[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

SONIA HENDERSON

-v-

CITY OF N.Y. & CON. ED.

CAL: # 40

INDEX NO. 400103/10

MOTION DATE

MOTION SEQ. NO. 001

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

FILED

JUN 10 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6-5-14

HON. KATHRYN FREED, J.S.C.
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

SONIA HENDERSON,

Plaintiff,

-against-

THE CITY OF NEW YORK and CONSOLIDATED EDISON OF NEW YORK,

Defendants.

----------X

DECISION/ORDER
Index No. 400103/10
Seq. No. 001

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1,2(Exs. A-P)
NOTICE OF CROSS-MOTION AND AFFIDAVITS ANNEXED.....	3,4(Exs. A-E)
ANSWERING AFFIDAVITS.....	.....5.....
REPLYING AFFIDAVITS.....	.....6.....
EXHIBITS.....	.....JUN 10 2014
OTHER.....	.....

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

Defendant Consolidated Edison of New York ("Con Ed") moves for an order, pursuant to CPLR 3212, seeking summary judgment dismissing all claims and cross-claims against it. Defendant The City of New York ("the City") cross-moves for an order, pursuant to CPLR 3211(a)(7), dismissing the complaint for failure to state a cause of action or, in the alternative, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross-claims against it. Plaintiff Sonia Henderson opposes the motions. After oral argument, and after consideration of the parties' papers and the relevant case law and statutes, the City's cross-motion

is **denied**.[1]

Factual and Procedural Background:

Plaintiff seeks monetary damages for personal injuries she allegedly sustained on April 16, 2008, when she tripped and fell on a manhole in a crosswalk located at the intersection of Second Avenue and 74th Street in New York County. In her notice of claim, filed July 7, 2008, plaintiff alleged that she fell due to a "raised, cracked, depressed, missing, broken and/or mis-leveled pavement and/or manhole cover (street hardware) located within the aforementioned crosswalk." Ex. A.[2]

At her 50-h hearing on September 9, 2008, plaintiff testified that she was injured when she stepped directly on a manhole cover which was "lower than the surrounding roadway." Ex. E, at 23-26. Photographs marked at plaintiff's 50-h hearing indicated precisely where in the crosswalk the manhole was located and where on the manhole she tripped. Ex. F.

Thereafter, plaintiff commenced the instant action by filing a summons and complaint on or about May 19, 2009. In the complaint, plaintiff alleged, inter alia, that she was injured when she fell due to a hazardous condition in the crosswalk located at Second Avenue and 74th Street and that the City negligently maintained the crosswalk and created the defect. Ex. B. The City joined issue by service of its verified answer on or about June 16, 2009. Ex. C.

---

[1]By so-ordered stipulation dated March 11, 2014, the date of oral argument of the motion and cross-motion, all claims and cross-claims against Con Ed were dismissed. Thus, this order will only address the City's motion.

[2]Unless otherwise noted, all references are to the exhibits annexed to the City's cross-motion.

In her verified bill of particulars dated April 21, 2010, plaintiff alleged, inter alia, that she was injured by a manhole cover in the crosswalk at Second Avenue and 74th Street which was not flush with the ground. Ex. D. Plaintiff asserted that the City created the condition and had prior written notice of the condition. Ex. D.

At his deposition on January 27, 2011, Omar Codling of the Office of Litigation Services of the New York City Department of Transportation ("DOT") testified that he performed a search for records relating to construction or repairs performed in the area of the alleged accident for a two-year period preceding the alleged accident. Ex. G, at 8. In an affidavit in support of the City's motion, Codling stated that he searched for permits, applications for permits, corrective action requests, notices of violation, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, resurfacing/milling records and Big Apple Maps for the area of Second Avenue between 73rd and 74th Streets for a two-year period preceding and including the date of the incident. His search revealed 11 permits, 9 hard copy permits, 1 application, 3 corrective action requests, 3 notices of violation, 16 inspections, 6 maintenance and repair records, 5 complaints and 4 gangsheets. Ex. K. He also located two Big Apple Maps. Ex. K. The records located by Codling were annexed to the City's motion as Ex. H.

