

**Roldan v City of New York**

2005 NY Slip Op 30181(U)

July 11, 2005

Supreme Court, New York County

Docket Number:

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 62

0121164/2001

ROLDAN, JESSENIA  
VS  
CITY OF NEW YORK

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

SEQ 1

SUMMARY JUDGMENT

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2 MAN

Answering Affidavits — Exhibits \_\_\_\_\_

1st 3

Replying Affidavits \_\_\_\_\_

MAN 4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant City of New York is denied in accordance with the attached memorandum decision.

**FILED**

JUL 22 2005

COUNTY CLERK'S OFFICE  
NEW YORK

JUL 11 2005

HON. DORIS LING-COHAN

Dated: [Signature]

[Signature]

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION J.S.C.

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 62

-----X

Jessenia Roldan and Roberto Roldan,

Plaintiff(s),

- against -

City of New York and New York City  
Housing Authority,

Defendant(s).

-----X

**Doris Ling-Cohan, J.:**

Index No. 121164/01

Motion Sequence No. 001

In this negligence action, plaintiffs claim that defendant the City of New York (“City”) is liable for injuries sustained on March 20, 2001 by plaintiff Jessinia Roldan when she allegedly stepped into a circular hole on the north side of Delancey Street, adjacent to the Williamsburg Bridge. The City moves for an order pursuant to CPLR § 3212 granting summary judgment and dismissing the complaint and all cross-claims.<sup>1</sup>

In seeking summary judgment the City contends that plaintiffs have failed to present evidence that: (1) the City had prior actual written notice of the sidewalk defect; and/or (2) that the City affirmatively caused and created the alleged defect in question.

At the outset, the Court notes that both sides provide a black and white copy of a “Big Apple Map” on which the print is so small that it is virtually unreadable.

On the issue of notice, the City first asserts that the nature of the defect alleged to have caused plaintiff injuries is different from the one described by the map produced by Big Apple Pothole and Sidewalk Protection Corporation. Plaintiff testified that she sustained injuries after

\_\_\_\_\_

<sup>1</sup> The action against co-defendant New York City Housing Authority was discontinued.

she “stepped into a hole.” (*see* Notice of Motion, Exh. J, at 21, lines 1-5). However, the City contends that the Big Apple Map indicates no marking of a hole at the accident location. (*see* Notice of Motion, Exh. I). In fact, the City argues that the Big Apple Map only denotes an extended area of cracked sidewalk on the north side of Delancey Street, east of Columbia. Furthermore, they contend that the Big Apple map and other photograph exhibits do not show that the cracks indicated on the Big Apple Map radiated from the defect that Ms. Roldan stepped into. The City argues that the marks elsewhere on the Big Apple map are not sufficient to provide notice of the defect that allegedly caused the subject fall. Therefore, the City maintains that it is entitled to summary judgment since they did not have prior written notice of the hole, unless plaintiff can prove that the City itself caused and created the alleged defect, which plaintiff is unable to do.

On the theory of cause and create, the City asserts that they have definitively and clearly proved through testimony and documentary evidence that no hydrant was removed from the entire block on which the alleged injury occurred. Specifically, the City argues that the drawing submitted by Outdoor Systems to demonstrate that there was a fire hydrant at the alleged incident location has no connection to the subject accident. In fact, the City contends that the alleged defect is 59 feet east of a bus shelter different than the one described by the Outdoor Systems drawing. Furthermore, the testimony by Mr. Seminara, a supervisor for the Department of Environmental Protection (which is responsible for the maintenance and repair of the City water and sewer systems including the repair, maintenance and replacement of fire hydrants), illustrates that, in order to remove a fire hydrant, a work order must be generated. (See Reply Affirmation, Exh. C, p. 11-12). In this case there is no such work order. Therefore, the City contends that it

has produced direct evidence disproving plaintiff's claim that a hydrant was removed from the incident location and therefore it is entitled to judgment as a matter of law.

In opposition, plaintiff argues that there is sufficient evidence that the City had prior written notice of the subject defect and that it created the condition that caused Ms. Roldan to become injured. Plaintiffs argue that the Big Apple map for the incident location describes defects so extensive that there can be no question that the particular defect which caused Ms. Roldan's fall is reasonably encompassed in the defective area delineated on the map.

