To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

FELICIA HYSMITH,

Plaintiff,

-against-

THE CITY OF MOUNT VERNON, ABC APPLIANCES, 145 APPLIANCE, CORP. and DONAVAN WHYTE, Individually,

Defendants.

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Index No. 57280/16
Mot. Seq. Nos. 003, 004, 005
Decision and Order

EVERETT, J.

The following papers were read on the motions:
003 Notice of Motion/Affidavit in Supp/Affirmation in Supp/Exhibits A-H (docs 92-102)

004 Notice of Cross Motion/Affirmation in Opp to Motion and in Supp of Cross Motion/Memorandum of Law in Opp to Motion and in Supp of Cross Motion/ Exhibits 1-5 (docs 104-111)
Affirmation in Opp to Cross Motion/Exhibit (docs 112-113)
Reply Memorandum of Law (doc 114)

005 Motion by Order to Show Cause/Affirmation in Supp/Exhibits 1-5 (docs 117-124)
Affirmation in Opp (doc 125)

Under motion sequence number 003, defendant City of Mount Vernon (City) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint as against it. Under motion sequence number 004, plaintiff Felicia Hysmith (Hysmith) cross-moves for an order, pursuant to CPLR 3212, granting summary judgment against the City on the issue of liability. Under motion sequence number 005, Hysmith moves, by order to show cause, for an order, pursuant to CPLR 3025, granting her leave to serve and file an amended complaint. The

motions, under motion sequence numbers 003, 004 and 005, are consolidated for disposition. Upon the foregoing papers, the motions are denied to the extent set forth below.

Hysmith commenced the instant action on May 23, 2016, seeking damages for physical injuries she allegedly sustained on May 19, 2015. The initial complaint named the City, ABC Appliances (ABC), and individuals Donavan Whyte (Whyte), the owner of ABC at the time of the accident, and Dominic Yanni (Yanni) as party defendants. On June 14, 2016, Hysmith served and filed an amended summons and amended verified complaint, which no longer names Yanni as a defendant, but now includes 145 Appliances, Corp. (145), as an additional party defendant. The amended verified complaint alleges that Hysmith sustained her injuries when she tripped and fell in front of ABC's principal place of business at 145 South Fourth Avenue, Mount Vernon, New York. Hysmith further alleges that the cause of her accident was the condition of the public sidewalk at that location, which the City has a nondelegable duty to maintain. Hysmith's allegations in this respect are as follows:

> "18. On or before May 19, 2015, the CITY removed a parking meter located in front of the property, leaving a hole approximately 1½ ft. wide and 5 inches deep, causing a defect in the sidewalk.
>
> 19. On or about May 19, 2015 and at all times relevant herein, defendant CITY was negligent in removing said parking meter, failing to make the defective area on the sidewalk safe after removal",

(complaint, ¶¶ 17, 18).

Although the City and Whyte served answers to the amended verified complaint, neither ABC, nor 145, answered, moved or otherwise timely appeared in the action. By decision and order dated June 16, 2017, this Court granted plaintiff's default motion against these defendants, and directed the parties to appear in the preliminary conference part to commence the discovery

process. The parties conducted discovery, including depositions, and on June 25, 2018, plaintiff filed a note of issue and certificate of readiness attesting to the completion of all known discovery.

On July 11, 2018, the City served and filed the instant motion for summary judgment dismissing the complaint, and on August 2, 2018, plaintiff served and filed her opposition to the City's motion, together with her cross motion for summary judgment as to liability.

It is well settled that the proponent of a motion for summary must:

> "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]).

