

**Mirabella v City of New York**

2008 NY Slip Op 30881(U)

March 27, 2008

Supreme Court, Richmond County

Docket Number: 0010263/2005

Judge: Thomas P. Aliotta

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

-----X  
MARK MIRABELLA and AIMEE BARCHUCK,

Plaintiffs,

Part C-2

-against-

Present:  
Hon. Thomas P. Aliotta

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

**Decision and Order**

Defendants.

Index No. 102631/05  
Motion No. 3339-001

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The following papers numbered 1 to 3 were marked fully submitted on the 30th day of January, 2008:

Pages  
Numbered

Defendant’s Notice of Motion for Summary Judgment with Supporting Papers.....	1
Plaintiffs’ Affirmation in Opposition.....	2
Defendant’s Reply Affirmation.....	3

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Upon the foregoing papers, the motion of defendant The City of New York to dismiss the complaint pursuant to CPLR 3211(a)(7) and for summary judgment pursuant to CPLR 3212 is denied in accordance with the following.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Mark Mirabella (hereinafter “plaintiff”) in a motor vehicle accident on October 3, 2004. The notice of claim alleges that plaintiff was traveling on Sycamore Street at or near the intersection of Lyndale Avenue on Staten Island, when his vehicle hit a “depression, dip and/or pothole in the roadway of Sycamore Street” causing the vehicle to overturn.

In moving for summary judgment, the City of New York (hereinafter “City”) maintains that plaintiff has failed to comply with the prior written notice requirement of §7-201(c) of the New York City Administrative Code. This section, more commonly known as the “pothole law”, limits the City’s liability for roadway defects to those of which the City has been notified exist at a specified location (*see Katz v City of New York*, 87 NY2d 241; *see generally Poirier v City of Schenectady*, 85 NY2d 310). Thus, prior written notice of an alleged street or sidewalk defect is a necessary precondition to the commencement of

an action for personal injuries against the City (*see Katz v City of New York*, 87 NY2d at 243; *Meehan v County of Nassau*, 239 AD2d 321). Nevertheless, the prior written notice requirement is not an absolute, and “may be excused when the municipality has or should have knowledge of a defective or dangerous condition because it either has inspected or was performing work upon the subject area shortly before the accident” or where the municipality has created the alleged hazardous or defective condition ( *Sewell v City of New York*, 238 AD2d 331, 331 [citations and internal quotation marks omitted]; *see Kiernan v Thompson*, 73 NY2d 840).

In support of its motion, the City relies upon the deposition testimony of a New York City Department of Transportation (hereinafter “DOT”) employee, Cynthia Howard, who performed a record search relative to the intersection of Sycamore Street and Lyndale Avenue for the two year period preceding the date of the accident. According to this witness, the search disclosed one complaint and/or repair order, and one Big Apple Map. She testified that the records indicate that on March 21, 2003, a complaint was reported to DOT regarding a pothole at that intersection, and that the defect was “closed” on March 24, 2003 (one year and six months prior to plaintiff’s accident). As for the Big Apple Map, the City argues that according to the legend which accompanies it, there are no symbols that indicate the presence of a defect in the roadway at the intersection of Lyndale Avenue and Sycamore Street. In view of the foregoing, the City contends that (1) it did not receive prior written notice of any defective roadway condition at the subject location, and (2) there is no evidence that an exception to that statutory requirement should apply, e.g., that the defect in question was the “immediate result” of any affirmative negligence on the part of the City (*see Bielecki v City of New York*, 14 AD3d 301).

In opposition, plaintiffs argue that the location of the “depression, dip, crack, imperfection and/or pothole” as set forth in the complaint is “Sycamore Street, at or near its intersection with Lyndale Avenue *and/or Sycamore Street at or near its intersection with Richmond Avenue* (emphasis supplied).”<sup>1</sup> Moreover, it is claimed that the pothole in question must have been located prior to and some distance away from the area where plaintiff’s vehicle came to rest after overturning. In support, plaintiff Mirabella’s 50-h testimony is submitted along with a copy of the police report wherein the “accident diagram” indicates, *inter alia*, that the vehicle overturned (as indicated by “arrows”) and came to rest on Sycamore Street *prior* to entering its intersection with Lyndale Avenue. Thus, it is argued that the roadway defect described by plaintiff at his 50-h hearing had to have been located “at or near” the prior intersection, i.e., the intersection of Sycamore Street and Richmond Avenue.

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<sup>1</sup> It is undisputed that Richmond Avenue and Lyndale Avenue constitute successive intersections with Sycamore Street along plaintiff Mirabella’s route of travel.

Pertinent in this regard, plaintiffs point out that the Big Apple Map delineates “extended sections of potholes or other hazards” across the entire pedestrian crosswalk at the intersection of Richmond Avenue and Sycamore Street, and that this description of the defect conforms with the injured plaintiff’s deposition testimony that it was “just a big hole... pretty much the whole length [sic] of the whole street and it was deep, there was holes inside of the hole.” Accordingly, the mapped defect at Richmond Avenue cannot be the same defect addressed in the City’s repair order which was, in any event, “closed” prior to this accident. Finally, it is argued that the instant motion is premature since the City filed it on the eve of the scheduled deposition of the “gang boss” allegedly associated with the repair order executed relative to the March 21, 2003 complaint of a pothole at the intersection where plaintiff’s vehicle came to rest. Turning first to the sufficiency of plaintiff’s notice of claim, courts have consistently recognized that General Municipal Law §50-e is to be applied flexibly “so as to balance two countervailing interests: on the one hand protecting municipal defendants from stale or frivolous claims, and on the other hand, ensuring that a meritorious case is not dismissed for a ministerial error” (Goodwin v New York City Hous. Auth., 42 AD3d 63, 66 [citations and internal quotation marks omitted]). Thus, General Municipal Law §50-e(6) states, in relevant part, that in the absence of prejudice to another party, at any time after the service of a notice of claim and at any stage of an action, a mistake, omission, irregularity or defect made in good faith in the notice of claim, may be corrected, supplied or disregarded in the discretion of the court.

Consonant with the foregoing, the circumstances of this case warrant the exercise of such discretion to allow a *nunc pro tunc* correction of a good faith error in identifying the exact location of the alleged roadway defect in order to conform with the description provided in the verified complaint filed nearly 2 ½ years ago in September of 2005, less than nine months after the notice of claim was filed (*see D’Alessandro v New York City Tr. Auth.*, 83 NY2d 891, 893; Goodwin v New York City Housing Auth., 42 AD3d at 66-67; Ingle v New York City Tr. Auth., 7 AD3d 574, 575). In addition, said description is consistent both with the police report and the evidence adduced at the 50-h hearing, including the nine photographs submitted by plaintiffs depicting the scene of the accident, and the testimony of plaintiff Mirabella that he was “coming from the [direction of the] Staten Island Ferry Terminal” and had been traveling on Sycamore Avenue for five to ten minutes prior to his accident (*see Streletskaya v New York City Tr. Auth.*, 27 AD3d 640,641; Power v Manhattan & Bronx Surface Operating Auth., 16 AD3d 655, 655-656; Matter of Zahra v New York City Housing Auth., 16 AD3d 245; Rupp v City of Port Jervis, 10 AD3d 391, 393). Moreover, the record is devoid of any evidence of bad faith on plaintiffs’ part, while the Big Apple Map, the police report and the evidence adduced at the 50-h hearing virtually eliminates the likelihood of prejudice to the municipal defendant (*see Kim L. v Port Jervis City School Dist.*, 40 AD3d 1042,1044-1045).

In light of the foregoing, it is the Court's opinion that the City has failed to make a prima facie showing of its entitlement to judgment as a matter of law based on the purported lack of prior written notice (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Accordingly, it is

ORDERED, that defendant's motion, *inter alia*, for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: March 27, 2008

/s/ \_\_\_\_\_  
THOMAS P. ALIOTTA, J.S.C.