injuries she allegedly sustained on July 20, 2010, by tripping on a pothole located along the curbside in front of 304 West 49th Street, between 8th and 9th Avenues in New York County. Consequently, plaintiff filed a Notice of Claim against the City on August 30, 2010. The instant action was subsequently commenced via Summons and Complaint dated January 18, 2011. The City joined issue upon service of its Answer on March 2, 2011.

Arguments and discussion: Seq. 001:

The City argues that it is entitled to summary judgment because it did not have prior written notice of the subject condition. It argues that since the gravamen of plaintiff's claim is that it permitted the roadway in front of 304 West 49th Street to remain in a defective condition, said claim comes under the purview of the prior written notice provision of §7-201(c)(2) of the Administrative Code of the City of New York. This statute lists three alternative prerequisites to an action maintained against the City for an injury, caused by, among other things, a roadway being out of repair, unsafe, dangerous or obstructed. Said prerequisites are: (1) "written notice of the defective,

unsafe, dangerous, or obstructed condition was actually given to the commissioner of transportation" or his designee; (2) "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 (3) "written acknowledgment from the City of the defective, unsafe, dangerous, or obstructive condition" (*Id.*; see also *Wittorf v. The City of New York*, 2009 WL 2221460 (Sup Ct, NY County 2009)).

The City argues that the purpose of the prior written notice law is to "limit liability to cases where the municipality has been given actual notice and opportunity to correct the hazardous condition" (*Poirer v. City of Schenectady*, 85 N.Y.2d 310, 316 [1995]), and that prior written notice is a condition precedent that a plaintiff is required to plead and prove in order to maintain its action. Additionally, the City argues that prior written notice requires specific notice of the particular condition/defect at issue, and that plaintiff bears the burden of pleading and proving that the City had prior notice of it.

In an effort to prove that it did not have prior written notice of the alleged defect, the City proffers the affidavit of Fulu R. Bhowmick, an employee of the Department of Transportation of the City of New York ("DOT"), annexed as Exhibit "D." In her affidavit, Ms. Bhowmick, a member of the Office of Litigation Services and Records Management, avers that she searches for records of permits, application for permits, corrective action requests ("CARS"), notice of violations ("NOV"), inspections, maintenance and repair orders, sidewalk violations, contracts, complaints and Big Apple Maps. She also avers that in response to a request of the New York City Law Department, she conducted a search in the pertinent electronic database for the aforementioned items for the roadway located at West 49th Street between 8th and 9th Avenue. Said search encompassed a period

of two years prior to and including July 20, 2010, and revealed 10 permits, 6 corrective action request, no notices of violation, ten inspections, 21 complaints, 14 maintenance and repair records, and 12 gang sheets for said location. Ms. Bhowmick also searched for Big Apple Maps for an area including the subject location. She found 1 Map which was served upon DOT by the Big Apple Pothole and Sidewalk Protection Corporation on October 23, 2003, which was at least 15 days prior to the date of the accident.

The City also argues that it is entitled to summary judgment because it did not cause and create the subject condition, and plaintiff did not submit any evidence establishing that it did. It also argues that at the very least, normal deterioration of the sidewalk, pathway or roadway over time, has consistently been held to be insufficient to establish the affirmative negligence exception to §7-120 (c)(2). It is well established that "[a] municipality that has enacted a prior written notice law is excused from liability absent proof of prior written notice or an exception thereto (*Carlo v. Town of Babylon*, 55 A.D.3d 769, 770 [2d Dept. 2008]; see *Poirer v. City of Schenectady*, 85 N.Y.2d 310 at 313). The Court of Appeals has recognized only two exceptions to this rule, i.e., "where the municipality created the defect or hazard through an affirmative act of negligence" [and] "where a special use confers a special benefit upon the locality" (*Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 [1999]; see *Oboler v. City of New York*, 8 N.Y.3d 888, 889 [2007]).

Plaintiff responds that while she takes "no position in regards to the City's second argument," [that it did not cause or create the complained of defect], "the City's initial argument falls on its face, as the City received prior written notice of the dangerous condition prior to the date of the plaintiff's fall." (See Aff. in Opp., ¶ 3). Plaintiff asserts that the written notice received by the City was in the form of a complaint about the pothole in question and other potholes located on that same street,

which creates a question of fact as to whether the City was aware of the defective condition. Plaintiff also asserts that "upon learning of the complaint, the City took subsequent action to repair the defect, which only casts further doubt as to whether they were aware of the pothole causing the plaintiff's fall." (*Id.*).

Plaintiff further argues that the City's motion is premature, as she has not yet had the opportunity to depose the individual tasked with repairing said pothole and is not yet in possession of the necessary information to properly oppose the instant motion. Additionally, in rebuttal of the City's argument that it did not have prior notice of the subject pothole, plaintiff refers to and relies on the June 22, 2012 deposition testimony of Omar Codling, a witness produced by the City who is employed as a record searcher for the DOT. Mr. Codling's transcribed testimony is annexed as Exhibit "A." In response, the City asserts that "of the complaints, none provide notice of the subject pothole. The only complaint that even makes mention of 304 West 49th Street is SR #1-1-502897104.....This complaint, however, was of a loose manhole cover." (See motion, p. 8,¶¶ 12-13), Plaintiff decries this assertion as a blatant mischaracterization of the facts.