Addressing the City's motion first, the central ground proffered for granting summary judgment in its favor is that no prior written notice of the defect was given to its Commissioner of Public Works, which, under local law, is a condition precedent to suit sounding in tort liability. The City's prior written notice legislation is set forth in section 265 of the Charter of the City of Mount Vernon. It provides, in relevant part:

> "[n]o civil action shall be maintained against the City for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk, crosswalk . . . parking lot or parking garage being defective, out of repair, unsafe, dangerous or obstructed unless, previous to the occurrence resulting in such damages or injury, written notice of the defective, unsafe, dangerous or obstructed condition of said street, highway, City tree, bridge, culvert, sidewalk, crosswalk, parking lot or parking garage was actually given to the Commissioner of Public Works and that there was a failure or neglect within a

> reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of."

With respect to municipal liability, it has long been the law in New York that:

> "in derogation of the common law, a locality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its sidewalks if it has not been notified in writing of the existence of the defect or hazard at a specific location. This rule comports with the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways, yet imposes responsibility for repair once the municipality has been served with written notice of an obstruction or other defect, or liability for the consequences of its nonfeasance, as the case may be"

(*Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999] [internal quotation marks and citations omitted]).

To establish that it did not have prior written notice of a dangerous or defective sidewalk condition in front of 145 South Fourth Avenue where Hysmith's alleged accident occurred, the City submits copies of the notice of claim and pleadings, the party deposition transcripts, and the sworn affidavit of its current deputy commissioner of the Mount Vernon Department of Public Works (DPW), Anthony Amiano (Amiano).

In his affidavit, Amiano avers, among other things, that as deputy commissioner, he oversees maintenance for the City's infrastructure, including sidewalk repair, and that he is the person responsible for handling the notices of claims served on the City. Amiano states that he reviewed the notice of claim pertaining to Hysmith's accident and conducted an investigation into the matter. His affidavit also states, in relevant part:

> "4. On or about November 13, 2015, a diligent and good faith search for records in the complaint files that are listed by street name was conducted in the Department of Public Works, City Hall, Roosevelt Square, Mount Vernon, New York for the location of 145 South 4th Avenue.

5. No prior written notice of complains were found with reference to any defective condition at the subject location.

6. Said records are kept and maintained in accordance with General Municipal Law, Section 50-g.

7. Further, I am unaware of any affirmative act or incident that lead to the City creating the defective condition at 145 South 4th Avenue . . .

8. Prior to and throughout the course of this action, I have not come across any information showing or tending to prove that the City created the defective condition at 145 South 4th Avenue . . .

9. Records maintained by the [DPW] for the location of 145 South 4th Avenue . . . do not reflect that the City created or caused the defective condition at 145 South 4th Avenue."

During his deposition, Amiano explained that his job responsibilities include inspecting sidewalks when either complaints or notices of claim come in, and that, when something is found to be a City problem, to designate it as such (a "Code 53"), and to assign a crew to make the repairs (Amiano tr at 8). With respect to the parking meters, Amiano testified that the meters are owned by the City, and that the City's parking authority is the agency that is responsible for installing, maintaining and fixing them, and for collecting the money that is put into them (*id.* 10, 11, 12). When asked whether the City removed a parking meter in front of 145 South Fourth Avenue prior to May 19, 2015, Amiano responded: "you'd have to check with the Parking Authority about that" (*id.* 13). Next, Amiano testified that, it was after the City's law department sent DPW the notice of claim about a knocked down parking meter and a hole in the sidewalk in front of 145 South Fourth Avenue, that he inspected the spot and directed his department to assist the parking authority "to make an unsafe condition safe," by filling the hole with cement (*id.* 14-17). He also testified that, while DPW assisted, it was responsibility of the parking authority to

handle the removal of parking meter and to take care of the hole left behind (*id.* 15, 28).

