Magito v Manley
2009 NY Slip Op 30781(U)
April 1, 2009
Supreme Court, New York County
Docket Number: 105863/03
Judge: Eileen A. Rakower
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SCANNED ON 4/7/2009

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

PRESENT: HON. EILEEN A. RAKOWER, Justice

PART 5

Index Number : 105863/2003

MAGITO, ROBERT

VS.

MANLEY, EDWARD

SEQUENCE NUMBER : 002

COMPEL

INDEX NO. 105863/03

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	

Cross-Motion: ✓ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
APR 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4-2-09

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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ROBERT MAGITO,

Plaintiff,

Index No. 105863/03

Seq No.: 002

- against -

Decision and Order

EDWARD MANLEY, JOHN A.M. MANLEY, OTTO E.M. MANLEY, LINCOLN ORENS as Trustee under agreement dated December 5, 1950 with MARGUERITA M. MANLEY for the benefit of FRANCIS MANLEY and THE CITY OF NEW YORK,

Defendants.

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NEW YORK

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when he tripped and fell "over a piece of metal that was protruding from the sidewalk in front of the premises commonly known as 91 University Place, Between East 11th and 12th Streets" in the County and State of New York on May 28, 2002. Plaintiff later identified the piece of metal as "a traffic sign pipe." Plaintiff now moves for a conditional order compelling defendant the City of New York ("City") to "disclose the information requested in plaintiff's Third Notice for Discovery and Inspection, dated November 9, 2007 and this Court's Compliance Conference Stipulations dated 10/7/08 and 12/16/08 within 20 days" or striking City's answer. City opposes and cross-moves to dismiss plaintiff's complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) or, in the alternative, for summary judgment pursuant to CPLR 3212. Plaintiff opposes City's cross-motion.

Plaintiff, in support of his motion, submits: the pleadings; the deposition transcript of Stacey Williams, Record Searcher for the New York City Department

of Transportation("DOT"); plaintiff's Third Notice for Discovery and Inspection, dated November 9, 2007; the deposition transcript of Sherry Johnson, Record Searcher for the DOT; a so-ordered stipulation dated October 7, 2008; City's Response to Case Notice for D&I, dated October 20, 2008; a letter from plaintiff's counsel to City, dated October 24, 2008; a so-ordered stipulation, dated December 16, 2008; copies of "traffic sign records;" a copy of City's Response to the Compliance Conference Orders Dated May 29, 2007 and August 14, 2007; a copy of City's Response to Second Notice for Discovery and Inspection Dated August 20, 2007; and a letter from plaintiff's attorney to City, dated December 23, 2008.

Plaintiff argues that City has failed to provide discovery demanded in its Third Notice for Discovery and Inspection dated November 9, 2007 and "this Court's Compliance Conference Stipulations dated 10/7/08 and 12/16/08." Specifically, plaintiff seeks:

> Gang Sheets for the period 1996 to the present relating to the installation, removal and/or maintenance of signs, sign posts and sidewalks within 3000 feet of the premises commonly known as 91 University Place . . . as testified to by Stacey Williams at the examination before trial held on November 7, 2007.

Plaintiff asserts that, according to Ms. Williams' testimony, the computer printout provided by City only shows repair orders but will not show if any action was taken in response to the repair order. Ms. Williams testifies:

> Q: Where on Plaintiff's 30 would it indicate that an action was actually performed regarding the complaint?
> A: Nowhere, it wouldn't show the action done, it would show if it was referred to maintenance and what date if maintenance looked at the complaint repair but it wouldn't show the actual action done at the location.
> Q: Would that information be contained on Plaintiff's 30?
> A: Which information?
> Q: That action was taken?
> A: You would have to request a gang sheet again to know if any action was taken.

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City submits the following: plaintiff's notice of claim; the pleadings; a response sheet and a copy of a "Big Apple Map"; a copy of "Traffic Sign Records;" a "Fits" report, dated March 7, 2005; and two color photocopies of a photograph of the subject location. City argues, in support of its cross-motion to dismiss, that it did not have prior written notice of the defect. City points out that, after conducting two different searches of DOT records for the subject location, including a search for permits, complaints, repair records, contracts and milling/ resurfacing records, no documents giving prior written notice were found. City asserts that the FITS report (citizen complaints made over the phone) produced by plaintiff's own search does not satisfy the prior written notice requirement. Even if it did constitute notice, the FITS report listed a complaint for a defect located across the street from where plaintiff's accident occurred. Specifically, the defect in the FITS report was for a location in front of 90-92 University Place as opposed to 91 University place. Finally, City argues that plaintiff cannot claim that it caused or created the defect. City acknowledges that the signs records are "the only documents produced to date by either party that might contain some evidence that the City is in some way created the subject defect." However, City claims that those documents only show that signs were "moved from one location to another" and, in any event, all signs on the block where plaintiff had his accident were deemed as being in "good condition" on April 4, 2002, six weeks prior to plaintiff's accident.

City, in opposition to plaintiff's motion, argues that it has not failed to comply with either of the two court-ordered stipulations. City notes that those stipulations only direct that City respond to plaintiff's D&I notices. City asserts that it did respond to those notices. Furthermore, City argues that it's response to the request for gang sheets is proper in that the time frame and distance from the defect is over-broad (1996 to the present and 3000 feet).In any event, City argues, gang sheets are created only when City workers make repairs to potholes and similar defects.

Plaintiff, in opposition to City's cross-motion, argues that he does not need to show that City had prior written notice of the defect because there is evidence that City caused or created such defect on April 4, 2002, a month and a half before his accident. In support of his contentions, plaintiff refers to the deposition testimony of Ms. O'Neil, the second DOT witness to testify on behalf of the City. Ms. O'Neill testifies about the sign records provided by City. Specifically, Ms. O'Neill testifies about the records pertaining to work done on April 4, 2002:

Q: The next notation "order note number 2, remove all N/S and N/B replace with no parking, 8:00 a.m. to 6:00 p.m. Monday through Friday" do you see that?
A: Yes.
Q: What does that refer to?
A: Remove all standing signs and no parking signs, replace with no parking8:00 a.m. through 6:00 p.m. Monday through Friday Signs.
. . .
Q: Do you know if . . . any records . . . indicate which signs along University Place and East 11thand 12th Streets were removed?
A: On the east side . . .it indicates which signs are now "no parking. . ." It shows item number 2, 4 and 5.

. . .
A: . . . looking at the new block front order that was dated April 4, 2002 where it indicates "need drive rails and sequence four and five." Looking at plaintiff's Exhibit 8 where it says four and five - -
Q: Under sequence?
A: Yes, under sequence.
Q: Which is the first column, correct?
A: Yes. It indicates that these signs, their placement has been changed. Number 4's sign placement is 160 feet from the curb line coming from East 11th Street. And that is on one drive rail. And number 5, this sign is placed 225 feet from the curb line of East 11th Street. So those two signs have been put on, they have been changed and put on separate drive rails . . . so the configuration of the area has changed . . . new drive rails have been put in and they are put in different distances.
Q: Is there anything to indicate on any of the documentation as to what was done with the old drive rails?
A: What do you mean by "what was done with the old drive rails?"
Q: Was the pole kept there, was it removed and the sidewalk repaired, was it cut off or any combination of the above?
A: Well, it has been moved. Whether it was cut or what, it is not indicating. But the drive rails have been replaced and placed at different locations.

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]).

New York City Administrative Code §7-201(c)(2) 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.

The only recognized exceptions to the notice requirement are (1) where a special use confers a special benefit upon the municipality or; (2) An act of affirmative negligence by the municipality caused or created the defect. When it is alleged that the municipality caused or created the defect, the exception is "limited to work by the City that *immediately* results in the existence of a dangerous condition." (*Oboler v. City of New York*, 8 N.Y.3d 888[2007]).

Although City has shown, prima facie, that it had no notice of the subject defect, City's cross-motion is denied as plaintiff has raised a question of fact as to whether City caused or created the subject defect. Plaintiff has submitted proof that various signs were moved in the area of his accident six weeks before the accident occurred. City's witness could not state whether the old signs were cut before they were moved or whether the whole sign post was moved to a new location.(see *Kiernan v. Thompson*, 73 nY2d 840[1988](where City's summary judgment was denied because there were questions of fact as to whether City caused or created the defect upon its removal of a tree stump, thereby creating a broken and defective condition on the sidewalk) (compare to *Bielecki v. City of New York*, 14 AD3d 301[1st Dept. 2005]) (where the court found that a defect developed over time due

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to water seeping into an area of patchwork repair of a pathway).

As to plaintiff's motion, pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party's answer is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. *(Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]). CPLR §3124 states:

> If a person fails to respond to or comply with any request, notice, interrogatory, demand, question, or order under this article . . . the party seeking disclosure may move to compel compliance or a response.

City has complied with both so-ordered stipulations directing that City respond to plaintiff's outstanding discovery requests. Thus, there is no basis upon which to strike City's answer. Further, City should not be compelled to produce the gang sheet(s) requested by plaintiff. The request for the gang sheets was triggered by a complaint which was received via telephone in 1996. An examination of the FITS report reveals that the complained of defect was located in front of 90-92 University Place. The defect which allegedly caused plaintiff's accident was located across the street, in front of 91 University Place. There is no good faith basis upon which to request gang sheets where there is no evidence of a complaint generating a repair order for the location in question.

Wherefore it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that the cross-motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: April 1, 2009

EILEEN A. RAKOWER, J.S.C

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