SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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SALVATORE MARINO,

Plaintiffs,

-against-

THE CITY OF NEW YORK, and FRANK CRANE

Defendants.

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Part C2

Present:

Hon. Orlando Marrazzo, Jr.

DECISION AND ORDER

Index No. 150041/2019

Motion No. 006

The following papers numbered 1 to 3, including e-filed documents listed by NYSCEF document numbers 119-145 were marked fully submitted on the 16th day of April, 2023:

Notice of Motion for Summary Judgment
By Defendant THE CITY OF NEW YORK, with Supporting Papers and Exhibits
(dated December 29, 2022)
.....1

Affirmation in Opposition
By Plaintiff SALVATORE MARINO
(dated April 5, 2023)
.....2

Reply Affirmation
By Defendant THE CITY OF NEW YORK
(dated April 17, 2023)
.....3

Upon the foregoing papers, the motion (No. 006) for summary judgment by defendant THE CITY OF NEW YORK is granted.

FACTS

Plaintiff SALVATORE MARINO (hereinafter "plaintiff") commenced this action to recover damages for injuries he sustained when he tripped and fell on a broken and raised sidewalk, protruding some 3 ½ to 4 inches from the ground in front of 111 Walbrooke Avenue in Staten Island. Defendant FRANK CRANE (hereinafter "CRANE") is the owner of the property adjacent to the sidewalk where the accident occurred. According to plaintiff, CRANE and defendant THE CITY OF NEW YORK (hereinafter "THE CITY") either created the sidewalk condition or allowed the sidewalk to remain in a dangerous condition for a substantial period of time in spite of notice of said defective condition.

As a result of his fall, plaintiff alleges to have sustained, *inter alia*, serious injuries to his cervical and lumbar spine which required that he undergo surgery for a bilateral L2-L5 lumbar medial branch block under fluoroscopic guidelines. Plaintiff further alleges that he sustained bilateral neck calcifications; left shoulder chronic Hill-Sachs deformity; left hand abrasions; left knee tenderness, forehead abrasions; active right L4-L5 radiculopathy with denervation in the right anterior tibialis and the right L4-L5 parasp muscles. He further alleges that he was confined to the hospital for one day following surgery and is confined intermittently to bed and home up to the present time. There is no claim for lost wages since he is retired from the New York City Sanitation Department.

Procedurally, the Court denied a prior motion by CRANE for summary judgment dismissing the complaint on the ground that triable issues of fact exist regarding whether CRANE had previously repaired the sidewalk thereby exposing him to potential liability for the defective condition of the sidewalk at the time of plaintiff's fall. There were also questions regarding whether CRANE applied for permission to repair and reconstruct the public sidewalk by cutting

or removing tree roots on his property in accordance with THE CITY's Administrative Code §19-152. Following the completion of discovery, this Court granted plaintiff's motion (No. 005) for a special preference trial pursuant to CPLR 3403(a)(4) on the ground that he is over seventy (70) years of age. He is now 86 years old.

In the current application, THE CITY moves for summary judgment and contends that it did not have prior written notice of the condition that is the subject of this lawsuit in accordance with Administrative Code §7-201(c). In this regard, THE CITY argues that while numerous records searches were conducted for permits, complaints, contracts, violations, inspections, maintenance and repair records in various CITY agencies including, *inter alia*, the Department of Transportation (DOT), Central Forestry Division, Staten Island Borough Forestry Division, and Department of Parks and Recreation, none of the records uncovered constitute prior written notice of the subject condition but, instead, relate to other work performed near the area of the subject location, *e.g.*, pedestrian ramps at the corner of Forest Avenue and Walbrooke Avenue.

THE CITY further argues that it did not have actual or constructive notice of the alleged defective sidewalk condition. According to THE CITY, two Big Apple Maps were submitted which illustrate defects in sidewalks, curbs and roadways, show no notations that coincide with the subject sidewalk defect. Accordingly, THE CITY cannot be charged with prior written notice of the specific condition at the location where plaintiff fell.

Furthermore, none of these records are sufficient to establish that THE CITY caused or created the defective sidewalk condition. In this regard, THE CITY argues there is no proof of any municipal repair that could have resulted in a dangerous condition as there were no maintenance and/or repair records found during the DOT's records search at the subject location

for an eight-year period prior to the date of accident. Thus, THE CITY argues that it cannot be held liable for causing plaintiff's injuries and summary judgment should be granted.

In opposition, plaintiff contends that THE CITY's motion must be denied based on questions of fact regarding (1) THE CITY's prior written notice of the defective condition of the sidewalk caused by the roots of the London Plan tree located on 111 Walbrooke Avenue and (2) whether THE CITY caused and/or created the alleged defect. In support, plaintiff relies on the expert reports by Joseph Farehnik and Terry Tattar, who both opined that botched repairs performed to the sidewalk at 111 Walbrooke Avenue caused the uprooting of the sidewalk which caused plaintiff to fall. According to these experts, the London Plane tree is known to have aggressive, fast growing root systems which can break through anything and that said tree roots broke through the sidewalk in front of 111 Walbrooke Avenue. These experts opine that someone attempted to repair the sidewalk but did so negligently, allowing the roots to break through the repair causing the sidewalk to break and extend upward nearly 4 inches. Defendant/homeowner CRANE has denied making any repairs on the sidewalk since purchasing the home in 1995.

