SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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TORI FLYNN, MARISA MONTE and ALYSSA VIANI,

Plaintiffs,

-against-

BENNY D'AMATO, JULIANNE D'AMATO and THE CITY OF NEW YORK

Defendants.

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JULIEANN D'AMATO,

Plaintiff,

-against-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Defendants.

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PART C-2
Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Action No. 1

Index No. 101171/09
Motion No. 3412-003

Action No. 2

Index No. 102897/09
Motion No. 241-001

The following papers numbered 1 to 6 were fully submitted on the 9th day of May, 2013:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant the City of New York, with Supporting Papers and Exhibits (dated December 19, 2012)	1
Notice of Motion for Summary Judgment by Defendant the City of New York, with Supporting Papers and Exhibits (dated January 18, 2013)	2
Affirmation in Opposition by Plaintiffs Tori Flynn, Marisa Monte, and Alyssa Viani, with Supporting Papers and Exhibits (dated March 5, 2013)	3
Affirmation in Opposition, by Plaintiff Julieann D'Amato, with Supporting Papers and Exhibits (dated March 27, 2013)	4
Reply Affirmation	

Upon the foregoing papers, the motions for summary judgment (one in each action) by defendant the City of New York (hereinafter the "City") are denied.

These actions[1] arise out of a motor vehicle accident that allegedly occurred on October 29, 2008 at approximately 7:30 p.m. on Bloomingdale Road between Hargold Avenue and Ramona Avenue on Staten Island. Insofar as it appears, plaintiff in Action No. 2, Julieann D'Amato, was operating a vehicle in which plaintiffs in Action No. 1 (Tori Flynn, Marisa Monte and Alyssa Viani) were riding as passengers when she "was caused to lose control of her motor vehicle due to driving over and into a large pothole, rut, and/or eroded right shoulder of the roadway and strike a tree adjacent to the right shoulder of the westbound lane of Bloomingdale Road" (*see* City's Exhibits "A", "Q").[2] Plaintiffs in each action allege that the City was negligent in causing and creating "the defective trench-like roadways/shoulder" allegedly struck by D'Amato (id.). Plaintiffs further allege that the City was negligent in allowing the roadway to become "obstructed, cracked, uneven, raised, depressed, missing portions thereof, deteriorated, and/or in a state of disrepair and /or improper repair" (id.). To the extent relevant, the alleged defect is described as "an irregular shaped deep cut into the asphalt pavement" measuring approximately "3' wide x 6-10" deep" (*see* Plaintiffs' Verified Bill of Particulars, City's Exhibit "H", p 2). It is further alleged that each of the plaintiffs sustained serious personal injuries.

At her deposition, plaintiff Julieann D'Amato testified that on the day of the accident, it was

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[1] A motion to consolidate the two actions for joint trial was granted by Order dated June 2, 2010 (*see* City's Exhibit "Y").

[2] Although separate Notices of Claim were filed by each individual plaintiff, said Notices assert identical allegations against the City (*see* City's Exhibits "A", "Q").

"drizzling" and "dark" outside (see EBT of Julieann D'Amato, pp 19-20). Plaintiffs Flynn, Monte and Viani were passengers in her vehicle (id. at 13). According to the witness, she had just turned onto Bloomingdale Road (from Churchill Avenue), and was driving at a "normal speed, like 20, 25" miles per hour when the accident occurred (id at 45-49, 56). D'Amato stated that as she was passing a curve in the road, she felt her car shifting to the right before her two right tires plunged into a trench along the right shoulder (id at 50-51). As recalled by one of the passengers, Tori Flynn, the vehicle went over a pothole immediately prior to going into the ditch (*see* EBT of Tori Flynn, p 131). In an attempt to get out of the trench, D'Amato allegedly turned her steering wheel to the left, causing the vehicle to cross the double yellow line (*see* EBT of Julieann D'Amato, pp 51-53). There was constant oncoming traffic from the opposite direction (id at 29). When D'Amato saw a car coming towards her, she steered back to the right, at which point she lost control, swerved and hit a tree (id. at 51-57, 64).

In moving for summary judgment in each action, the City asserts, inter alia, that plaintiffs have failed to establish prior written notice. In addition, it is claimed that plaintiffs have failed to demonstrate the applicability of either of the two recognized exceptions to the prior notice requirement. In support, the City submits the following affidavits and deposition testimony by various Department of Transportation (hereinafter "DOT") employees.