At her deposition on July 31, 2012, plaintiff testified that she fell on a manhole cover located within a crosswalk at the intersection of Second Avenue and 74th Street. Ex. B to Plaintiff's Aff. In Opp., at 19-20, 26-27.

At his deposition on August 30, 2012, Edwin Tardy, a construction laborer for the New York City Department of Environmental Protection ("DEP") Bureau of Water Supply, reviewed the photograph of the manhole which plaintiff testified caused her to fall and stated that it was a water

valve cover. Ex. J, at 7, 15. Tardy stated that none of the exhibits marked at his deposition, including complaint service requests ("CSRs") and corresponding work orders, which were located pursuant to a DEP search (Ex. I), indicated that the DEP received any complaints for the water valve cover in question. Ex. J, at 71. Tardy testified that, if a CSR referred to a water valve cover, the relevant code under the entry "problem" would have begun with a "W", which none did. Ex. J, at 22-25. Although Tardy acknowledged that there had been a complaint of a manhole cover sunken three inches on Second Avenue between East 74th and 75th Streets, it was repaired on November 15, 2007. Ex. J, at 26-31. The records marked as exhibits at Tardy's deposition were accompanied by two unsworn memoranda from the DEP's Records Retention Unit. One memorandum accompanied DEP documents produced as a result of a search of "water records" for Second Avenue between East 73 and 74 Streets for the period April 16, 2006-April 16, 2008, while the other accompanied DEP documents produced as a result of a search for "sewer and water records" at Second Avenue and East 74 Street during that same period.

Positions of the Parties:

The City argues that it is entitled to summary judgment because it did not have prior written notice of the alleged condition and the gravamen of plaintiff's claim falls under the purview of 7-201(c)(2) of the Administrative Code of the City of New York, a statute intended to limit its liability in situations wherein it was given actual notice and an opportunity to remedy the hazardous condition. The City also argues that it is entitled to summary judgment because it did not cause or create the alleged hazardous condition.

In support of its cross-motion, the City submits the notice of claim, the summons and

complaint and its answer, the verified bill of particulars, plaintiff's 50-h hearing testimony, photographs of the alleged defect, Codling's deposition testimony and affidavit, documents located pursuant to Codling's search of the City's records, and Tardy's deposition testimony. The City asserts that neither the permits nor the complaint reports established prior written notice since they did not pertain to the alleged defect. The City further maintains that Tardy's testimony establishes that it did not have prior written notice of the alleged defect.

Plaintiff argues that the cross-motion must be denied since numerous inspection reports and complaints generated by the DOT and DEP placed the City on notice of the allegedly defective condition. Specifically, plaintiff relies on a DOT inspection report dated July 26, 2007 which states that work consisting of "construct or alter manhole &/or casting" was performed on Second Avenue between East 73rd and East 74th Streets, that the work was completed on July 27, 2007, and that it passed inspection. Plaintiff further relies on DOT "FITS" reports dated March 24 and 26, September 27, and November 15, 2007 and February 7, 2008 relating to potholes at the subject intersection. Finally, plaintiff relies on a DEP work order dated July 19, 2006 reflecting that there was a sinkhole next to a catch basin on Second Avenue and East 74th Street. The documents relied upon by plaintiff are annexed to her affirmation in opposition as Exhibit D.

In a reply affirmation in further support of its cross-motion, the City argues that the documents referred to in plaintiff's affirmation in opposition do not raise an issue of fact warranting the denial of the application. First, the City asserts that the inspection report relied upon by plaintiff does not set forth any specific defect the manhole cover had and that, in any event, the result of the inspection was a "pass", meaning that no defect was found. The City further asserts that the complaints regarding potholes in the area do not raise an issue of fact since plaintiff testified that she

fell as a result of stepping on a depressed manhole cover. Ex E, at 24, 26. The City further argues that the DEP report regarding a repair to a catch basin is irrelevant since it does not describe the condition which caused plaintiff's fall. Further, asserts the City, the DEP repaired the condition on July 22, 2006, prior to the alleged incident.

Conclusions of Law:

The City's Motion to Dismiss

It is well settled that "[o]n a motion to dismiss the complaint pursuant to CPLR§ 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept the facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994); *see 511 W. 232nd Owners Corp. v. Jennifer Realty, Corp.*, 98 N.Y.2d 144 (2002); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

Pursuant to New York Administrative Code §7-201(c)(2), no civil action may be maintained against the City arising from a dangerous or defective condition on a sidewalk or in a roadway unless the plaintiff pleads and proves that the City received prior written notice of such defect. *See Minew v. City of New York*, 106 A.D.3d 1060 (2d Dept. 2013). Where a municipality such as the City has enacted a prior written notice law, it may not be subjected to liability for injuries emanating from a dangerous roadway condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies. *See Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 (1999). 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 *supra* at 474; *see also Yarborough v. City of New York*, 10 N.Y.3d 726, 728 (2008); *Oboler v. City of New York*, 9 N.Y.3d 888, 889 (2007).

Here, since plaintiff alleges that the City had prior written notice of the alleged defect or, in the alternative, that the City created the defect, she has stated a valid claim and the City's motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is denied.

The City's Motion for Summary Judgment

"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). 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).

In moving for summary judgment on plaintiff's claim that it had prior written notice of the alleged defect or created the condition, the City relies on documents produced as a result of searches by the DOT and the DEP of their respective records to establish that it had no prior written notice of the allegedly dangerous condition. As noted above, Codling stated in an affidavit that he searched the DOT's records for permits, applications for permits, corrective action requests, notices of violation, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, resurfacing/milling records and Big Apple Maps for the area of Second Avenue between 73rd and 74th Streets for a two-year period preceding, and including, the date of the incident. Ex. K. Conspicuously absent from Codling's December 27, 2013 affidavit, however, is a representation that

the records produced by the DOT established that the City did not have prior written notice of the allegedly dangerous condition. *See Martinez v City of New York*, 105 AD3d 1013, 1014 (2d Dept 2013). Nor did Codling specifically testify at his deposition that the City did not receive prior written notice of the alleged defect. Ex. G. Therefore, the DOT records do not establish the City's prima facie entitlement to summary judgment. *See Martinez v City of New York, supra* at 1014.

Although the City also relies upon DEP records, it "failed to submit any affidavit from any City [or DEP] official or employee demonstrating that a search of the appropriate [DEP] records had been done and that there was no prior written notice of the alleged dangerous condition that caused the plaintiff's accident." *Martinez v City of New York, supra* at 1014. Nor was there any deposition testimony by Tardy, the DEP's witness, or any other witness for the City or the DEP, which indicated that a search of the DEP records had been performed without locating any evidence of prior written notice. *Id.*, at 1014. In fact, Tardy testified that he did not search for the records and that he knew neither who did nor whether the searcher worked for the DEP. Ex. J, at 35. As noted above, the records allegedly located pursuant to a search conducted by the DEP were accompanied by nothing other than two unsworn memoranda from the DEP's Records Retention Unit setting forth the parameters of the search. Ex. I. Thus, the City failed to make a prima facie showing that it did not receive prior written notice of the allegedly dangerous condition. *See Martinez, supra* at 1014.

Finally, the City's cross-motion must also be denied since it failed to establish that the alleged defect was not created by its own affirmative negligence. *See Wald v City of New York*, 115 AD3d 939 (2d Dept 2014).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the City's cross-motion for summary judgment is denied in all respects; and it is further,

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

Dated: June 5, 2014

ENTER:

Kathryn E. Freed, J.S.C.

HON. KATHRYN E. FREED
JUSTICE OF SUPREME COURT