In regard to THE CITY, plaintiff argues that a records search conducted by THE CITY revealed that THE CITY was present at the subject sidewalk location for various reasons including a DOT and PARKS sidewalk program to perform sidewalk ramp repairs and to prune neighborhood trees. More specifically, the search uncovered a 2014 work order indicating that tree pruning was performed at the subject location. Plaintiff further contends that while inspections are usually conducted prior to performing the pruning job, THE CITY failed to produce any corresponding inspection report or any proof indicating whether or not the work performed pursuant to the order related to tree branches or tree roots penetrating the sidewalk. Plaintiff further

argues that THE CITY did not submit any of its repair records. Based on the failure to produce these records, plaintiff argues that THE CITY's motion must be denied.

In regard to whether THE CITY created a dangerous condition, plaintiff argues that questions of fact exist as to whether THE CITY or the property owner performed the botched repair work on the sidewalk within the last ten years. Plaintiff argues that whoever performed the repairs failed to alleviate the problem by pouring concrete over protruding tree roots. In this regard, plaintiff argues that questions exist as to whether THE CITY immediately created a dangerous condition when it performed its tree-pruning work at the subject location. Thus, THE CITY's motion must be denied.

DISCUSSION

It is well established that the proponent of a summary judgment motion must make a *prima facie* showing of its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]. The failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see* Weingrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once that initial burden has been satisfied, however, the burden shifts to the party opposing the motion to produce sufficient evidence to raise a triable issue of fact (*id.*). Accordingly, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat the motion (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]), and opposition papers which are "entirely conjectural [present] ... no genuine issue of fact" and warrant the entry of summary judgment (*see* Cassidy v. Valenti, 211 AD2d 876, 877 [3rd Dept. 1995]). Here, in the opinion of this Court, THE CITY has met its initial burden, while in opposition, the plaintiff has failed to raise a triable issue of fact.

In order to maintain an action in tort against THE CITY for an alleged defective condition existing on the sidewalk, there must be proof established that THE CITY received prior written notice of the dangerous condition and that THE CITY failed to correct the condition within 15 days of receiving such notice (*see* Administrative Code §7-201(c); Katz v. City of New York, 87 NY2d 241, 243 [1995]). "[P]rior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City" (Katz v. City of New York, 87 NY2d at 243). The purpose of said law is to limit liability to cases where the municipality has been given written notice and an opportunity to correct the hazardous condition (*see* Poirer v. City of Schenectady, 85 NY2d 310 [1985]).

In this case, THE CITY has established its entitlement to judgment as a matter of law by demonstrating the absence of any prior written notice of the defective condition of the sidewalk which caused plaintiff's fall. The Court has considered all of the proof submitted, including the voluminous records submitted following THE CITY's records search; the EBT testimony of the parties, agency personnel and its records searchers; and photographic evidence which depicts the condition of the sidewalk at the time of plaintiff's fall, and has determined that THE CITY has established that it had no prior written notice of the defective condition of the sidewalk. While plaintiff argues that a 2014 work order pertaining to a block pruning contract at the subject location must have provided THE CITY with notice of the defective condition of the sidewalk, the work order refers specifically to pruning and tree inspection only and that there was no indication that sidewalk inspections were conducted in connection with the tree pruning work order (*see* THE CITY's Exhibit H, EBT transcript Trevor Lepucki). To assume otherwise would be entirely conjectural and insufficient to raise a triable issue of fact.

Similarly, the Big Apple Maps and relative map keys submitted to the Court fail to establish prior written notice of the subject defect at the accident location. In order to establish prior written notice as against THE CITY, a Big Apple Map must illustrate the specific condition alleged by plaintiff. Accordingly, in this case, there are no notations illustrating a defect on the maps at the location of plaintiff's fall. Thus, the maps are not sufficient to constitute prior written notice of the defect (*see* D'Onofrio v. City of New York, 11 NY3d 581 [2008]).

The aforementioned records also sufficiently demonstrate that THE CITY did not cause or create the subject condition through any affirmative act of negligence (*see* Amabile v. City of New York, 93 NY2d 471 [1999]) since the results of the various CITY record searches fail to reveal that THE CITY performed any work at the location which may have "immediately resulted in a dangerous condition which caused plaintiff to fall" (*see* Oboler v. City of New York, 8 NY3d 888, 889 [2007]; Bielicki v. City of New York, 14 AD3d 301 [1st Dept. 2005]). Contrary to plaintiff's contentions, block pruning, if any, was allegedly performed four years prior to the date of plaintiff's accident. Accordingly, since there is no proof of the creation of any defect following said pruning, it cannot be said that any pruning work immediately resulted in a dangerous condition. The affidavits submitted by plaintiff's experts in this regard fail to raise triable issues of fact.

Since none of the records are sufficient to establish prior written notice to THE CITY of the condition of the sidewalk in front of 111 Walbrooke Avenue, (*see* Holt v. County of Tioga, 95 AD2d 934, 935 [3rd Dept. 1983]), or that THE CITY caused or created the purported defect through some affirmative act of negligence, plaintiff's assertions are insufficient to defeat THE CITY's motion for summary judgment.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant THE CITY OF NEW YORK is granted; and it is further

ORDERED that the complaint and any cross-claims against it are hereby severed and dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

ENTER,

HON. ORLANDO MARRAZZO, JR.

Hon. Orlando Marrazzo, Jr.
Supreme Court Justice

DATED: June 21, 2023