

MacBride v City of New York

2007 NY Slip Op 32710(U)

August 17, 2007

Supreme Court, New York County

Docket Number: 0104269/2004

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER
J.S.C.

PART 5

Index Number : 104269/2004

MACBRIDE, SAMANTHA

vs

CITY OF NEW YORK

Sequence Number : 002

PARTIAL SUMMARY JUDGMENT

DEX NO. _____

OTION DATE _____

OTION SEQ. NO. _____

OTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
AUG 30 2007
NEW YORK
COUNTY CLERK

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

Dated: 8/17/07

EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
SAMANTHA MacBRIDE,

Plaintiff,

Index No.
104269/04

- against -

Decision and
Order

THE CITY OF NEW YORK,

FILED

Defendant.
AUG 30 2007
NEW YORK
COUNTY CLERK

-----X
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she hit a speed bump and fell while riding her bicycle on a bicycle path on the east side of the East River Drive at the south end of East River Park in the county and state of New York on June 25, 2003. Plaintiff now moves for partial summary judgment on the issue of liability pursuant to CPLR 3212. Defendant the City of New York ("City") opposes the motion.

Plaintiff was riding her bicycle northbound on a the above mentioned bicycle path at approximately 5:45 p.m., while it was still light out. Plaintiff claims she hit the bump and fell. The speed bump was made of the same dark asphalt as the road and was not painted or delineated in any way. There were no warning signs for the approaching speed bump. City admits installation, ownership, control and maintenance of the subject speed bump.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*,

49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

Plaintiff, in support of her motion submits: the 50-h Hearing testimony of plaintiff; deposition testimony of Hector M. Sauri, Park Supervisor; the expert affidavit of Nicholas Bellizzi, P.E., licenced Professional Engineer; an order issued by the Honorable Justice Michael Stallman dated May 30, 2006 where City admits installation, ownership, control and maintenance of the subject speed bump; twenty-four color photographs of the accident scene; and the *Guidelines for the Design and Application of Speed Humps*, prepared by ITE Technical Council Speed Humps Task Force.

Plaintiff argues that the City created a hazard within the bicycle path by placing and installing the speed bump without proper warning signs, and without highlighting the bump with proper markings. Plaintiff's expert opines that

The subject speed bump should have been equipped with warning signs, advance warning signs, high-visibility pavement markings and advance pavement markings . . . the unsafe, dangerous, and hazardous unmarked and unsigned speed bump was a nuisance, snare and trap to unwarned of unsuspecting bicyclists . . . (Bellizzi Affidavit, Page 8).

Plaintiff points out that City's own Park Supervisor concedes that it is the practice to paint speed bumps.

Q: . . . was there ever a time the speed bump in zone two was in any way painted or marked to differentiate it from the surrounding pathway or surface?

A: I don't recall but it should have been painted yellow.

Q: Do you recall a time which it was painted yellow?

A: I don't recall.

Q: What is the reason that you said the speed bump should have been painted yellow?

A: Because if we put in a speed bump, normally we paint it yellow.

Q: That's the procedure of yourself or the park or something else?

A: That's a procedure for anybody because it's uplifted so you would notice it. (Sauri Deposition, Page 33, Lines 9-25).

Still, neither plaintiff's pleadings nor plaintiff's expert point to any statute or ordinance requiring a speed bump in a bicycle path to be painted. The subject speed bump was three inches in height and 28 inches in width. It had been there for a period of time. Indeed, plaintiff had taken this particular route home from work before on her bicycle, and admits having seen the bump months before, although not in the moments before her accident.

Plaintiff relies on City's admission that it installed, owns and controls the speed bump as proof of negligence, and seeks summary judgment on the issue of liability. While City's creating the condition relieves plaintiff of proving prior notice of the condition, City, does not concede that the subject speed bump was a defective condition which proximately caused plaintiff's fall. Additionally, City asserts in its answer and in opposition to the instant motion that there are issues of comparative negligence. City provides the 50-h hearing testimony of plaintiff stating she had seen the bump before to support its contention. Knowing that the bump was there, did plaintiff operate her bicycle in a safe manner?

Whether the bump was a defective condition which was the proximate cause of plaintiff's accident and whether plaintiff shares responsibility for her accident are issues of fact for the jury. Summary judgment on the issue of liability is precluded where an issue of fact exists as to the comparative negligence of the plaintiff. (*Stein v. Travers*, 272 A.D.2d 132[1st Dept. 2000]).

Wherefore it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied.

DATED: AUGUST 17, 2007



EILEEN A. RAKOWER, J.S.C.

FILED
AUG 30 2007
NEW YORK
COUNTY CLERK'S OFFICE