According to the affidavit of DOT record searcher Fulu Rani Bohwmick, upon conducting a search for records concerning Bloomingdale Road between Hargold Avenue and Ramona Avenue for the five-year period preceding the accident date, she found five permits, one application for a permit and five corresponding inspection reports indicating that the road had been resurfaced. However, she did not find any corrective action requests or notices of violation (*see* Affidavit of Fulu Rani Bohwmick dated November 20, 2012). The search also revealed "one in-house resurfacing record, four gang sheets for milling and resurfacing, two complaints about potholes, three gang

sheets for roadway defects and four maintenance and repair records ("FITS reports")" (id.). She further averred that all of the recorded defects appeared to have been "closed" by the accident date (id.). The most recent Big Apple Map served on the DOT is dated February 2, 2004, well before the date of the occurrence (id.).

According to the affidavit of DOT paralegal, Sean Williams, a search for records conducted by him relative to the roadway located at the intersection of Bloomingdale Road and Hargold Avenue for the five-year period preceding the accident date yielded three permits and two inspection reports indicating that the road had been resurfaced (see Affidavit of Sean Williams dated November 15, 2012). His search also revealed seven complaints about potholes, along with corresponding FITS reports indicating that all of the defects had been closed (id.).

According to DOT records, the most recent pothole repair prior to the accident was performed on June 8, 2007, and was supervised by DOT employee Lawrence Parente (*see* City's Exhibit "BB"). At his EBT, Parente testified that he has been working for the DOT for 25 years, and currently holds the job title of highway repairer (see EBT of Lawrence Parente, p 10). He confirmed that he had supervised the crew which performed the repair work on Bloomingdale Road between Ramona and Hargold Avenues on June 8, 2007 (id. at 27-28). After referring to a copy of the gang sheet for the date of repair, the witness reported that three midsize holes had been filled (see EBT of Lawrence Parente, pp 28-29; *see* City's Exhibit "BB").

Deposed at plaintiffs' behest, DOT employee, Jon Graham, testified that he held the title of "borough planner for capital construction [and] street reconstruction for the borough of Staten Island" up until "sometime in 2006 or 2007" (*see* EBT of Jon Graham, pp 7, 13). According to the witness, one of his ongoing projects pertained to the improvement of Bloomingdale Road (id. at 14). Graham further testified that he had conducted one official inspection of the subject roadway, but

could not recall precisely when this was done (id. at 17). However, he did recall that after conducting the inspection, he made handwritten notations on a map indicating "poor roadway" on the segment of Bloomingdale Road between Ramona Avenue and Englewood Avenue, which encompasses its intersection with Hargold Avenue (id. at 23-25; *see also* City's Exhibit "EE"). The "poor roadway" notation was made in reference to the "asphaltic surface" and "width of the roadway" (id. at 25-26). Graham stated that after his official inspection, he authored a memorandum in which he reported that the "width of Bloomingdale Road is narrowest along the western edge of Bloomingdale Park, and [near the] undeveloped park between Drumgoole and Amboy Road" (id. at 37). Graham also observed that some of the curb was missing at said location (id. at 38). Following his inspection, Graham wrote that "Bloomingdale Drumgoole Road [sic] to Englewood is very unsafe. Bad potholes [are present] on northbound side plus [the] center line [is] in wrong place. Potholes push people over [the] line." (id. at 58, 60). Although Graham does not recall when these notations were made, he believed that it must have been some time between 2002 and 2006 (id. at 57, 62). While proposals for the improvement of certain road conditions were submitted to the City's Department of Design and Construction under a capital project initiation, Graham testified that the Bloomingdale project was never pursued (id. at 21, 45). In fact, Graham stated that he submitted a second proposal for a capital project initiation without success in or around 2004 with "more lushed out" details and "longer project justification" (id. at 73-77). His long-term goal had been to make Bloomingdale Road between Amboy Road and Arthur Kill Road safer (id. at 78). By October of 2006, he "gave up [on] Staten Island" and "handed it over to another staffer" (id. at 80).

Pursuant to the Administrative Code of the City of New York, §7-201(c)(2), a plaintiff must plead and prove that the City had prior written notice of a roadway defect or a dangerous or obstructed condition before it can be held liable for its alleged negligence related thereto (*see Minew v. City of New York*, __AD3d__, 2013 NY Slip Op 3822 [2nd Dept 2013]). The only two recognized exceptions to the prior written notice requirement are where the municipality itself created the defect

through an affirmative act of negligence, or where the defect resulted from a special use by the municipality which conferred a special benefit upon it (id. at *2).