On the issue of cause and create, plaintiffs assert that there is a great deal of circumstantial evidence for a jury to find that the City created the defective condition. Specifically, the plaintiff relies on documents produced by Outdoor Systems, which indicate that a water hydrant existed 59 feet from the east side of a bus shelter on Delancey Street. (*see* Notice of Motion, Exhibit F). Because the City is the only entity which removes fire hydrants and the circular hole which caused the subject accident is consistent with the size and shape of a fire hydrant, plaintiffs assert that there is sufficient evidence to demonstrate that the City created the alleged defect.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "succinctly to warrant the court as a matter of law in directing judgment." (*see* CPLR § 3212 [b]; *Zukerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*see Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 853 [1985]). Furthermore, the law is also well settled that the remedy of summary judgment is a drastic one that should be granted only where the proponent of summary judgement

can establish there are no material issues of fact. (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231). A court reviewing a motion for summary judgment should draw all reasonable inferences in favor of the non-moving party, and should not pass on issues of credibility. (*see Dauman Displays, Inc. V. Masturzo*, 168 AD2d 204 [1<sup>st</sup> Dept 1990]).

Generally, a municipality owes a duty to keep public sidewalks in a reasonably safe condition (*See D'Ambrosio v New York*, 55 NY2d 454, 462 [1982]). A failure to repair a defective condition, of which it has notice, either actual or constructive, will place liability with the City for damages to any person injured thereby. (*id.*)

To establish a civil action against the City for damage to property or injury to person, the Administrative Code § 7-201(c)(2) requires that “written notice of the defective unsafe condition was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice.” Notice is sufficient if it brings the particular condition at issue to the attention of the authorities (*see Patane v City of New York*, 284 AD2d 513, 514 [2d Dep’t 2001]). The requirement for prior written notice is a condition precedent that is strictly construed; failure to provide such notice bars a claim against the City (*Poirer v City of Schnectady*, 85 NY2d 310 [1995]). However, the exception lies that where the City causes the defect, no notice is necessary (*see Kiernan v Thompson*, 73 NY2d 840m 841-842 [1988]; *Messina v City of New York*, 190 AD2d 659 [2<sup>nd</sup> Dep’t 1993]).

Here, the evidence submitted by the City does not establish as a matter of law that the City did not receive notice of the alleged defect that caused Ms. Roldan to fall. The Big Apple Map appears to show an extended section of cracked sidewalk covering the entire area in front of, *inter alia*, building numbers 292, 288, 280, which includes the building location of the

alleged accident (292). In fact, the color photographs attached by plaintiffs in opposition [Affirmation in Opposition, Exh. A], specifically photographs marked #3 and #4, clearly show at least one large crack emanating from the hole which plaintiff Jessica Roldan claims to have stepped into, prior to her fall. Whether the description of the defect provided in the map is sufficient to give notice to the City of the subject defect, presents a triable issue of fact (*see Johnson v. City of New York*, 280 AD2d 271 [1<sup>st</sup> Dept 2001]; *Patane v. City of New York*, 284 AD2d at 514; *Almadotter v. City of New York*, 15 AD3d 426 [2<sup>nd</sup> Dept, 2005]); *Quinn v. City of New York*, 305 AD2d 570 [2<sup>nd</sup> Dept 2003]). Thus, the City's motion for summary judgment on the issue of whether it received prior written notice of the subject defect is denied.

Furthermore, the issue of whether the City caused or created the alleged defect in which Ms. Rodan fell is also a factual issue to be determined at trial. The circular defect which was the alleged cause of the subject accident may be consistent with the previous existence of a fire hydrant as claimed by plaintiffs. Plaintiffs have submitted a site drawing prepared by Outdoor Systems, Inc. which indicates that a water hydrant existed 59 feet from the east side of a bus shelter on Delancey Street. (*see* Notice of Motion, Exhibit F). Additionally, the Court notes that Mr. Seminara, of the DEP, testified that a large number of old style high pressure fire hydrants were removed, but that he could not indicate if such hydrant types were removed from Delancey Street without referring to a "high pressure system map", which was not produced at his deposition (Affirmation in Opposition, Exh. C, EBT of Joseph Seminara, at 24-26). Plaintiffs did in fact request such map from the City; however, the record does not reveal whether such map was supplied. Thus, the City's motion for summary judgment is denied with respect to the issue of whether the City caused or created the subject defect.

As summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence and no issue of comparative negligence is present (*Ugarriza v. Schmieder*, 46 NY2d 471, 475-476 [1979]), this Court is constrained to deny the within motion. (*see Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 [1978]).


Accordingly, based upon the above, it is

ORDERED that the City's motion for summary judgment is denied; and it is further

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

This constitutes the decision, order and judgment of the Court.

Dated:           11/1/08          

  
\_\_\_\_\_  
Hon. Doris Ling-Cohan, JSC

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