

**Vega v City of New York**

2009 NY Slip Op 32416(U)

October 15, 2009

Supreme Court, New York County

Docket Number: 117650/2004

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA  
*Justice*

PART 52

Carlos Vega

INDEX NO.

112548-05

MOTION DATE

- v -

MOTION SEQ. NO.

004

MOTION CAL. NO.

City of New York

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

~~motion~~ and cross-motion are decided in accordance  
~~with an~~ accompanying memorandum decision.

**FILED**  
OCT 21 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: October 15, 2009

Saliann Scarpulla  
**SALIANN SCARPULLA** *SC.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

----- X  
CARLOS VEGA,

Plaintiff,

- against-

Index No.:117650/2004  
Submission Date:  
9/09/2009

THE CITY OF NEW YORK,

**DECISION AND ORDER**

Defendant.

----- X

For Plaintiff:  
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New York, NY 10036

For Defendant City of New York:  
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100 Church Street, 4<sup>th</sup> Floor  
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**FILED**  
OCT 21 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Papers considered in review of this motion to compel and cross-motion for summary judgment:

Notice of Motion . . . . .	1
Aff in Support . . . . .	2
Aff in Support of Cross-Motion . . . . .	3
Aff in Opp. . . . .	4
Reply Aff . . . . .	5

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, plaintiff Carlos Vega (“Vega”) moves for an order pursuant to CPLR 3124 compelling defendant the City of New York (the “City”) to produce witness Scott Roveto to appear for an examination before trial. The City opposes this motion, and cross-moves for summary pursuant to CPLR 3212 dismissing all claims against it.

On May 9, 2005, at approximately 6:00 p.m. Vega was bicycling on East 98<sup>th</sup> Street, between Lexington Avenue and Park Avenue, when rode into a hole, causing him to fall off the bicycle. In his affidavit submitted in this action, Vega states that he observed the hole to be approximately one foot long, six inches wide and approximately one foot deep. After falling, Vega was taken by ambulance to Metropolitan Hospital Center, where he was diagnosed with fractures of his left foot.

In his verified complaint, dated September 2, 2005, Vega alleged causes of action for negligence and creation and maintenance of a public nuisance against the City. The City denied all material allegations of the complaint, and asserted three affirmative defenses, including Vega's culpable conduct, assumption of the risk, and limited liability pursuant to CPLR 1601 and 1602.

On June 8, 2006 plaintiff took the deposition of Rosario Carluzzo, a witness from the New York City Department of Transportation ("Carluzzo"). Carluzzo testified regarding pothole complaints and repairs in the area where Vega's accident occurred. In particular, Carluzzo was asked about a FITS report which was issued on August 20, 2004, as a result of a citizen complaint about a pothole located on East 98<sup>th</sup> Street between Park Avenue and Lexington Avenue, at approximately the same location where Vega's accident occurred. Carluzzo testified that the records indicate that on August 22, 2004 a crew arrived at the location and noted that it was "FRE" or "found already restored" by another crew.

Carluzzo further testified that there was another FITS report issued on December 1, 2004, as a result of another citizen complaint regarding the same location. As a result,

Carluzzo testified, he and a crew went to the location on December 2, 2004 at 7:10 p.m. and repaired the pothole. Carluzzo stated that the pothole was repaired with a cold patch, which he described as a temporary solution. Carluzzo referred the matter to borough maintenance for follow-up with hot asphalt to make the repair permanent.

After the Carluzzo deposition, Vega requested additional documents from the City, including maintenance and repair records for any subsequent permanent repair to the pothole at issue. The parties then had two compliance conference, resulting in orders dated July 11, 2007 and November 7, 2007 directing the City to provide the maintenance and repair records for the permanent repair. Vega subsequently moved to strike the City's answer for failure to comply with discovery demands.

After Vega filed the motion to strike, the City responded to the November 7, 2007 compliance conference order with the affidavit of Scott Roveto ("Roveto"), Director of Manhattan Street Maintenance for the New York City Department of Transportation, dated March 27, 2008.<sup>1</sup> In his affidavit Roveto explains that there were no additional repair records to produce, as there had been no subsequent repairs to the pothole at issue. Roveto also stated that a cold patch is not a temporary solution, as testified by Carluzzo, but instead is a permanent repair, and no additional repair work was required.<sup>2</sup>

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<sup>1</sup> The City claims that at this time, Vega was already in possession of a affidavit by Roveto dated January 4, 2007. The City purports to annex a copy of the January 4, 2007 affidavit to its motion papers, but no such affidavit was submitted.

<sup>2</sup> This Court (Paul Feinman, J.) Denied Vega's motion to strike, finding that the "the 3/27/08 affidavit of Scott Roveto satisfies the city's obligation vis-a-vis the 11/7/07

Vega now moves pursuant to CPLR 3124 for an order compelling the City to produce Roveto for an examination before trial. Vega argues that he is entitled to depose Roveto to resolve the inconsistencies between the statements in Roveto's affidavit and Carluzzo's deposition testimony. In response, the City cross-moves pursuant to CPLR 3212 for summary judgment dismissing the complaint, and also opposes Vega's motion to compel the examination before trial of Roveto as unnecessarily duplicative. In support of its cross-motion, the City argues that it is entitled to summary judgment because it did not have prior written notice of the pothole and that it did not cause and create the defect. Vega argues that the City's cross-motion for summary judgment should be denied because of the City's affirmative negligence in using a cold patch at the hole, which resulted in an immediately dangerous condition.

### **Discussion**

Summary judgment is an extraordinary remedy and is only appropriate where the movant has established that there is no question of fact on any issue which would require a trial. *See Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974). The court may grant summary judgment upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact. CPLR 3212(b); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). On a motion for summary judgment the testimony of the \_\_\_\_\_ stipulation of the parties.”

nonmoving party is accepted as true. *O'Sullivan v. Presbyterian Hosp. in City of New York at Columbia Presbyterian Medical Center*, 217 A.D.2d 98, 101 (1<sup>st</sup> Dep't 1995).

Section 7-201 (c) (2) of the Administrative Code of the City of New York (also known as the "Pothole Law") provides that no civil action shall be maintained for personal injury sustained as a result of a defect in any street unless written notice of the condition was previously given to appropriate municipal officials. "Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained roadway unless it has either received prior written notice of the defect or an exception to the prior written notice requirement applies." *Griesbeck v. County of Suffolk*, 44 A.D.3d 618, 619 (2<sup>nd</sup> Dep't 2007). The Court of Appeals has "recognized only two exceptions to prior written notice laws – 'where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality.'" *Oboler v. City of New York*, 8 N.Y.3d 888, 889 (2007) (quoting *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 (1999)).

The affirmative negligence exception is "limited to work by the city that immediately results in the existence of a dangerous condition." *Oboler*, 8 N.Y.3d at 889 (quoting *Bielecki v. City of New York*, 14 A.D.3d 301 (1<sup>st</sup> Dep't 2005)). The affirmative negligence exception does not apply where the defect complained of developed over time. "Even if a municipality performs negligent pothole repair, where the defect develops over time with environmental wear and tear, the affirmative negligence exception is inapplicable." *Diaz v. City of New*

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York, 56 A.D.3d 599, 600-01 (2d Dep't 2008); see also *Yarborough v. City of New York*, 10 N.Y.3d 726, 728 (2008).

Here, the City asserts that it did not have prior written notice of the pothole as required by the Pothole Law. Prior written notice laws are to be strictly construed. *Gorman v. Town of Huntington*, 12 N.Y.3d 275, 279 (2009). Permits and telephonic citizen complaints, even if later reduced to writing, do not constitute "prior written notice." *Gorman*, 12 N.Y.3d at 280. The lack of prior written notice is not challenged by Vega. "Where the City establishes that it lacked prior written notice under the Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one the two recognized exceptions to the rule." *Yarborough*, 10 N.Y.3d at 728.

Vega argues that the affirmative negligence exception applies here because the City's repair job to the pothole consisted of only the application of cold patch, and was never completed with the application of the hot asphalt.<sup>3</sup> Thus, Vega concludes, the City left the pothole in an unrepaired and immediately dangerous condition. Vega points to Carluzzo's testimony that the cold patch applied in the area where Vega's accident occurred was a temporary remedy, and would only be a complete, permanent restoration upon the application of hot asphalt.

In addition, Vega submits the affidavit of Nicholas Bellizzi, P.E., a licensed engineer, who reviewed various documents, including the repair reports, deposition testimony and

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<sup>3</sup> Vega does not argue that the special use exception applies in this case, so the Court will not address it.

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attached exhibits, and the pleadings in this matter. It is Bellizzi's opinion that in repairing the pothole with only cold patch, the city performed repair work which immediately resulted in a dangerous condition.

In opposition, the City points to Roveto's statement that the cold patch was a permanent solution. The City also argues that whether or not the repair was complete, the hole which caused Vega's accident was the result of environmental wear and tear which occurred over time, and therefore that the City did not cause an immediate danger. In addition, the City points to Bellizzi's affidavit, which notes that the cold patch would strip off quickly (not immediately), due to weather, road, bicycle and foot traffic. The City also argues that there is a question as to whether the FITS report relied on by Bellizzi deals with the same hole which caused Vega's accident.

Based upon the conflicting statements of Carluzzo, Bellizzi, and Roveto, and the other conflicting evidence submitted, Vega raises a triable issue of fact as to whether the City created a "defective condition within the meaning of the exception, which requires that the affirmative negligence of the City immediately result in the existence of a dangerous condition." *Yarborough*, 10 N.Y.3d at 728. Unlike Carluzzo, the City employee who allegedly inspected and worked on the pothole in issue, Roveto has no personal knowledge of the particular pothole at issue. Roveto is a supervisor, and he admits in his affidavit that his statements are based upon documents he has reviewed and the nature of cold patched and hot asphalt generally. Roveto offers no statements to indicate he personally inspected the

block of East 98<sup>th</sup> Street, between Lexington Avenue and Park Avenue, or any potholes that may have been repaired there.

As Vega has raised a triable issue of fact as to whether the City created a defective condition within the meaning of the affirmative negligence exception, the City's motion for summary judgment is denied.

Vega cross-moves to compel the examination before trial of Roveto. Vega claims that he needs to depose Roveto because of the inconsistencies between the Roveto affidavit and the Carluzzo deposition testimony.

First, Vega fails to submit a deposition notice to show that he has served a notice to take Roveto's deposition on the City and that the City has failed to comply with the deposition notice. Further, Vega has not submitted an affirmation of good faith as required by 22 NYCRR 202.7(a). This failure alone requires denial of Vega's cross-motion to compel Roveto's deposition. *See Dunlop Development Corp. v. Spitzer*, 26 A.D.3d 180 (1<sup>st</sup> Dep't 2006); *Sixty-Six Crosby Assocs.*, 256 A.D.2d 26 (1<sup>st</sup> Dep't 1998) (motion to compel properly denied "since summary denial . . . is mandated when it is made without a proper affirmation of good faith").

Finally, "a party seeking to depose additional witnesses must make a detailed showing of the necessity for taking such depositions." *Collicchio v. City of New York*, 181 A.D.2d 528 (1<sup>st</sup> Dep't 1992). Vega has failed here to make that detailed showing. As stated above, Roveto has no actual knowledge of the facts of Vega's accident or of the pothole repair. He based his statements solely on the review of City documents and his own general knowledge.

For the reasons set forth above, Vega's cross-motion to compel Roveto's deposition is also denied.

In accordance with the foregoing, it is

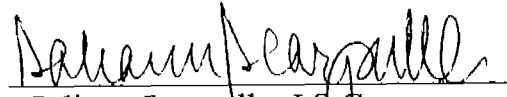
ORDERED that defendant the City of New York's cross-motion for summary judgment to dismiss plaintiff Carlos Vega's complaint is denied; and it is further

ORDERED that plaintiff Carlos Vega's motion to compel the examination before trial of Scott Roveto is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
October 15, 2009

ENTER:

  
Saliann Scarpulla, J.S.C.

**FILED**  
OCT 21 2009  
COUNTY CLERK'S OFFICE  
NEW YORK