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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT PART 5

Justice

Index Number : 112649/2010
SCANDIFFIO, DON
vs
CITY OF NEW YORK
Sequence Number : 001
COMPEL DISCLOSURE CAL. #137

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 8-12-13
AUG 12 2013

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT, 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

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

----------X

DON SCANDIFFIO,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendants.

----------X

DECISION/ORDER
Index No. 112649/2010
Seq. No. 001

HON. KATHRYN E. FREED:

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

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-3
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	4
REPLYING AFFIDAVITS	5
EXHIBITS	
OTHER	

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

Plaintiff initially moved for an Order compelling defendant The City of New York to respond to his Notice for Discovery and Inspection, dated July 11, 2012. He claimed that the pothole which caused his accident had been subsequently repaired and thus, he demanded the production of any records of notice and repair. In response, the Court issued a written order directing in pertinent part, that Defendant City "shall review DOT records regarding the repair of the pothole in question & shall produce any records of notice and repair from June 2009 until March 31, 2010. If none exist, an affidavit will be provided. The above to be completed within 60 days...."

At the time of said motion to compel, the City had cross-moved for an Order pursuant to CPLR§3211(a)(7), dismissing plaintiff's complaint, or in the alternative, granting it summary

judgment pursuant to CPLR§3212. Since the motion to compel has already been addressed, the Court now turns its attention to said cross-motion.

After a review of the papers presented, all relevant statutes and case law, the Court denies the cross-motion without prejudice.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries he allegedly sustained on or about September 27, 2009, when he was riding his bicycle in the northbound lane of Riverside Drive, approximately 40 feet from the southeast corner of Riverside Drive, in New York County, and his front wheel hit a pothole, causing him to be propelled to the ground. As a result, he sustained injuries including, but not limited to, a fracture of his left distal radius requiring surgical repair.

Thereafter, plaintiff commenced the instant action via service of a Summons and Verified Complaint on or about October 1, 2010. The City served its Answer on or about October 15, 2010. Plaintiff appeared at a hearing pursuant to General Municipal Law§ 50-h on March 5, 2010. On or about December 17, 2010, he serve a Verified Bill of Particulars and then served a Supplemental Bill of Particulars on or about April 25, 2011.

Positions of the parties:

In its Cross-Motion, the City argues that it is entitled to summary judgment because it did not have prior written notice of the alleged condition. It argues that Administrative Code §7-201(c) limits its duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions of which it has been notified of. Additionally, the City argues that prior written notice of a defect is a condition precedent that a plaintiff is required to plead and prove to maintain an action against it. The City also argues that it is entitled to summary judgment because

it did not cause and/or create the alleged condition. It argues that to defeat a motion for summary judgment, plaintiff must produce evidentiary proof in admissible form that the City did cause or create the complained of condition.

In support of its position, the City submits an affidavit of Cynthia Howard, an employee of the Department of Transportation of the City of New York ("DOT"), annexed as its Exhibit "K." In her affidavit, Ms. Howard states that as a member of the Office of Litigation Services and Records Management, she searches for records that may include permits, applications for permits, corrective action requests, notices of violations, inspections, contracts, maintenance and repair orders, complaints, sidewalk violations, resurfacing/milling records and Big Apple Maps. She also states that she personally conducted a search in the pertinent electronic database and also hard copy locations, for the aforementioned kinds of records for the roadway located at Riverside Drive between West 139th Street and West 142nd Street.

Ms. Howard further states that the location searched is a single roadway segment of Riverside Drive between West 139th Street and West 142nd Street, and not the service road located at Riverside Drive between West 139th Street and West 140th Street. Her search encompassed a period of two years prior to and including September 27, 2009, the date of the accident. She states that her search revealed no records. Additionally, Ms. Howard states that her search for Big Apple Maps for an area including the subject location revealed two maps which were served upon DOT by the Big Apple Pothole and Sidewalk Protection Corporation on October 23, 2003, more than 15 days prior to the accident. However, since said Big Apple Maps are not annexed as an exhibit, the Court does not know what effect they have on the positions of the parties at this time.

Plaintiff argues that the subject defect, although concealed by water and darkness at the time of his accident, was an open and obvious defect, which was and is therefore, not subject to any prior written notice requirements. Plaintiff asserts that at his§ 50-h hearing, he testified that the subject pothole was approximately eight to ten inches deep and was oblong in shape (Exhibit "B," pp. 36-37). He also testified that it was approximately one and a half feet in length. (Id. p. 30). Plaintiff further testified that it was dark at the time of the accident, (see Exhibit "C," p. 12), and the roadway was wet. He specifically testified that he could not see the subject pothole because it was totally covered with water, *(id.* p. 14), and that the hole was so deep, it was filled to capacity due to the rainstorm immediately prior to the accident. *Id.* p. 15. Therefore, plaintiff argues that since said defect was sufficiently open and obvious, it should have come to the attention of the City even without prior written notice. Lastly, plaintiff argues that evidence of subsequent repairs is admissible if an issue of control or maintenance exists.

Conclusions of law:

"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.3d 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 [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]).

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 it alleged negligence related thereto (see *Minew v. City of New York*, 106 A.D.3d 1060, [2d Dept. 2013]). The Court of Appeals recognizes only two statutory exceptions to the prior written notice requirement: 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 (see *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 [1999]; *Oboler v. City of New York*, 8 N.Y.3d 888, 889 [2007]; *Yarborough v. City of New* York, 10 N.Y.3d 726, 728 [2008]).

Indeed, the purpose of the written notice provision is to insure that a municipality has a reasonable opportunity to cure defective conditions, the existence of which it could not be expected to know absent some sort of positive appraisal (see *Ferris v. County of Suffolk*, 174 A.D.2d 70 [2d Dept. 1992]). Where, however, dangerous conditions are easily visible, apparent upon visible inspection, inspection of the site has been made for the purpose of discovering just such defects, and the defects have existed for a sufficient length of time prior to the accident to allow the municipality to discover and remedy them, the need for written notice has been abrogated. (*Id.* at 74-75). It is the combination of an inspection for the purpose of discovering dangerous defects and the open and notorious nature of the defect which gives rise to notice to the municipality.

In the case at bar, the Court finds that in view of the fact that the City was previously ordered to provide records of subsequent repair of the subject pothole to plaintiff, the instant summary

judgment motion is premature at this juncture. Therefore, the Court will permit the parties to re-visit this issue at a later date.

In accordance with the foregoing, it is hereby

ORDERED that the City's cross-motion for summary judgment is denied without prejudice; and it is further

ORDERED that the parties shall appear at a compliance conference scheduled for AUGUST 20, 2013 at 80 Centre Street, Room 103 at 2:00 p.m.; and it is further

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

DATED: August 12, 2013

AUG 12 2013

ENTER:

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

AUG 16 2013

COUNTY CLERK'S OFFICE
NEW YORK