Pertinently, section 7-201(c)(2) of the Administrative Code does not set forth any requirements pertaining to the specificity of the notice to be provided thereunder (*see Alexander v. City of New York*, 59 AD3d 650, 651 [2nd Dept 2009]). However, since the prior notice law is in derogation of the common law, it must be strictly construed against the City (id.). As a consequence, it has been held that notice is sufficient if it brings the particular condition at issue to the attention of the appropriate authorities (id.). In addition, it has been held that where a dispute exists as to the adequacy of the notice, the issue of whether it sufficiently identified the nature and location of the claimed defect is for the jury to decide (id. at 652).

Here, the City demonstrated its prima facie entitlement to judgment as a matter of law through the affidavits of its record searchers and the deposition testimony of DOT employee Lawrence Parente, all of which served to establish that there were no unaddressed repair requests regarding the relevant section of Bloomingdale Road on the date of the occurrence (*see Phillips v. City of New York*, __AD3d__, 2013 NY Slip Op 4319 [2nd Dept]). In opposition, plaintiffs have failed to raise a triable issue of fact as to whether the City received prior written notice.

While plaintiffs purport to rely upon the deposition testimony of DOT employee Jon Graham to establish prior written notice of surface defects on Bloomingdale Road in the vicinity of the accident (or a written acknowledgment of same), their witness testified that his most recent (i.e., second) memorandum in support of a capital improvement project for Bloomingdale Road was prepared in 2004, four years prior to the accident in question. In any event, it is clear that the writing could not have been created subsequent to October of 2006, when Graham "gave up [on] Staten Island" and "handed [his job] over to another staffer". Giving plaintiffs the benefit of every possible

favorable inference from this testimony, it is insufficient to rebut the City's prima facie showing of the absence of prior written notice of the roadway defect which purportedly existed on the evening of October 29, 2008, particularly in light of the evidence of resurfacing and pothole repair.

However, plaintiffs' submissions are nevertheless sufficient to raise a triable issue of fact as to whether the City created the defect in question through an affirmative act of negligence, a key exception to the prior written notice requirement (*see Yarborough v. City of New York*, 28 AD3d 650, 651, *affd* 10 NY3d 726). To the extent relevant, plaintiffs' expert, Nicholas Belizzi, notes that the "New York State Department of Transportation Highway Design Manual Section 3.3.5 indicates that it is desirable to limit the drop-off at the edge of a shoulder". It further provides that "drop-offs in excess of 50 mm (1.9 inches) should be addressed during construction" (*see* Expert Affidavit of Nicholas Belizzi, para 34). In this case, the pavement drop-off as measured by plaintiff's expert was stated to range "in height from six (6) inches to ten (10) inches". On this basis, Belizzi states that the drop-off "should have been addressed as part of the [re-]paving project" (id.), but that the DOT "simply chose to leave this dangerous condition they created" (id. at 35). In this connection, plaintiffs' expert opines to a reasonable degree of engineering certainty "that the steep pavement edge drop off encountered by plaintiffs' vehicle was an unnecessary hazard that the defendant should have mitigated... in order to eliminate or reduce the chance of injury to motorists" (id. at 36). He further opines that had "the pavement edge drop-off directly caused and created by the NYC Department of Transportation during the repaving project... been eliminated prior to the date of the subject accident, the driver would not have encountered the drop-off and would have been able to safely maneuver the vehicle" (id. at 40). Also referenced in support are (1) numerous publications by the American Association of State Highway and Transportation Officials addressing the dangers presented by pavement drop-offs (id. at 32); (2) 17 NYCRR §234.10, which requires that low shoulder or no shoulder signs be used to warn of shoulder conditions that may adversely affect the control of vehicles(id. at 28); and (3) the Manual of Uniform Traffic Control Devices (MUTCD)

adopted by United States Federal Department of Transportation, Highway Administration , which mandates that "Shoulder Drop-off Sign[s] be posted when shoulder drop-offs are more than 3" in height" (id. at 29). It is undisputed that no such signs were posted at the accident location (id.). Finally, plaintiffs' expert opines that the failure "to place any warnings of the shoulder drop-off was a deviation from the applicable standards in the road construction industry such as the MUTCD" (id. at 30).

Through the detailed affidavit of their engineering expert, plaintiffs have sufficiently raised a triable issue of fact as to whether the City affirmatively created the dangerous condition which caused the accident through negligent design and construction (*see Pennamen v. Town of Babylon,* 86 AD3d 599, 600 [2nd Dept 2011]; *cf. Loughlin v. Town of N Hempstead,* 84 AD3d 1035 [2nd Dept 2011]; *Rochford v. City of Yonkers*, 12 AD3d 433, 434 [2nd Dept 2004]).

Accordingly, it is

ORDERED that motions for summary judgment (one in each action) by defendant the City of New York are denied.

ENTER,

/s/
Hon. Thomas P. Aliotta
J.S.C.

DATED: July 3, 2013