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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 : 111382/2009
HAULSEY, SANDRA
vs
CITY OF NEW YORK
Sequence Number : 004 CAL: #32
REARGUMENT/RECONSIDERATION

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

FILED

MAR 18 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3-7-14

MAR 07 2014

_____, 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

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SANDRA HAULSEY,

Plaintiff,

-against-

DECISION/ORDER
Index No. 111382/2009
Seq. No. 004

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and NICO ASPHALT PAVING, INC.,

Defendants.

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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.1-8).
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3-4.....
REPLYING AFFIDAVITS.....	..... .5.....
OTHER.....	.....

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

In this personal injury action commenced by plaintiff Sandra Haulsey, defendant The City of New York ("the City"), moves for an Order, pursuant to CPLR 2221, granting reargument of its prior motion for summary judgment seeking dismissal of the complaint pursuant to CPLR 3212. Plaintiff and co-defendant Nico Asphalt Paving, Inc. ("Nico") oppose the motion. After a review of the papers presented, all relevant statutes and case law, this Court **denies** the motion.

Factual and Procedural Background:

Plaintiff seeks monetary damages for personal injuries she allegedly sustained on December 10, 2008, when she tripped and fell on a pothole in the crosswalk of West 143rd Street along the west side of Adam Clayton Powell Boulevard (Seventh Avenue) in New York County. On or about August 11, 2009, plaintiff commenced the captioned action against the City. She subsequently amended her complaint to name as defendants Nico and Consolidated Edison Company of New York, Inc. ("Con Ed"), which allegedly performed work in the crosswalk where she was injured.

By notice of motion dated January 18, 2013, the City moved for summary judgment, arguing that it did not have prior written notice of, and did not cause or create, the alleged condition. The City further asserted that it was entitled to the protection of New York City Administrative Code §7-201(c)(2), a statute intended to limit its liability in situations in which it was given actual notice and an opportunity to remedy the hazardous condition. The City argued that the only records which reflected that it performed any work in the subject area were a maintenance and repair report ("FITS" report), dated April 23, 2007, as well as a corresponding gangsheet for the roadway work performed on April 24, 2007, and that these records did not establish that it had prior written notice of the alleged condition.

In support of its motion, the City relied on the testimony of Department of Transportation ("DOT") Supervisor of Highway Repair Como Mordente, who supervised work performed on West 143rd Street between Seventh and Eighth Avenues on April 24, 2007. Mr. Mordente, who testified based on the FITS report dated April 23, 2007 and corresponding gangsheet dated April 24, 2007, stated that 5 potholes were filled in the area of West 143rd Street and Seventh Avenue on April 24,

2007. He also testified that any other defect existing on the block would have been repaired at that time.

The City also submitted the affidavit of Stacey Williams of the DOT's Office of Litigation Services and Records Management, who stated that she performed a search for documents relating to work performed at the site of the alleged incident and found 13 permits, 3 applications for permits, 14 inspections, 3 notices of violation, 1 maintenance and repair record, 1 gangsheet for roadway work, and a 2003 Big Apple Map.

In opposing the motion, plaintiff argued, inter alia, that the City's motion had to be denied because it had prior written notice of the pothole from its own agency, the DOT, and the City was on notice of the work it had performed on its behalf by Con Ed and Nico. Plaintiff asserted that, at the very least, an issue of fact existed regarding whether the DOT's repairs made the area safe. Plaintiff also submitted the deposition testimony of Patrick Keough, an employee of Con Ed, who testified that Con Ed had a permit allowing it to open the roadway on West 143rd Street between Seventh and Eighth Avenues and that this opening was backfilled on May 9, 2008. Last, plaintiff submitted the deposition testimony of John Denegall, a superintendent for Nico, who stated that he reviewed several opening tickets and a paving order revealing that Nico worked at the intersection.

Citing the repairs performed by the DOT on April 24, 2007, Nico opposed the City's motion by asserting that the City failed to establish that it did not have written notice of the subject pothole. Nico also argued, inter alia, that the City omitted from its motion the deposition transcript of Grey-Talen Oneza, a Supervisor for the Highway Repair Division of the DOT, who testified at a deposition on behalf of the City regarding existence of the defect on West 143rd Street between Seventh and Eighth Avenues and which was listed on the FITS report and corresponding gangsheet

marked into evidence during his deposition. The defect detail sheet reflected the existence of a pothole "located at crosswalk" at Seventh Avenue and West 143rd Street which was repaired by the City on April 24, 2007.

Con Ed adopted the arguments proffered by Nico, essentially asserting that the City's motion had to be denied because issues of fact existed regarding whether the alleged defective condition was either caused or created by the City and whether the City had written notice of the defect.

By Order dated August 14, 2013 and entered August 19, 2013, this Court denied the City's motion for summary judgment, finding that the City failed to establish its prima facie entitlement to such relief. Relying on *Bruni v City of New York*, 2 NY3d 319 (2004), this Court found that material issues of fact exist regarding whether the City had prior written notice of the subject pothole. Quoting *Bruni,* this Court stated that "a written statement showing that the city agency responsible for repairing a condition had first-hand knowledge both of the existence and the dangerous nature of the condition is an 'acknowledgement' sufficient to satisfy the Pothole Law [Administrative Code § 7-210(c)]." *Id.*, at 325. The City then brought the instant motion seeking to reargue its motion for summary judgment.