Plaintiff asserts that one of the documents marked during Mr. Codling's deposition, refers explicitly to "numerous potholes at the curbside" of 49th Street between 8th and 9th Avenue." In discussing this particular record, Mr. Codling testified that it was "a two page repair order bearing defect number DM20109908 and dated April 9, 2010", 4 ½ months pre-accident. In addressing this specific document in its motion, the City argues that "[t]he Complaint of 'numerous potholes at curbside,' marked plaintiff's Exhibit 19 for identification, does not provide notice since it fails to provide a specific location, instead pertaining to the whole of 49th Street between 8th and 9th Avenue." (See Aff. p. 9, ¶14).

Mr. Codling testified that said document was generated through an unidentified citizen's complaint and stated that "the defect was a pothole located on West 49th Street between Eighth and Ninth Avenue, one of numerous potholes at the curb site." (*Id.* pp. 58-59). Mr. Codling also testified that he could not determine from said report on which side of the curb these potholes were located. However, he testified that "on April 9, 2010, the repair order referred to street maintenance, and on April 29, 2010, the crew was assigned to fix the defect under Mr. Knight." (*Id.* pp. 58-59). He also testified that the aforementioned repair report indicated that work on the pothole was done on April 29, 2010 and thus, the defect status was marked closed. (*Id.* p.60). Plaintiff urges the Court to take particular notice of the fact that in looking at the gangsheet in evidence, Mr. Codling was unable to determine where specifically on West 49th Street between Eight and Ninth Avenue, the potholes were located. (*Id.* p. 60).

In referencing Mr. Codling's testimony, plaintiff argues that the City cannot plausibly contend that "there is, at once, both a) notice of numerous potholes at the curbside on the street in question and b) definitively no notice of a pothole in front of the curbside abutting one of the properties on that same street." (See Aff. Opp. ¶7). Therefore, plaintiff maintains that the City's position that in was put on notice of "numerous potholes at the curbside" of West 49th Street between 8th and 9th Avenue, but not of the specific one that caused plaintiff's injuries, is nonsensical.

"The proponent of a summary judgment motion 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 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising

a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

The Court acknowledges that it is well settled that citizens' prior oral complaints, standing alone, do not constitute prior written notice, even if reduced to writing by the City (see *Lopez v. Gonzalez*, 44 A.D.3d 1012 [2d Dept. 2007]). Therefore, the singular April 9, 2010 complaint of "numerous potholes at the curbside" along 49th Street between Eighth and Ninth Avenue is insufficient as a matter of law to establish prior written notice (see *Gorman v. Town of Huntington*, 12 N.Y.3d 275 [2009]). To be considered a sufficient written acknowledgment of a defect, the internal document(s) generated by the City must specify the character and location of the defect in question (*Walker v. City of New York*, 34 A.D.3d 226, 227 [1st Dept. 2006]) (finding insufficient, a repair order stating that a pothole was somewhere in the intersection).

However, the Court is not totally convinced that the City did not have any prior notice of the subject pothole. Indeed, the Court notes that there is nothing in Ms. Bhowmick's affidavit which sufficiently supports the City's lack of prior notice argument. Moreover, as the City states in its motion, "the corresponding maintenance and repairs sheet (hereinafter "gang sheet"), notes that the City repaired 18 potholes on 49th Street in response to this particular complaint. None of those could be the subject pothole since those potholes were filled." (Aff. p. 9).

The Court agrees with plaintiff that this comment can only infer two possible scenarios: (1) that the City, apprised of "numerous potholes at the curbside" of West 49th Street between 8th and 9th Avenues, dispatched some individual(s) to repair the subject pothole, actually observed the subject pothole, but failed to repair it; or (2) the City, was aware of eighteen separate potholes on this street, but somehow, was not aware of the subject pothole. It would seem that the only way to determine with any semblance of certainty why this pothole went virtually ignored, would be to follow plaintiff's suggestion, and conduct the necessary deposition of the person(s) involved in the filling of the other potholes.

In view of the foregoing, the Court finds that the City has failed to establish a prima facie entitlement to summary judgment as a matter of law in that questions of material fact clearly exist.

Sequence No. 002:

In Sequence No. 002, defendant Central Parking Systems of New York ("Central"), moves for an Order pursuant to CPLR§3212, granting summary judgment to Central, and dismissing plaintiff's Complaint and any and all cross-claims on the grounds that moving defendant did not have a duty to own, operate, maintain, control, repair or inspect the public roadway wherein plaintiff Karen Leitner allegedly fell and there are no material issues of fact with regard to any alleged negligence or obligations on behalf of Central.

