

**Nieves v City of New York**

2008 NY Slip Op 33313(U)

December 4, 2008

Supreme Court, New York County

Docket Number: 116016/05

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

NIEVES, IRIS et al.,  
Plaintiff,  
-v-  
NEW YORK CITY TRANSIT AUTHORITY,  
Defendants.

INDEX No. 116016/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. No. 001  
MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits- Exhibits....	<u>1, 2, 3</u>
Answering Affidavits- Exhibits _____	<u>4 + 5</u>
Replying Affidavits _____	<u>6</u>

CROSS-MOTION:  YES  NO

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION WHICH IS ATTACHED.

**FILED**  
DEC 11 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 12/4/08

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 21

-----x  
IRIS NIEVES and ALBERTO NIEVES,

Plaintiffs,

Index No.: 116016/05

-against-

DECISION AND ORDER

THE CITY OF NEW YORK, THE NEW YORK  
CITY TRANSIT AUTHORITY and THE NEW  
YORK EYE AND EAR INFIRMARY IPA, INC.,

Defendants.

-----x  
MILLS, J.

**FILED**  
DEC 11 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**FACTUAL BACKGROUND**

This is an action to recover for personal injuries allegedly sustained by plaintiff Iris Nieves on June 7, 2005, when she allegedly tripped and fell on the curb located in front of the premises located at 310 East 14<sup>th</sup> Street in the county of New York. Plaintiff Alberto Nieves brings a derivative action for loss of consortium and services.

Defendant City of New York (City) moves for summary judgment, pursuant to CPLR 3212, asserting that it had no prior written notice of the alleged defect on the curb at the accident location. Plaintiff separately cross-moves against City and the New York City Transit Authority (NYCTA) to strike City's and NYCTA's answers for failing to provide discovery pursuant to a discovery order.

**DISCUSSION**

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Pursuant to the Administrative Code of the City of New York § 7-201 (c), the City's liability for accidents occurring on city streets is limited to those situations in which the City has received prior written notice of a defective or unsafe condition at the location at which the accident took place.

"The failure to demonstrate prior written notice leaves plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying a defective sidewalk. Because this prior written notice provision is a limited waiver of sovereign immunity, in derogation of common law, it is strictly construed [citations omitted]."

*Katz v City of New York*, 87 NY2d 241, 243 (1995).

"It is well established that Administrative Code

7-201 (c) (2) requires plaintiff to plead and prove the City had prior notice of a sidewalk defect, unless it is claimed that the City was affirmatively negligent in causing or creating the defective condition, in which case a plaintiff has no burden to either plead or prove notice [citations omitted]."

*Elstein v City of New York*, 209 AD2d 186, 186 (1<sup>st</sup> Dept 1994).

If the City did not perform any maintenance work at the subject location for a two-year period immediately preceding the accident, it is presumed that the City did not cause the alleged defective condition. *Supra*; see *Gruska v City of New York*, 292 AD2d 498 (2d Dept 2002).

In the instant matter, the complaint fails to allege that City had any prior notice of the alleged defect. In its motion, City provides the transcript of the examination before trial of a records searcher employee whose function it is to search records. This affiant stated that no records were found for any repair work performed at the accident cite for the two years immediately preceding the alleged accident. Further, affiant testified that, according to a Big Apple map filed on October 23, 2003, there was no defect at the alleged accident cite.

"[T]he City properly requires that prior notice be traced to the most current Big Apple map on file, i.e., the map that is closest in time to the date a defect is alleged to have caused an accident." *Katz v City of New York*, 87 NY2d at 244. In response to City's motion, plaintiff provided photographs of the location

and a Department of Transportation (DOT) report, pursuant to plaintiff's FOIL request, indicating that there was a written report, dated May 26, 2003, stating that there was a "cracked sidewalk damaged in front of bus stop" at the address at which the alleged accident took place, and that the matter was referred to maintenance on the same date. However, this report pre-dates the Big Apple map testified to by the DOT employee.

In its reply, City provides a Big Apple map filed 15 days prior to the alleged accident, which does not indicate any defect at the accident location. Plaintiff asserts that this Big Apple map should not be considered because it was first provided in reply papers, basing her contention on *Migdol v City of New York*, 291 AD2d 201 (1<sup>st</sup> Dept 2002). *Migdol* correctly states that evidence submitted with reply papers is properly rejected if it is submitted in an attempt to remedy deficiencies in the initial motion. However, plaintiff's reliance on *Migdol* is misplaced on two counts. First, it is plaintiff's burden to demonstrate that the City had prior written knowledge of the street defect (*Poirier v City of Schenectady*, 85 NY2d 310 [1995]), not the City's burden to prove that it had no such prior knowledge; and second, the evidence may be considered if it is used to respond to arguments in plaintiff's opposition, which it was. *Migdol v City of New York*, *supra*.

Plaintiff further argues that she requires additional

discovery to determine whether or not the document provided by NYCTA indicates a condition that was not remedied at the location at which the alleged accident occurred. However, this contention fails "to raise a triable issue of fact, offering only hope and speculation as to what additional discovery would uncover."

*Gruska v City of New York*, 292 AD2d at 499.

City's motion is granted, because of plaintiff's

"failure to raise a triable issue as to whether defendant had prior written notice, pursuant to Administrative Code of the City of New York § 7-201 (c) (2), of the sidewalk defect alleged to have caused the ... plaintiff's harm. The alleged ... defect does not appear on the relevant map prepared by the Big Apple Pothole and Sidewalk Corporation ... [internal citations omitted]."

*Cuffey v City of New York*, 255 AD2d 203, 203 (1<sup>st</sup> Dept 1998).

Based on the foregoing, plaintiff's crossmotion to strike City's answer is denied.

Plaintiff's other crossmotion to strike the answer of NYCTA is also denied.

"In order to invoke the drastic remedy of preclusion (CPLR 3126), the court must determine that the party's failure to comply with a disclosure order was wilful, deliberate and contumacious [internal citation omitted]." *Holliday v Jones*, 36 AD3d 557, 557-558 (1<sup>st</sup> Dept 2007). So too is the striking of a pleading so drastic a remedy that it should only be invoked when there is a clear refusal of a party to obey a discovery order. See *Villega v New York City Housing Authority*, 231 AD2d 404 (1<sup>st</sup>

Dept 1996).

In the instant matter, it cannot be said that NYCTA has acted in a wilful or contumacious manner. According to plaintiff's motion, only one item requested as part of discovery is missing, that of a response to a Notice for Discovery and Inspection, dated August 7, 2008. NYCTA has already provided voluminous discovery, and addresses this particular request in its opposition. NYCTAs' responses have not been "so egregious as to outweigh the general policy that actions should be resolved on their merits . . . ." *Commerce & Industry Insurance Company v Lib-Com, Ltd.*, 266 AD2d 142, 145 (1<sup>st</sup> Dept 1999). "A party's dissatisfaction with its opponent's document production is an insufficient basis for a finding that the opponent was willful and contumacious." *Id.* at 146.

It is noted that the prior discovery orders did not provide for any sanctions in the case of a party's failure to comply. Furthermore, the responses included in the opposition papers renders this crossmotion moot.

#### **CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that the City of New York's motion for summary judgment is granted and the action is hereby severed and dismissed as against defendant the City of New York, and the Clerk is directed to enter judgment in favor of said defendant;

and it is further

ORDERED that plaintiff's crossmotions are denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 12/4/08

ENTER:

*Donna*

Donna Mills, J.S.C.

**DONNA M. MILLS, J.S.C.**

**FILED**  
DEC 11 2008  
COUNTY CLERK'S OFFICE  
NEW YORK