Positions of the Parties:

In support of its motion to reargue, the City asserts that this Court misapplied the law governing prior written notice in finding that questions of fact exist regarding whether the City had prior written notice of the alleged defect and whether the City made a written acknowledgment of the alleged defect in its repair record (FITS report) and corresponding gangsheet. Specifically, the City asserts that the FITS report and gangsheet do not constitute prior written notice pursuant to

Administrative Code §7-201(c). The City states that, although it "does not dispute that these records reflect that potholes existed at one time in the subject location and were repaired" such records do not constitute prior written notice to it. It also argues that this case is distinguishable from *Bruni* since, in that matter, there was an "open" work order pending at the time of the alleged incident.

The City further asserts that any notice the City may have had of the subject pothole was "extinguished" when the DOT crew completed its repairs on April 24, 2007 and the City received no further complaints about the defect. It also argues that its awareness of a defect in the area does not constitute adequate notice of another defect which actually caused the accident.

Finally, the City claims that neither plaintiff's two calls to 311 to report the pothole does nor the Big Apple map submitted in support of its motion create a question of fact regarding prior written notice.

In opposition to the motion, plaintiff asserts that the City's motion must be denied pursuant to Administrative Code § 7-201(c) since it had notice of the condition from its own agency, the DOT. Indeed, urges plaintiff, the City concedes in its motion for reargument that it had records reflecting that potholes existed and were repaired at the site of the alleged incident.

Nico's opposition to the motion substantially reiterates the arguments made by plaintiff and the City's reply affirmation essentially reiterates the arguments set forth in its main affirmation in support.

Conclusions of Law:

A motion for leave to reargue "shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR 2221(d)(2). Such motion "is

addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782 (1993). Reargument is not intended to afford an unsuccessful party successive opportunities to argue issues previously decided (*see Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st Dept. 1984]), or to present arguments different from those originally asserted. *William P.Pahl Equip. Corp. v. Kassis, supra* at 27; *Amato v. Lord & Taylor, Inc.*,10 A.D.3d 374 (2d Dept. 2004). On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v. Browning School*, 80 A.D.2d 790 (1st Dept. 1981). Professor David Siegel in N.Y. Prac, § 254, at 449 (5th ed) succinctly instructs that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind." Here, the City's motion for reargument must be denied, as this Court properly determined that the City failed to establish its prima facie entitlement to summary judgment and that an issue of fact exists regarding whether the City had prior written notice of the alleged condition.

Pursuant to New York City Administrative Code §7-201(c)(2), no civil action may be maintained against a municipality arising from a dangerous or defective condition on a roadway unless plaintiff establishes that the City received prior written notice. *See Sacco v City of New York*, 92 AD3d 529 (1st Dept 2012).

In *Bruni v City of New York, supra*, the Court of Appeals held that "a written statement showing that the city agency responsible for repairing a condition had first-hand knowledge both of the existence and the dangerous nature of the condition is an 'acknowledgment' sufficient to satisfy [Administrative Code § 7-210(c)]." *Id.*, at 325. Here, it is undisputed that the City had knowledge of the alleged defect as of April 23, 2007 and sent a team to repair it the following day. Indeed, the

City states in its motion papers that it "does not dispute that the [FITS report and corresponding gangsheet] reflect that potholes existed at one time in the subject location and were repaired." Given the City's admitted knowledge of the condition, there is, at the very least, an issue of fact regarding whether it had the requisite written knowledge pursuant to Administrative Code § 7-210 (c). The City's concession that it had knowledge of the defect also renders academic its argument that the awareness of one defect in the area is inadequate notice of another defect which caused the accident. The Court also notes the numerous sources that indicate the City was on notice of the condition, including, inter alia, "14 inspections, 3 notices of violation, 1 maintenance and repair record, 1 gangsheet for roadway work..." The Court notes the numerous indications that indeed there were defects here, which, taken together raises the issue of the City's knowledge of the condition and when subsequent actions were taken.

In asserting that it did not have prior written notice of the defect, the City relies, inter alia, on *Marshall v City of New York*, 52 AD3d 586 (2d Dept 2008) and *Khemraj v City of New York*, 37 AD3d 419 (2d Dept 2007). In *Marshall*, the Second Department found that records reflecting that pothole repairs had been made over one year before the accident did not establish prior written notice. In *Khemraj*, the Second Department held that a FITS report reflecting that a pothole repair had been made over 1 ½ years before the alleged accident was insufficient to establish prior written notice. Here, however, unlike in *Marshall* and *Khemraj*, the plaintiff gave testimony at her 50-h hearing which "contradicted the City's documentation showing that the subject defect had been repaired, closed, and made safe, more than a year prior to the accident." *cf. Abott v City of New York*, 2014 N.Y. App. Div. LEXIS 1085 (1st Dept, February 18, 2014), *citing Khemraj, supra* at 420. Specifically, plaintiff testified that the pothole returned two weeks after it was filled. Thus, there is

a question of fact as to whether the City's repair actually rendered the defect safe. If the repair did not render the defect safe, then the City's argument that any notice it may have had of the subject pothole was "extinguished" when the DOT crew completed its repairs on April 24, 2007 would have no merit.

Although this Court inadvertently overlooked the Big Apple map submitted by the City in support of its motion for summary judgment, this mere oversight does not warrant the granting of reargument. In the City's affirmation in support of its motion for summary judgment, its attorney stated, in conclusory fashion, that the Big Apple map "cannot be interpreted as proof of prior written notice" since "the map is devoid of marks indicating potholes at the subject location." However, any question as to whether the map gave notice of the defect which caused the accident may not be determined by counsel but rather is for the jury. *See Yousef v Lee*, 103 AD3d 542 (1st Dept 2013). Moreover, the City submitted no proof that the 2003 map reflected the condition of the crosswalk as of the date of the incident five years later.

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

ORDERED that the City's motion is denied; and it is further

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

Dated: March 7, 2014

MAR 0 7 2014

ENTER:

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

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT