

Scheele v City of New York

2008 NY Slip Op 31351(U)

May 9, 2008

Supreme Court, New York County

Docket Number: 0118204/2004

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PRESENT: _____
J.S.C.
Justice

PART 5

Scheele, Michael

INDEX NO. 118204/04

- v -

City of New York

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED
MAY 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: May 9, 2008

[Signature]

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
MICHAEL SCHEELE,
Plaintiff,

Index No.
118204/04

- against -

Decision
and Order

THE CITY OF NEW YORK and
BJW ASSOCIATES, LLC,
Defendants.

Mot. Seq. 002

HON. EILEEN A. RAKOWER

FILED
MAY 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff brings this action for personal injuries he allegedly sustained when he stepped on a manhole cover and fell near the southeast corner of 5th Avenue and East 19th Street in the County and State of New York on May 7, 2004. Defendant BJW Associates, LLC ("BJW") previously brought a motion for summary judgment and both plaintiff and defendant the City of New York ("City") cross-moved for summary judgment. By order of this Court dated January 24, 2008, BJW's motion was granted in full, plaintiff's cross-motion was granted in part on the issue of liability against City and City's cross-motion was denied. City now moves to reargue on the grounds that this Court did not consider City's original opposition to plaintiff's cross motion and its cross motion to grant summary judgement to City. Plaintiff opposes that motion to re-argue.

After reviewing the papers submitted by the City on its original cross-motion, the court notes that it did indeed mis-state in its January 24, 2008 decision that City failed to oppose plaintiff's cross-motion. City's opposition was included with its own cross-motion for summary judgment. Accordingly, City's motion to re-argue is granted.

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]).

City restates its original position that it did not have notice of the manhole defect and, therefore, cannot be held liable. It relies on New York City Administrative Code §7-210(c)(2) which states, in relevant part,

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any . . . sidewalk . . . being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice . . . was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice.

City argues that the court misapplied the law in its previous decision when it stated that City had constructive notice of the manhole defect because it had an affirmative duty to inspect the manhole. City argues that the court misapplied the law when it found that 34 RCNY 2-07(b)(1), rather than New York City Administrative Code §7-210(c)(2) governed under the circumstances here. It points out that while 34 RCNY 2-07(b)(1) states that the word “street” means “sidewalk,” RCNY 2-02(b)(3) states that

manhole covers, cellar doors and other similar installations in the sidewalk in dangerous or unsafe condition . . . [constitute] sidewalk defects. (Emphasis added.)

Plaintiff concedes that New York City Administrative Code §7-210(c)(2) requires prior written notice as a predicate to liability in sidewalk cases, but argues that it was not intended to apply to the defective lip underneath a manhole cover.

As the court previously noted, the legislature, by enacting prior written notice requirements, has acknowledged that municipalities cannot be aware of every dangerous condition on its streets and public walkways. (*Poirier v. City of Schenectady*, 85 N.Y.2d 310 [1995]). The purpose of “notice provisions is to insure

that a municipality has a reasonable opportunity to cure defective conditions, the existence of which it could not be expected to know absent some sort of positive appraisal.” (*DiPaolo v. Village of Tuckahoe*, 253 AD2d 841 [2nd Dept. 1998]). Moreover, the contention that constructive notice may serve as a substitute for prior written notice lacks merit. (*Amabile v. City of Buffalo*, 93NY2d 471 [1999] citation omitted). Additionally, plaintiff has the burden of pleading and proving that City had prior written notice of the specific defect involved. (*Katz v. City of New York*, 87 NY2d 241 [1995]; *Belmonte v. Metro Life Insurance Company*, 304 AD2d 820 [1st Dept. 2003]).

Here, plaintiff has not shown that City had prior written notice of the specific defect alleged as required by Administrative Code §7-210(c)(2). Therefore, City’s motion for summary judgment must be granted. (Administrative Code §7-210(c)(2); *Amabile v. City of Buffalo*, *supra*; *Katz v. City of New York*, *supra*). Wherefore, it is hereby

ORDERED that City’s motion to re-argue is granted; and it is further

ORDERED that upon re-argument, Plaintiff’s motion for summary judgment is denied; and it is further

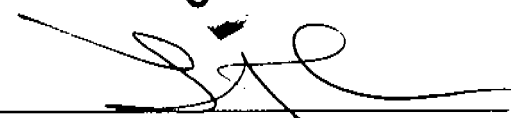
ORDERED that upon re-argument, City’s cross motion for summary judgment, dismissing plaintiff’s action and any cross-claims against it is granted. The Clerk is directed to enter judgment accordingly.

All other relief requested is denied.

This constitutes the decision and order of the court.

Dated: May 9, 2008

FILED
MAY 13 2008
COUNTY CLERK'S OFFICE
NEW YORK



EILEEN A. RAKOWER, J.S.C.