SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM **PART**

Justice

----------X

SHARON PHILLIPIN,

Plaintiff,

- v -

CITY OF NEW YORK, PEXCO LLC,

Defendants.

----------X

INDEX NO. 451086/2018

MOTION DATE 01/18/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document num H. IM (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 84, 91

were read on this motion for SUMMARY JUDGMENT.

On February 26, 2018, plaintiff Sharon Phillipin commenced the instant action based upon injuries she allegedly sustained on January 3, 2017, after tripping and falling on a "channelizer post,"—a plastic post used for directing traffic also known as a flexible delineator, bollard, or pylon—which had been flattened against the ground at the intersection of Whitehall Street and Bridge Street. Plaintiff's complaint asserts claims for, inter alia, negligence, negligent design, and strict product liability. Both defendants interposed Answers which, inter alia, asserted cross-claims against the other for contribution and indemnity (NYSCEF Doc. Nos. 7, 10). The City now moves for summary judgment dismissing the complaint and Pexco LLC's cross-claims against it. Only plaintiff opposes the motion.

In support of its motion, the City submits the transcript of the examination before trial ("EBT") of Stacey Williams, a Records Searcher at the New York City Department of Transportation ("DOT") in which she attests that a search of DOT records related to the intersection of Whitehall Street and Bridge Street as well as Whitehall Street between Bridge Street

and Stone Street for a two-year period between January 3, 2015 and January 3, 2017 revealed a September 2015 complaint related to a channelizer post (NYSCEF Doc. No. 46 [Williams EBT at pp. 9-11, 13-20]). The City also submits the records produced as a result of the search referenced in Williams's EBT (NYSCEF Doc. No. 44 [City Second CSO Response]). Finally, the City submits the EBT transcript of Adam Weir, a Supervisor of Traffic Device Maintainers at DOT in which he testifies that the City installed channelizer posts at Whitehall Street and Bridge Street in 2012 and that maintenance was performed at the location on November 2016 and December 2016 (NYSCEF Doc. No. 38 [Weir EBT at pp. 8-21, 37, 62]).

DISCUSSION

"The proponent of a summary judgment motion 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" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). Here, the City contends that this action must be dismissed as against it because: (1) the subject condition was open and obvious, readily observable, and not inherently dangerous; (2) the City did not have prior written notice of the defective channelizer post; and (3) plaintiff failed to plead a design defect claim in her Notice of Claim.

The City has not established at this juncture that the channelizer post was open and obvious, readily observable, and not inherently dangerous. "While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion" (Tagle v Jakob, 97 NY2d 165, 169 [2001] [internal citations omitted]). That is not the

case here. A condition is open and obvious when it is "plainly observable and [does] not pose any danger to someone making reasonable use of his or her senses" (Boyd v New York City Hous. Auth., 105 AD3d 542, 543 [1st Dept 2013] [internal citations and quotations omitted]). However, "visible hazards do not necessarily qualify as open and obvious because the nature or location of some hazards, while they are technically visible, make them likely to be overlooked" (Powers v 31 E 31 LLC, 123 AD3d 421, 422 [1st Dept 2014] [internal citations and quotations omitted]).

Here, plaintiff's testimony that the post in question was white and blended in with the white line painted on the ground against which the post was flattened (NYSCEF Doc. No. 42 [Phillipin EBT at pp. 28, 39]), raises a question of fact as to whether the channelizer post was open and obvious, precluding summary judgment on this basis (See e.g., Mashozhera v El Nuevo JB Bakery Inc., 191 AD3d 605 [1st Dept 2021] ["Even if plaintiff saw the configuration of the bakery's exterior steps when she entered the store, the evidence that the bottom step was less visible to her as she was exiting the store is sufficient to raise a triable issue of fact precluding summary judgment"]; see also Martinez v Levites Realty Mgt., LLC, 59 Misc 3d 1207(A) [Sup Ct, Bronx County 2018]).

The City has, however, established that its entitlement to summary judgment pursuant to Section 7-201 of the Administrative Code of the City of New York. That statute provides, in pertinent part, that:

> 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.

(Administrative Code §7-201[c][2]).

The only exceptions to the requirements of Administrative Code §7-201 are "where the locality created the defect or hazard through an affirmative act of negligence [or] where a 'special use' confers a special benefit upon the locality" (Oboler v City of New York, 8 NY3d 888, 889 [2007] [internal citations and quotations omitted]).

Plaintiff concedes that the City has established that it did not have prior written notice of the channelizer post in question (NYSCEF Doc. No. 72 [Plaintiff's Memo. of Law. in Opp. at ¶3]) but argues that this is of no moment because the requirements of Administrative Code §7-201 does not apply. Specifically, plaintiff argues that the City was affirmatively negligent insofar as it was aware that channelizer posts are generally prone to break, thereby creating a hazardous condition, yet did not create a system to ensure all the channelizer posts were timely repaired or replaced. This argument is unavailing—"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 in original] [internal citations omitted]) and not, as here, through a dangerous condition that gradually developed over time and was not repaired (See Bielecki v City of New York, 14 AD3d 301, 302 [1st Dept 2004]). The City's motion for summary judgment is, therefore, granted.

In light of the foregoing, the Court does not reach that branch of the City's motion for summary judgment dismissing plaintiff's design defect claim.

Accordingly, it is

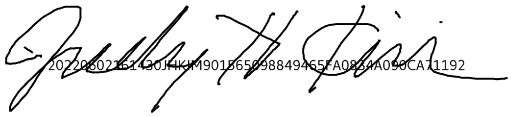
ORDERED that the City's motion for summary judgment dismissing the complaint and all cross-claims as against it is granted and the complaint and cross-claims are hereby dismissed in their entirety as to the defendant the City of New York; and it is further

ORDERED that within twenty days of entry, the City shall serve a copy of this order with notice of its entry upon all remaining parties and upon the Clerk of the Court (60 Centre St., Room 141B) and the Trial Support Office (60 Centre St., Rm. 158M) in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon all parties, the Clerk of the Court is directed to enter judgment dismissing the complaint in its entirety as against defendant the City of New York and to amend the court's records to reflect the change in the caption herein; and it is further

ORDERED that since the City is no longer a party to this action, the Trial Support Office shall reassign this action to the inventory of a non-City Part.

This constitutes the decision and order of the Court.



6/2/2022
DATE

HON. JUDY H. KIM, J.S.C.

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