



Outside Counsel

Mapping Out Proof In Sidewalk Defect Cases

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Walking the streets and sidewalks of New York City can be a dangerous and trying experience. The same can be said of representing a client that was injured as a result of a defective sidewalk.

Pursuant to Section 7-201 of the New York City Administrative Code, counsel representing a person injured by a hazardous condition on a sidewalk or roadway must usually prove that the City had actual prior written notice of the condition at least 15 days prior to the date of the plaintiff's accident.

To prove his or her prima facie case, frequently plaintiff's counsel will seek to utilize a Big Apple Map. These maps bear symbols on them indicating the type of defective condition present on the sidewalk or crosswalk and are accompanied by a legend to interpret the symbols on the map, and are filed by the Big Apple Pothole and Sidewalk Protection Corporation on the City's Department of Transportation Prior

Notification Unit. Copies of the maps are kept by the Big Apple Pothole and Sidewalk Protection Corporation's office with proof of the date and time they were served on the City's Department of Transportation Prior Notification Unit.

Usually, the plaintiff does not offer the Big Apple Map into evidence to prove the existence of a defective condition, but simply for the purpose of establishing that the City received prior written notice of the claimed defect. As such, the map is admissible. *Larkin v. City of New York*, N.Y.L.J., March 14, 2000, P. 29 Col. 2 (Sup. Kings).

While an employee of the Big Apple Pothole & Sidewalk Protection Committee Inc., is competent to establish the requisite foundation for the admission of the Big Apple Map into evidence, the map is also admissible when a foundation is laid by an employee of the New York City Department of Transportation. This is usually accomplished pursuant to a subpoena duces tecum that is served on the City of New York, Department of Transportation, for a particular witness, requiring the person to

produce in court at the trial of the case the original Big Apple map that it received, or a certified copy of it, for the site in question.

A corporation which is served with a subpoena duces tecum must comply with it by producing the requested material and by providing someone who can testify about origin, purpose, and custody, and the trial court commits error in failing to require the corporation to compel a witness to appear. *Castro v. Alden Leeds, Inc.*, 144 A.D.2d 613 (2nd Dept. 1988). This includes a municipal corporation, such as the City of New York.

Whether the witness is a DOT employee or any other witness ... it would be inappropriate for this court to preclude the introduction of the challenged map solely on the basis urged by the City, namely, that the witness is not a Big Apple employee. This court will not declare that an employee of Big Apple is the exclusive, categorical, foundation witness for the introduction of the map. Indeed, in the opinion of this court, that ruling would constitute a violation of established rules of evidence. *Larkin v. City of New York*,

N.Y.L.J. March 14, 2000, P. 29 Col. 2 (Sup. Kings).

Pursuant to the pot hole law, N.Y.C. Admin. Code Sec. 7-201 (c) (3) [previously numbered Sec. 394a-1.0(d)], [T]he commissioner of transportation shall keep an indexed record ... of all written notices which the city receives ... of the existence of such defective, unsafe, dangerous or obstructed conditions, which record shall state the date of receipt of each such notice, the nature and location of the condition stated to exist and the name and address of the person from whom the notice is received. This record shall be a public record. The record of each notice shall be maintained in the department of transportation ... and shall be preserved ... for a period of not less than ten years.

In reviewing the Admin. Code and Gen. Mun. Law Secs. 50-f and 50-g (which also requires the city to index and maintain records of all notices of defect and notices of claim, by location), the courts have held that under the law, it is the City which must keep accurate records of all notices of defect, from all sources. *Shatzkamer v. Eskind*, 139 Misc. 2d 672, at 679 and 682 (Civ. Kings 1988). [I]t is the City which has been made custodian of the records both for notices of claim and for the notices called for by the pot-hole law. *Bair v. City of New York*, 131 Misc. 2d 734, at 739 (Sup. Kings 1986).

Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. and filed with the Department of Transportation serve as prior written notice of defective conditions depicted

thereon. *Katz v. City of New York*, 87 N.Y.2d 241, 243 (1995). It is well settled that Big Apple maps filed with New York City Department of Transportation serve as prior written notice to the city of the defective conditions indicated on the maps (citations omitted). *Weinreb v. City of New York*, 193 A.D.2d 596, 598 (2nd Dept. 1993).

In *Weinreb*, supra, the Appellate Division unanimously found that the Big Apple Maps gave the City of New York notice of the defective condition which the plaintiff alleged caused her injuries, and found that the lower court erred in failing to do so.

In *Matter of Big Apple Pothole and Sidewalk Protection Committee v. Ameruso*, 110 Misc. 2d 688 (Sup. N.Y. 1981), aff'd., 86 A.D.2d 986, lv. den., 56 N.Y.2d 507 (1982), the Honorable Stanley S. Ostrau held that [T]he maps in question do, by any standards, constitute written notices as required by the statute. 110 Misc. 2d at 691. The court held that pursuant to the New York City Administrative Code, the City was required to keep a record of all written notices of defective conditions, and was mandated by law to record the notices given by the maps and did not have any discretion in this regard. *Id.*

The court found that the Big Apple maps were far more detailed than the City's own forms for notification. 110 Misc. 2d at 690. The court noted that the Sanborn Map Company was commissioned to perform the survey of defects, and as part of that arrangement, the company used trained field survey personnel to provide detailed maps. The maps

show the location of the defects found by the surveyors and identify the nature of the defects by use of the different symbols that are keyed to the map legend.

Based on these statutes and decisions, this court may take Judicial Notice of the fact that the Big Apple map is admissible as a public record maintained by the Department of Transportation, and is reliable with respect to notice of defective conditions. See, CPLR 4511; *Sam & Mary Housing Corp. v. Jo/Sal Market Corp.*, 100 A.D.2d 901 (2nd Dept. 1984).

Conclusion

The Big Apple map is admissible as a record maintained by the Department of Transportation. See, CPLR 4540; 4518; 4539.

Once the map had been entered into evidence, plaintiff has established a prima facie case of prior written notice of a defective condition. *Brown v. City of New York*, *N.Y.L.J.* Aug. 25, 1999, P. 23 Col. 3 (Civ. Bronx).