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. 159018/2015

BRIAN HOWELL,

MOTION DATE 10/17/2019

Plaintiff,

MOTION SEQ. NO. 002 & 003

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, AND CONSOLIDATED EDISON OF NEW YORK, INC.,NICO ASPHALT PAVING, INC.,

DECISION + ORDER ON MOTION

Defendant.

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AND CONSOLIDATED EDISON OF NEW YORK, INC.

Third-Party
Index No. 595653/2016

Plaintiff,

-against-

VALI INDUSTRIES, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motions 002 & 003) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 81, 82, 83, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, and 110

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

For purposes of disposition, motion sequence numbers 002 and 003 are hereby consolidated.

Plaintiff commenced this action seeking damages for personal injuries allegedly sustained on September 4, 2014, when he was riding his bicycle in the vicinity of 125th Street between Seventh and Eighth Avenue. Plaintiff alleges that he tripped and fell on a defective condition in the roadway. In motion sequence no. 002, the City of New York ("City") moves for summary judgment pursuant to CPLR 3212 to dismiss plaintiff's complaint and all cross-claims on the ground that the City lacked prior written notice. Plaintiff, Consolidated Edison of New York ("Con Ed"), and Nico Asphalt Paving Inc. ("Nico") oppose the motion. In motion sequence no. 003, the City moves pursuant to CPLR 3211(a)(7) to dismiss the complaint on the ground that plaintiff

failed to plead prior written notice. Plaintiff opposes motion sequence no. 003 and cross-moves to amend his complaint to include an allegation that the City had prior written notice.

Motion Sequence No. 002

In motion sequence no. 002, the City argues that it is entitled to summary judgment pursuant to CPLR §3212 because it did not have prior written notice of the alleged defect, as required by Administrative Code §7-201. In support of its motion, the City did a two-year DOT search for records pertaining to the roadway intersection located at West 125th Street between Seventh Avenue and Eighth Avenue. The City contends that the records produced as a result of the search establish that the City lacked prior written notice of the alleged defect and that the City did not cause or create the alleged defective condition. Therefore, it is the City's position that it cannot be held liable pursuant to Administrative Code §7-201.

In opposition, Con Ed relies on two work orders, which were produced as part of the City's exchanged DOT records, to argue that there is a question of fact as to whether the City had prior written notice of the subject condition. Those two work orders are SR 1-1-912927286 ("the 27286 work order") and SR 1-1-1000924220 ("the 24220 work order"). The 27286 work order indicates that on November 26, 2013, in front of 261-271 West 125th Street (between 7th and 8th Avenue), there were a series of hummocks 7 inches high on the roadway, and 8 feet from the curb, which Con Ed contends matches the location and condition complained of by plaintiff. Con Ed argues that while this work order states that it was closed on December 9, 2013, there is no indication as to whether any repair was actually done. As to the 24220 work order, Con Ed notes that said work order indicates that on August 11, 2014, it was reported that the street at 271 West 125th Street had a big lump, raised up and raised down, which Con Ed also contends matches the location and condition complained of by plaintiff. Said work order was closed on September 15, 2014. Thus, it is Con Ed's position that the City has not definitely established that these work orders were closed before plaintiff's accident date. In the alternative, Con Ed argues that the City's motion should be denied as premature as no depositions have been conducted in this matter.

Plaintiff and co-defendant Nico adopt and incorporate the arguments made in Con Ed's opposition papers.

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]).

Administrative Code §7-201(c)(2) states as follows:

> No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe

"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]).

Upon a review of the submitted papers and accompanying exhibits, this Court finds that even assuming *arguendo* that the City made a prima facie showing of entitlement to judgment as a matter of law, the opposing parties have raised an issue of fact with regard to the 24220 work order. Said work order was generated on August 11, 2014 and was created in response to a 311 call. Per the work order, the caller indicated that the street had "a big lump its raised up and raised down" in the vicinity of 271 West 125th Street, which is between 7th and 8th Avenue. At his 50-h hearing, plaintiff testified that he fell on a pothole/uneven/beat up street. As such, this Court finds that there is a question of fact as to whether the condition and location described in the 24220 work order match the condition and location complained of by plaintiff. In the "notes to customer" section, this work order indicates that the complaint was sent to maintenance crew to be repaired and the order further notes that the work order was not closed until September 15, 2014, shortly after plaintiff's accident. Thus, there is a question of fact as to whether the 24220 work order constitutes written acknowledgment by the City of the condition that allegedly caused plaintiff's accident.

Motion Sequence No. 003

In motion sequence no. 003, the City moves for dismissal pursuant to CPLR 3211(a)(7) on the ground that plaintiff failed to plead prior written notice, a condition precedent to maintaining

this cause of action. Additionally, the City argues that (1) plaintiff's complaint must be dismissed because plaintiff cannot identify the alleged defective condition without engaging in speculation; and (2) because his notice of claim is vague and fails to comply with the requirements set forth in GML 50-e. The City contends *inter alia* that the notice of claim fails to specify an exact location where the accident occurred- instead the plaintiff simply alleges that he was riding his bike on 125th Street between 7th and 8th Avenue.

By cross-motion, plaintiff moves to amend the complaint to add two paragraphs asserting prior written notice of the subject defect, as he argues that there would be no prejudice to the City. Plaintiff attaches a Proposed Amended Complaint. The City opposes the amendment.

In *Perez v City of New York*, 110 AD3d 777 [2d Dept 2013], the Court held that plaintiff's complaint therein should not have been dismissed without granting plaintiff leave to plead prior written notice. Thus, because here the City has failed to show any prejudice or surprise, plaintiff herein is granted leave to amend her complaint to add an allegation that the City received prior written notice of the alleged defect. (*See Id* at 779.)

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

ORDERED, that the City's motion for summary judgment (motion sequence no. 002) is denied in its entirety; it is further

ORDERED, that the City's motion to dismiss (motion sequence no. 003) is denied in its entirety; it is further

ORDERED, that plaintiff's cross-motion for leave to amend the complaint is granted; and it is further

ORDERED, that plaintiff's Proposed Amended Complaint shall be deemed served and filed; and it is further

ORDERED, that plaintiff shall serve a copy of this order with notice of entry within 30 days upon all parties.

This constitutes the decision and order of the court.

December 23, 2019

HON. JULIO RODRIGUEZ III, JSC

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