

Marshall v City of New York

2007 NY Slip Op 31003(U)

April 30, 2007

Supreme Court, Richmond County

Docket Number: 0011455/2003

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X
JAMES MARSHALL,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant(s).
-----X

Part C-2
Present:
Hon. Thomas P. Aliotta

Decision and Order

Index No. 11455/03
Motion No. 885-001

The following papers numbered 1 to 3 were used on this motion on the 21st day of February, 2007:

	Pages Numbered
Notice of Motion with Supporting Papers and Exhibits (dated March 13, 2006).....	1
Affirmation in Opposition with Exhibits (dated February 12, 2007).....	2
Affirmation in Reply with Exhibit (dated February 20, 2007).....	3

Upon the foregoing papers, defendant’s motion for summary judgment dismissing the complaint based upon plaintiff’s non-compliance with the prior written notice requirement of §7-201© of the Administrative Code of the City of New York is granted.

Plaintiff was allegedly injured on August 28, 2002, when the bicycle he was riding hit a “large crack and hole in the roadway” at the intersection of Nelson Avenue and Edgewood Road in Staten Island, New York. On October 29, 2002 plaintiff served a Notice of Claim upon the City (see Plaintiff’s Exhibit “A”).

In support of the motion to dismiss, defendant the City of New York (hereinafter, the City) asserts that plaintiff cannot prove compliance with the prior written notice requirement of §7-201©

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of its Administrative Code, which requires, in part, that the City receive prior written notice “of the defective, unsafe, dangerous, or obstructed condition” which caused plaintiff’s injury. It is axiomatic that compliance with the prior written notice requirement is a statutory condition precedent to a personal injury action against the City, and that the failure to comply constitutes a bar to the action (see Acevedo v. City of New York, 128 AD2d 488).

According to the deposition testimony of Sherry Johnson, Principal Administrative Associate of the City of New York, a search of the City’s records for prior written notice of any defective or dangerous condition at the location specified in the Notice of Claim was conducted, and four repair orders for potholes were found. In every case, the repair was made more than one year prior to the date of plaintiff’s accident (see Defendant’s Exhibit “D” pp 9-15). Additionally, it was established that the most recent Big Apple Map did not indicate any pothole at the location of plaintiff’s fall (see Defendant’s Exhibit “E”). It is well settled that repair orders from the Department of Transportation do not constitute prior written notice to the City (see Khemraj v. City of New York, 37 AD3d 419; Fraser v. City of New York, 226 AD2d 424).

In opposition, plaintiff has failed to raise a triable issue of fact with respect to prior written notice.

In the alternative, plaintiff asserts that even if the City did not have prior written notice, the deposition testimony of highwayman Michael Ricciardi indicates that the City’s attempted repair of the condition was known to be only “temporarily safe.” Accordingly, it is claimed that the City created the defect through an affirmative act of negligence, and may be sued for damages even in the absence of prior written notice under the “cause and create” exception (see Amabile v. City of Buffalo, 93 NY2d 471). The Court disagrees.

The affirmative negligence exception to the prior notice requirement is limited to work by the City that “immediately” results in the existence of a dangerous condition (see Oboler v. City of New York, ___NY3d___, 2007 NY Slip Op 02441 citing Bielecki v. City of New York, 14 AD3d 301). At bar, plaintiff purports to rely upon the expert affidavit of Peter Pomeranz, P.E., a consulting engineer, who opined, *inter alia*, that “[t]he existing fix of filling the pothole with asphalt only temporarily repairs the pothole” (see Plaintiff’s Exhibit “17”). However, said affidavit is insufficient to raise a triable issue, as “plaintiff [has] submitted no evidence...that the repair in question immediately resulted in a dangerous condition” (Yarborough v. City of New York, 28 AD3d 650, 651). An ineffectual job of pothole repair is not an affirmative act of negligence for purposes of the above exception to the prior written notice requirement unless it can be shown that the repair actually

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made the condition worse (Kushner v. City of Albany, 27 AD3d 851 *affd* 7 NY3d 726). No such issue has been raised in this case.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further.

ORDERED that the Clerk enter judgment accordingly.

The foregoing constitutes the Decision and Order of the Court.

Law Clerk to notify all parties of this Decision/Order.

DATED: APRIL 30, 2007

/s/ _____
HON. THOMAS P. ALIOTTA, J.S.C.

All sides notified by EVE/pt on 4/30/07

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