Following Amiano's testimony, plaintiff requested that the City produce a knowledgeable witness from its parking authority. In response, the City produced parking enforcement officer Omar Jimenez (Jimenez). It was during preliminary questioning that Jimenez explained that the City does actually not have a parking authority, rather, it has a parking bureau that works as a part of the Mount Vernon Police Department (MVPD), and that he is one of the MVPD parking bureau's parking enforcement officers (Jimenez tr at 5, 6). Jimenez testified that his responsibilities as a parking enforcement officer are to issue summonses and to report which meters are broken (*id.* 5). He explained that the parking enforcement officers then give the reports about broken meters to the parking meter workers, who are also part of the MVPD's parking bureau (*id.* 5, 8-9). In response to counsel's questions, Jimenez testified that it is the responsibility of the parking meter workers to maintain the records relating to the City's parking meters, and to oversee the maintenance of the City's parking meters (*id.* 8-9). Upon further questioning, Jimenez testified that the parking meter workers handle the installation and removal of the City's parking meters (*id.* 11), and that, when a parking meter is removed, the hole is supposed to be filled in immediately (*id.* 11, 17). He also testified that the parking meter workers bring with them the materials they need to fill in a hole, and answered "no," when asked whether there "[a] are any instances where the parking bureau works with the department of public works to maintain a sidewalk" (*id.* 21).

When asked questions specific to the instant action, Jimenez stated that he did not know whether the parking enforcement officers, or the parking meter workers, were notified about the

subject hole at 145 South Fourth Avenue, or whether the parking bureau took any steps to fill the hole (*id.* 18).

The City also supports its motion with case law on the question of prior written notice, including actions involving public sidewalks and parking meters, which consistently dismiss actions when it is established that a municipality was not given prior written notice, as mandated by local laws (*see Gorman v Town of Huntington*, 12 NY3d 275 [2009]), and argues that the evidence supports dismissing the complaint on this basis.

Upon review of the City's proof on the issue of prior written notice, the Court finds that the City's proof lacks sufficient detail to establish this defense as a matter of law. Amiano's affidavit lacks clarity as to who it was who conducted a search of DPW's records on November 13, 2015, in that Amiano does not state whether it was he or another employee who conducted the search, and the affidavit also does not indicate what period of time the search covered - whether it covered a period of days, weeks, months, or years prior to May 19, 2015. This lack of relevant detail was not remedied by Amiano when he testified during his deposition: "[i]n our records that I checked prior to when the Notice of Claim came in, I checked to see if we had anything for this address and we didn't have any complaints for this address" (Amiano tr at 19-20).

Having failed to demonstrate entitlement to summary judgment, the City's motion is denied, and the Court need not reach Hysmith's arguments based on the two exceptions to the prior written notice rule, that the City derives a benefit from its use of the sidewalk for its parking meter (*see Ocasio v City of Middletown*, 148 AD2d 431, 432 [2d Dept 1989]), and that the City created and/or exacerbated the dangerous condition by leaving a one and a half foot by five inch

deep hole in the sidewalk pavement when its employees removed the broken parking meter (*see Kiernan v Thompson*, 73 NY2d 840, 842 [1988]).

Also denied is plaintiff's motion for summary judgment, which is premised on her assertions that, regardless of whether it had prior written notice: (1) the City owns and is responsible for both the sidewalk and the parking meter in front of 145 South Fourth Avenue; (2) the City receives a benefit (money) from its use of the parking meter installed in the subject sidewalk; (3) the cause of her accident was the sizable hole that was created when the City removed the parking meter that had been knocked down, and then failed to fill or otherwise remediate the hole that was then permitted to remain unprotected for an unreasonable period of time prior to her accident on May 19, 2015; and (4) the City had actual and constructive notice of the defective condition.

Plaintiff's chief proofs in support of her motion are the party deposition transcripts. She relies on the defense witnesses' testimony regarding the City's acknowledged ownership of the subject sidewalk and parking meter, and regarding the City's agencies/bureaus' responsibilities for maintaining the subject sidewalk and parking meter, for which it receives remuneration. Hysmith also relies on the testimony of Whyte,[1] who recalled making a verbal complaint to the City, at some nonspecific time, about the broken parking meter in front of 145 South Fourth Avenue (Whyte tr at 18, 19). Next, Hysmith offers her own deposition testimony to establish that: prior to, and at the time of, her accident, she lived and traversed South Fourth Avenue on a regular basis; she actually observed City DPW workers remove the broken parking meter and

[1] By written stipulation dated July 2, 2018, plaintiff discontinued her causes of action against Whyte.

place it in their white DPW truck several months before her accident; and based on her own observations, the subject hole, where the parking meter had been, was left unchanged for some three months prior to her accident (Hysmith tr at 36, 57-58, 68-69). While this evidence states a claim against the City for negligence, and a basis for claiming that one or both exceptions to the prior written notice law may apply in this instance, it does not establish the City's liability as a matter of law.

Questions of fact exist as to whether the City had prior written notice of the alleged condition, and if, at time of trial, the City is successful in establishing that it did not have prior written notice, then questions of fact exist as to whether either of the accepted exceptions to the prior written notice rule (special use or that the City created and/or exacerbated the defect) apply. Furthermore, while plaintiff is incorrect in asserting that actual notice and/or constructive notice constitute exceptions to the prior written notice rule (*see Quinn v City of New York*, 305 AD2d 570, 572 [2d Dept 2003]), her contentions about notice would be relevant, and present issues for resolution by the trier of fact, should the City not be able to establish lack of prior written notice.

Turning to plaintiff's motion for leave to serve and file an additional amended complaint in order to state, more clearly, her allegations regarding special use and the City's creation and/or exacerbated of the defect sidewalk, the City objects to the motion on the following bases. First, the City correctly points out that plaintiff has a pending cross motion for summary judgment on her current complaint, which renders her second motion procedurally in error. Next, the City contends that plaintiff incorrectly denominated her proposed complaint as an "amended verified complaint," when it should have been denominated as a "second amended verified complaint," given that she already served and filed the "amended verified complaint" that is the subject of the

City's motion and plaintiff's cross motion. The City's objection on this basis is unavailing. Hysmith's misnomer of the proposed amended complaint is, by itself, an insufficient reason for denying leave, as no substantial right of a party is being prejudiced by the correctable mistake (CPLR 2001). The City's next assertion - - that plaintiff cannot rely on the special use exception, because she did not come into contract with any part of the parking meter - - is wholly lacking in merit, and its objection based on lack of prior written notice is addressed above. As to the City's contention that it would be prejudiced by an order granting plaintiff leave to serve a proposed amended complaint, because discovery is concluded, and the delay is significant, and the proposed amended complaint is patently devoid of merit, is itself, lacking in merit.

A review of the deposition testimony of both Amiano and Jimenez reveals that questions relating to the exceptions to the prior written notice requirement were posed by plaintiff's counsel and largely blocked by the City's defense counsel. While each of the City's witnesses gave knowledgeable answers about the operations of their particular departments, when presented with questions relating to the applicability of either exception, defense counsel interposed an objection, which, regardless of whether a proper basis for the objection was stated, in almost every instance coincided with the witness's claimed lack of knowledge, or an equivocal response. The City then objected to plaintiff's request to conduct further discovery as to these issues, whether by deposition of witnesses with knowledge, or by written post-EBT demands. The court finds that the City's decision not to seek discovery on these issues, and/or to prevent plaintiff from pursuing discovery on these issues, is inconsistent with its current complaints about the timing, the merits and the prejudicial effects of granting leave. However, given that leave cannot be granted while there is a pending cross motion for summary judgment

on the current amended verified complaint, plaintiff's motion by order to show cause for leave to serve and file a further complaint is denied without prejudice.

Accordingly, it is

ORDERED that the motion and cross motion are denied; and it is further

ORDERED that the motion by order to show cause is denied without prejudice; and it is further

ORDERED that the parties appear for in the settlement conference part in courtroom 1600, Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York, on Tuesday, December 4, 2018 at 9:15 a.m., to schedule a date for trial.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
November 15, 2018

ENTER:

HON. DAVID F. EVERETT, A.J.S.C.

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