SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III **PART** IAS MOTION 62EFM

Justice

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INDEX NO. 160659/2016

NATIVIDAD OPPENHEIMER

MOTION DATE 05/16/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

CITY OF NEW YORK,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff commenced this action seeking to recover damages allegedly sustained in a trip and fall accident on December 26, 2015, in a hole in the roadway on Amsterdam Avenue near its intersection with West 151st Street, New York, New York. Defendant City of New York ("City") now moves for summary judgment, and plaintiff opposes the motion.

In support of its motion, defendant City submits copies of the notice of claim, pleadings, bill of particulars, 50-h hearing transcript, photographs marked at the 50-h hearing, plaintiff's deposition transcript, photographs marked at plaintiff's deposition, Department of Transportation ("DOT") records, an affidavit by DOT employee Matthew Moretto, and defendant's deposition transcript. Defendant City argues that it is entitled to summary judgment because 1) it did not have prior written notice of the alleged defect and 2) there is no evidence to suggest that it cause or created the alleged defect.

In opposition, in plaintiff's papers and at oral argument, plaintiff does not dispute that defendant City did not have prior written notice of the subject defect. Additionally, plaintiff does not argue that defendant City caused or created the alleged defect nor specifies any evidence in the record which would suggest same. Rather, plaintiff contends that the presence of DOT repair workers at the location of plaintiff's alleged accident prior to the alleged accident creates a question of fact as to whether defendant City had actual notice. Both in plaintiff's papers and at oral argument, plaintiff relies upon *Bruni v City of New York*, 2 NY3d 319 (2004), for the proposition that actual notice can provide a basis for liability in this matter.

In reply, defendant City reiterates its main contentions and further argues that actual notice "is not the legal standard that governs the City's liability for defective roadway conditions" (*see* City aff. in reply at ¶ 7). Defendant City contends that plaintiff's failure to address or dispute the issues of whether defendant City had prior written notice or whether defendant City caused or created the alleged defect requires the instant motion to be granted.

The proponent of a motion for summary judgment must tender sufficient evidence to show its entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing, "the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]).

"Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous roadway[, sidewalk, or encumbrance] condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (*Phillips v. City of New York,* 107 A.D.3d 774 [2d Dept 2013] citing *Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *see* New York City Administrative Code 7-201 and 7-210).

"Where the City establishes that it lacked prior written notice under the Pothole Law [NYC Admin. Code 7-201], the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). Additionally, the affirmative negligence exception 'is limited to work by the City that immediately results in the existence of a dangerous condition' (*Oboler v City of New York*, 8 NY3d 888, 889 [2007] [emphasis omitted], quoting *Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005])" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

Here, it is undisputed that defendant City did not receive prior written notice of the alleged defect. Consequently, the burden shifted to "plaintiff to demonstrate the applicability of *one of two* recognized exceptions to the rule" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008] [emphasis added]), that is, defect creation or special use (*id.*; *see Chambers v City of New York*, 147 AD3d 471 [1st Dept 2017]). In opposition, plaintiff did not submit any exhibits and makes no argument with respect to the 'cause and create' exception. Moreover, plaintiff makes no mention of special use.

What remains, then, is plaintiff's argument that actual notice can serve as a predicate for liability in this action and that *Bruni v City of New York*, 2 NY3d 319 (2004), stands for this proposition. In *Bruni*, prior to the alleged accident, a City supervisor "filled out a 'Foreman's Report' in which he stated: 'Repair defective C/B unit…is missing bricks on the wall stock due to caving. Loc. safe at this time.' [The supervisor] testified that 'caving' meant 'a hole in the street'" (*id.* at 322). In analyzing this written report as a predicate for liability, the Court of Appeals wrote as follows: "[we] hold 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" (*id.* at 325 [emphasis

added]). Moreover, the Court of Appeals explicitly interpreted the "written acknowledgement requirement":

> "While the purpose of the acknowledgement provision is not explained in the legislative history, we interpret it as permitting a lawsuit where there is documentary evidence showing, as clearly as written notice to DOT would show, that the City knew of the hazard and had an opportunity to remedy it" (*id.* at 326).

Simply, then, the *Bruni* case does not stand for the proposition that actual but unwritten notice can serve as the basis for liability in an action where a sidewalk or roadway defect allegedly causes injury. Rather, for defendant City to be held liable for a crosswalk or roadway defect, defendant City must have prior written notice of the alleged defect, defendant City must have caused or created the alleged defect, or defendant City must have made some related special use (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

Under the relevant precedent, including both *Bruni* and *Yarborough*, "documentary evidence" (*i.e.* written acknowledgement) of prior notice is required. Moreover, there is a critical distinction to be made between acknowledgement of the defect and acknowledgement of the presence of repair workers in the area to perform roadway maintenance. Here, plaintiff relies on four instances of the latter—that is, evidence that DOT repair workers were in the area performing roadway maintenance—which is insufficient. As the Court of Appeals made clear in *Bruni*, the written statement must show "knowledge both of the existence and the dangerous nature of the condition" (*Bruni* at 325). As argued by plaintiff, "it is undisputed that four 'gangs' of repair workers were present at the site of plaintiff's fall, and there is nothing to even suggest that they did not observe the subject roadway defect, a large hole near the cross walk" (plaintiff's aff. in opp. at ¶ 8). The lack of suggestion however, does not create an issue of fact as to prior written notice of the existence and dangerous nature of the alleged defect.

This court therefore finds that plaintiff has failed to raise a triable issue of fact in opposition to defendant City's motion for summary judgment insofar as the records showing DOT repair workers were in the subject area on several occasions prior to plaintiff's alleged accident do not create a question of fact as to whether defendant City had prior written notice of the alleged defect, whether defendant City caused or created the alleged defect, or whether defendant City made special use of the area. It is undisputed that defendant City did not have prior written notice of the subject defect. Thus, defendant City has shown its entitlement to judgment, and such showing is unrebutted.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected.

Accordingly, it is ORDERED that defendant City of New York's motion for summary judgment is granted in its entirety, dismissing plaintiff's complaint as against it; and it is further

ORDERED that defendant City of New York is to serve a copy of this Order with Notice of Entry within twenty days of entry upon plaintiff and the General Clerk's Office; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

July 16, 2019

HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**