Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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DHANKUMARIE MAHASE,

Plaintiff,

- against -

THE CITY OF NEW YORK and THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

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Index Number: 13023/05

Motion Date: 05/01/07

Motion Cal. No.: 10

Motion Seq. No. 1

The following papers numbered 1 to 16 read on this motion by defendant New York City Transit Authority pursuant to CPLR 3212 and 3211 for summary judgment dismissing the complaint and all cross-claims against it and cross-motion by the City of New York pursuant to CPLR 3212 dismissing the complaint and all cross-claims against it.

	PAPERS NUMBERED
Amended Notice of Motion-Exhibits.....	1-4
Notice of Cross-Motion-Exhibits.....	5-9
Affirmation on Opposition to Cross-Motion-Exhibits....	10-11
Affirmation on Opposition to Cross-Motion-Exhibits....	12-14
Reply Affirmation.....	15-16

Upon the foregoing papers, it is ordered that the motion and cross-motion are decided as follows:

Motion by defendant Transit Authority (hereinafter referred to as the “TA”) for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against it is granted.

Plaintiff allegedly sustained injuries as a result of slipping and falling when she stepped into a puddle of water in the roadway located at Liberty Avenue and Rockaway Blvd. in front of the Rockaway Blvd. subway station in Queens County on November 30, 2004. Plaintiff, at her 50-H hearing (annexed to the motion as Exhibit “D”) and in her deposition taken by the attorney for the TA(Exhibit “E” to motion), testified that her husband had driven her to the

subway stop and that as she exited the vehicle, she stepped into a large puddle of water on the roadway approximately three feet away from the curb and slipped. The accident occurred at approximately 7 A.M. She stated that it had been pouring rain the night before and that heavy rain continued into the morning hours. She believes that the puddle was the result of that rainfall. There are no photographs of the alleged condition.

Plaintiff's attorney, in his affirmation in opposition to the City's cross-motion, contends that the TA owes a duty to plaintiff merely by virtue of the fact that the accident occurred in front of a subway station.

The Transit Authority does not own, maintain, operate or control the public streets and sidewalks (see New York City Charter §383). The duty to repair and maintain roadways, including those adjacent to bus and subway stops, is the responsibility of the City, not the Transit Authority (see, Cioe v. Petrocelli Electric Co., Inc., 33 AD 3d 377 [1st Dept 2006]). Therefore, the Transit Authority had no duty of care with respect to the subject roadway and, thus, cannot be held liable for injuries caused by the alleged condition(see Pantazis v. City of New York, 211 AD 2d 427 [1st Dept 1995]).

Moreover, plaintiff testified in her deposition(Exhibit "E" to motion)that there were vegetable skins and banana peels in the puddle and she believes that she slipped and fell as a result of stepping on one of the peels.

Therefore, since plaintiff's own deposition testimony establishes that the puddle into which she stepped was the result of an overnight rainstorm and that she believes that her slip and fall was actually caused by her stepping on a discarded vegetable or banana peel, the TA has demonstrated by proof in admissible form that it did not create the condition in the roadway that allegedly caused plaintiff's injuries.

Since the Transit Authority does not own or control and is not statutorily obligated to maintain and repair the public roads, even those located at subway stops, and has proffered evidence in admissible form demonstrating that it did not cause the condition, it has established its prima facie entitlement to summary judgment, as a matter of law. Plaintiff's affirmation in opposition fails to raise an issue of fact.

The City, in its cross-motion, contends that there is an issue of fact as to whether the TA created the alleged condition, and in support thereof, annexes a copy of the deposition of Herbert

Stempel, employed by the New York City Department of Transportation as a record searcher in the Office of Litigation Services (Exhibit "F" to cross-motion). Stempel testified that he performed a search of the highway records for the period November 30, 2002 to November 30, 2004. He stated that he found several permits issued to Judlau Contracting Inc. to open the "roadway and/or sidewalk" on Liberty Avenue from 93rd Street to 94th Street for the purpose of rapid transit construction of communications rooms.

Stempel's testimony and the copies of the permits he refers to, which are also annexed to the cross-motion, fail to raise an issue of fact. In the first instance, the permits were for work on Liberty Avenue between 93rd and 94th Streets, which is not the location of the accident alleged by plaintiff (Liberty Avenue and Rockaway Blvd). Even were there permits for the accident site, and even if work was done at the subject location, there is no proof that such work created any defect in the roadway. Plaintiff does not allege that the roadway was in a defective condition. No demonstrative or documentary evidence has been produced to indicate that there was any defect in the roadway. She testified that she stepped into a puddle of water that had formed as a result of a recent heavy rain and slipped upon a vegetable or banana peel that was in the puddle. The record on this motion does not establish or even raise an issue of fact as to whether any street excavation work was the cause of the puddle. The City also fails to show how street construction was in any way related to the presence of produce refuse in the street.

In addition, no evidence has been proffered to show that the TA made any special use of the street. Even if the TA had made a special use of the subject location, no proof is offered to demonstrate how that special use caused the puddle to form or caused the vegetable peels to be present. By plaintiff's own testimony, the puddle was caused by a recent heavy rain, not by any human agency, and her fall was the result of her slipping upon a vegetable peel, not a defect in the roadway.

There is nothing in the record on the cross-motion to show that the TA had any connection whatever to the subject roadway. In the absence of any evidence offered either by plaintiff or the City to rebut the TA's prima facie showing of entitlement to summary judgment, there is no question of fact as to whether the TA created or caused the alleged condition.

Therefore, the TA has established its prima facie entitlement to summary judgment as a matter of law.

Cross-motion by the City pursuant to CPLR 3212 dismissing the complaint and all cross-claims against it is also granted.

Plaintiff does not deny that she did not give prior written notice to the City, pursuant to §7-201 [c] of the New York City Administrative Code. Prior written notice is a prerequisite to maintaining an action against the City for damages relating to a street defect (see Katz v. City of New York, 87 NY 2d 241 [1995]).

No issue has been raised that the City caused or created the defective condition, thereby obviating the requirement of prior notice (see Ock v. City of New York, 34 AD 3d 542 [2nd Dept 2006]). Plaintiff's opposition papers fail to raise an issue of fact. Therefore, the City has established its entitlement to summary judgment as a matter of law.

Accordingly, the complaint is dismissed as against the City and the TA.

Dated: May 16, 2007

KEVIN J. KERRIGAN, J.S.C.