Central asserts that in their Bill of Particulars, plaintiffs allege that the subject accident occurred on July 20, 2010 at the "roadway in front of 304 West 49th Street, New York, New York, at the curb cut thereat for Central Parking Systems, and more particularly, that portion of the roadway located approximately 154 feet west from the southwest corner curb line of 8th Avenue and W. 49th Street and then one foot north of the curb." (See Central's Motion, Exhibit "B," p.1, ¶ 6(b)).

Central explains that the parking garage is located at 304 West 49th Street and is managed by Central pursuant to a Management Agreement with 304 Associates, LLC. Central argues that it is not liable for plaintiff's injuries because it did not have a duty to own, operate, maintain, control or repair the public roadway/street in front of the garage located at 304 West 49th Street.

As support for its argument, Central refers to specific aspects of plaintiff's GML§50-h testimony as well as her deposition testimony. At her §50-h hearing, respondent testified that the accident occurred "on the street"in response to the question "When you say the accident occurred in front of 304 West 49th Street, did the accident occur on the street, on the sidewalk, the curb, or somewhere else?" Plaintiff responded, "on the street." (Exhibit "C," pgs. 14-15). Additionally, during her deposition testimony, plaintiff testified that as she was walking towards the open door of her car after the garage attendant brought it to her, she "stepped in a hole and fell." (Exhibit "D," pgs. 29-32).

Additionally, Central annexes the affidavit of Henry J. Abbot, Corporate Secretary of Central to its moving papers as Exhibit "F." In his affidavit, Mr. Abbot avers that the aforementioned management agreement was in "full force and effect," (*id*), at the time of the subject accident. He also avers that subject to said Agreement, Central was only responsible for the sidewalk and curb cuts on the sidewalk adjacent to the parking facility and Central did not have a duty to own, operate, maintain, control or repair the public roadway/street in front of 304 West 49th Street. Moreover, Central did not have any duty to maintain or repair any defective conditions on the public roadway or street in front of this address, nor was it under a duty to perform any repair work, and did not perform any repair work on this public area. Finally, Mr. Abbot avers that Central was solely responsible for conditions relating to the garage located at 304 West 49th Street and the adjacent

sidewalk.

Plaintiff argues that Central had a duty to plaintiff, pursuant to the "special use doctrine," not to cause or permit a dangerous condition by making use of same for private, commercial purposes. "Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous or defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (*Hauser v. Giunta*, 88 N.Y.2d 449, 452-453 [2d Dept. 1996]; see also *Khaimova v. City of New York*, 95 A.D.3d 1280, 1281 [2d Dept. 2012]). "An abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk only when the owner or lessee either created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner or the lessee liable for injuries caused by a breach of that duty" (*Hevia v. Smithtown Auto Body of Long Is., Ltd.*, 91 A.D.3d 822, 822-823 [2d Dept. 2012]; see *also Petrillo v. Town of Hempstead*, 85 A.D.3d 996, 997 [2d Dept. 2011]; *Romano v. Leger*, 72 A.D.3d 1059, 1059 [2d Dept. 2010]; see also *Simmons v. Guthrie*, 304 A.D.2d 819 [2d Dept. 2013]) .

Moreover, plaintiff argues that Central's affirmative acts created a hazardous and unsafe condition for her. She asserts that the actions of the parking attendant in pulling her car out, parking it, and directed her into it by opening up the passenger door, placed her directly in line with the subject pot hole, which was "directly adjacent to the passenger side doorway." (See Plaintiff's Aff., Exhibit "A," Plaintiff's Aff. in Opp.). Additionally, plaintiff testified that her car was "parked partially halfway in the driveway and halfway in the street in front of Central Parkway." (Central's Motion, Exhibit "C," GML§ 50-h hearing test. p.16 #13-15). She further testified that she "walked towards the car, stepped in a hole, and fell." (*Id.* p. 18, 5-6), and "didn't trip, just "lost [her] balance

and went over." (*Id.* 21-22).

In accordance with the aforementioned testimony, plaintiff argues that Central had a non-delegable duty to provide a safe means of ingress and egress to its customers, which it failed to provide via its usual and customary procedure of directing pedestrians to a dangerous area. Indeed, if Central utilized the area wherein the pothole was located for its own purposes, it would have an obligation to keep the area reasonably safe to avoid injury to pedestrians. Therefore, given the fact that there are triable issues of fact as to whether Central created an unsafe condition by directing plaintiff towards the defect (see *Coulton v. City of New York*, 29 A.D.3d 301 [1st Dept. 2006]; *McKenzie v. Columbus Ctr., LLC*, 40 A.D.3d 312 [1st Dept. 2007]; *Lucciola v. City of New York*, 12 Misc.3d 365, 2005 N.Y. Slip Op. 25584 (Sup Ct. NY County 2005), summary judgment is denied.

In accordance with the foregoing, it is hereby

ORDERED that in Sequence 001, the City's motion for summary judgment is denied;

ORDERED that in Sequence 002, defendant Central Parking Systems of New York, Inc.'s motion for summary judgment is also hereby denied; and it is further

ORDERED that plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: July 23, 2013

JUL 23 2013

FILED

JUL 26 2013

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT