Wegman v City of New York
2001 NY Slip Op 30076(U)
November 20, 2001
Sup Ct, NY County
Docket Number: 123078/98
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. Justice

PART 11

Weyman

INDEX NO. 123078-98

MOTION DATE 4-5-01

- v -

MOTION SEQ. NO. 02

City

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion & cross motion are decided in accordance with the annexed memorandum Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SCANNED DEC 12 2001

Dated: 11/21/01

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11
--X
CHARLES WEGMAN,
Plaintiff,

-against-

Index No. 123078/98

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Defendant.
--X
JOAN MADDEN, J.:

The City of New York (the "City") moves, pursuant to CPLR 3211, for an order dismissing the complaint, or alternatively, pursuant to CPLR 3212, for an order granting summary judgment based on plaintiff's alleged failure to comply with New York City Administrative Code § 7-201(c)(2). Plaintiff Charles Wegman cross-moves, pursuant to CPLR 3126(3) for an order striking the City's answer or rendering a default judgment against the City, or alternatively, pursuant to CPLR 3212(f), for an order denying or staying the City's motion, and compelling the production of discovery by the City.

This is an action for personal injuries allegedly sustained by plaintiff on May 22, 1998, while he was riding his bicycle eastbound in the right lane on West 23rd Street, between 5th and 6th Avenues, New York, New York ("the Subject Roadway"). Plaintiff claims that he was caused to be thrown from his bicycle when his bicycle rode over a Department of Transportation "DETOUR" sign (the "Sign"), which was lying on the Subject Roadway (Plaintiff'sExhibit A, Verified Bill of Particulars dated 2/9/99, ¶ 14).

The City claims that this action should be dismissed since

plaintiff failed to show that the City had received prior written notice of the alleged dangerous condition, as required by section 7-201(c)(2) of the Administrative Code of the City of New York (the "Administrative Code").

Plaintiff does not dispute the City's contention that it did not receive notice of the alleged defective condition caused by the Sign. However, in opposition to the City's motion, he claims that notice was not required, or, alternatively, that the City was affirmatively negligent in creating the alleged defective condition, thus excusing his failure to comply with the prior notice statute. Additionally, he maintains that, pursuant to CPLR 3212(f), the City's motion should be denied, since there is outstanding discovery concerning the placement and securing of the Sign, information which is in the exclusive possession and control of the City.

Administrative Code 7-201(c)(2) requires a plaintiff to plead and prove that the City had prior notice of the defective condition, unless the City was negligent in causing or creating the defective condition, in which case a plaintiff has no burden to either plead or prove notice (Elstein v City of New York, 209 AD2d 186 [1st Dept 19941; see also, Miller v Citv of New York, 225 AD2d 396 [1st Dept 19961). Prior written notice statutes, like this one, are to be read strictly, and have been construed as applying to "'actual physical defects in the surface of a street, highway, bridge, culvert, sidewalk or crosswalk'" (Lopez v New York City Housing Authority, 149 AD2d 342, 343 [1st Dept

1989], quoting Doremus v Incorporated Vil. of Lynbrook, 18 NY2d 362 [1966]), such as holes and cracks, and not to the failure to maintain or erect traffic signs (Alexander v Eldred, 63 NY2d 460 [1984]).

The negligence complained of here includes, inter alia, the City's alleged affirmative negligence in causing "a nuisance, trap and hazard to exist on the public roadway," and "in failing to affix and/or improperly affixing [the] metal sign" (Complaint, ¶ 29). Further, plaintiff submits photos of the Detour signs, including the subject Sign, and an affidavit by Peter Pomeranz, a licensed engineer, who opines that the design and construction of the Sign and its supports was negligent. The City concedes that, on April 23, 1998, a month prior to plaintiff's alleged accident, it placed temporary barricades in the Subject Roadway where plaintiff's accident occurred. The City also appears to admit that it was responsible for the Detour signs installed in connection with the barricades. A claim alleging a failure to properly install a Detour sign, as alleged by plaintiff, does not fall within the purview of the prior written notice statute, since it is akin to a failure to maintain traffic signs (see, Hughes v Jahoda, 75 NY2d 881 [1990]; see also, Alexander v Eldred, supra), and does not constitute an "actual physical defect[] in the surface" of the Subject Roadway (see, Lopez v New York City Housing Authority, supra, at 343).

Further, prior written notice is not required where, as here, it is claimed that the City was affirmatively negligent in

creating the defective condition by its improper installation and construction of the Sign. (see, Miller v City of New York, 225 AD2d 396, supra [prior written notice is not needed where there was evidence that the City negligently left in place an inadequately secured guardrail section adjacent to a sign post at accident site]). The City acknowledged that it placed temporary barricades at or near the accident site a month before the accident, and seems to admit that it was responsible for the installation of the Detour signs at the Subject Roadway a short time before the alleged accident. Notably, the record is devoid of any documentation or explanations from the City regarding the manner in which these signs were installed.

In addition, contrary to the City's position, the affidavit of Dorothy Rozier, a member of DOT's Search and Appearance Unit, who supervises searches for records maintained by DOT's Traffic Unit is not dispositive as to whether the City's affirmative negligence was responsible for the accident. Ms. Rozier states that a search of records for two months prior to the accident, "revealed no records of repair orders or complaints which indicate that an employee or independent contractor hired by the City of New York caused or created a defective "Detour" sign located in the right traveling lane on West 23rd Street between 6th Avenue and 5th Avenue, about 35 feet north of 40 West 23rd Street, New York, New York." Assuming arguendo that Ms. Rozier's affidavit is sufficient to show whether the City's records establish prior notice of allegedly defective condition, her

conclusory statements do not negate the City's potential liability in connection with the installation and condition of the Sign. In addition, summary judgment in the City's favor is not warranted since, as set forth below, it would appear that the City has not turned over all discovery relevant to its alleged role in causing or creating the condition on which the City's alleged liability is based

In light of the foregoing, the City's motion for dismissal of the complaint, or alternatively, for summary judgment, is denied.

Plaintiff's cross motion, pursuant to CPLR 3126, seeks, inter alia, alternate penalties based on the City's alleged refusal to comply with discovery orders. CPLR 3126 provides various sanctions for failing to comply with outstanding discovery requests or court-ordered discovery obligations, the most drastic of which is dismissal of a party's pleadings (Hassan v Manhattan and Bronx Surqface Transit Operating Authority, ___ AD2d ___, 730 NYS2d 286 [1st Dept 20011). Plaintiff alleges that the City has not fully complied with all the directives set forth in the preliminary conference order dated July 2, 1999[1] and an

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[1]The July 2, 1999 Preliminary Conference Order directs the City to provide within 45 days:

1. Copies of applications, permits, cut forms, violations, contracts, repair records, maintenance records, prior written complaints, all for subject location two years prior to [date of accident].

2. Names of contractors and subcontractors working at the subject location for 2 years prior to [date of accident].

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order of this court dated March 2, 2000.[2]

While the City denies this contention, its papers are ambiguous as to whether the City performed, as directed by the court, a two-year search of its records regarding repair orders and complaints of the Sign, or only a two-month search. Moreover, the City attached documents to its summary judgment motion that it apparently did not provide in discovery, including the DOT document dated July 21, 1998 indicating that on April 23, 1998, a temporary barricade was erected at the accident site, although the City claims these documents were not turned over because they were dated after the accident date. These discovery failures also raise issues as to whether the City complied with the remaining discovery directives contained in the aforementioned orders. At the same time, however, it cannot be said on this

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Defendant to provide copies of contracts for work being done at subject location for 2 years prior to and including [date of accident].

3. Copies of maps, specifications, records designating where "DETOUR" signs were to be placed at subject location on [date of accident].

4. Copies of any incident/accident reports for the subject location.

[2]The March 4, 2000 required the City, within 30 days, to "provide plaintiffs with...courtesy copies of permit exchanged at EBT which the plaintiff marked as plaintiff's exhibit #2" and "to review the sufficiency of DOT deposition re: sufficiency and to inquire and produce affidavit, if appropriate, re" DOT sign at accident site."

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record whether the City's failure to comply with the discovery orders was "willful and contumacious" so as to warrant the imposition of discovery sanctions (See, e.g., Christian v The City of New York, 269 AD2d 135 [1st Dept 2000]; Villega v New York City Housing Authority, 231 AD2d 404 [1st Dept 1996]).

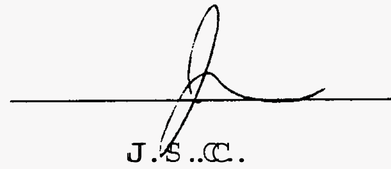
Thus, the cross motion is granted only to the extent of directing that a compliance conference be held in Part 11 on ~~November 29~~ December 13, 2001, at 9:30 a.m. at which various issues shall be considered, including whether the City should be required to submit to a further deposition, and whether any subsequent failure of the City to comply with court-ordered discovery would warrant the imposition of discovery sanctions.

Accordingly, it is

ORDERED that the City's motion to dismiss the complaint or, alternatively, for summary judgment is denied, and it is further

ORDERED that the plaintiff's cross motion is granted to the extent of directing that a compliance conference be held as indicated above.

Dated: November 20, 2001



J.S.C.