

Lazerus v City of New York

2010 NY Slip Op 30192(U)

January 22, 2010

Supreme Court, New York County

Docket Number: 111986/05

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. SALIANN SCARPULLA PART 52
J.S.C.

JUNE LAZERUS,

Index No. 111986/05

Plaintiff,

Motion Date _____

- v -

Motion Seq. No. 002

Calendar No. _____

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, FRANK BASILE
CONTRACTING CORP., AND CONSOLIDATED EDISON
COMPANY OF NEW YORK,

Defendants.

The following papers, numbered 1 to 4 were read on this motion to strike.

Notice of Motion/Petition/Order to Show Cause — Affidavits — Exhibits
Answering Affidavits — Exhibits
Replying Affidavits

FILED
PAPERS NUMBERED
1
2
JMA
28 2010

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is

ORDERED that the defendant The City of New York's motion for summary judgment is determined in accordance with the accompanying decision and order.

This constitutes the Decision and Order of the Court.

Dated: January 20, 2010

Saliann Scarpulla
Hon. Saliann Scarpulla J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 TRIAL SUPPORT TO TRANSFER TO NON-CITY IAS PART; CITY IS NOT A PARTY OR
NOT REPRESENTED BY CORPORATION COUNSEL

MOTION/CASE IS RESPECTFULLY REFERRED TO

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

-----X

JUNE LAZERUS,

Plaintiff,

- against-

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, FRANK
BASILE CONTRACTING CORP., AND
CONSOLIDATED EDISON COMPANY OF
NEW YORK,

Defendants.

-----X

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For Defendant The City of New York:
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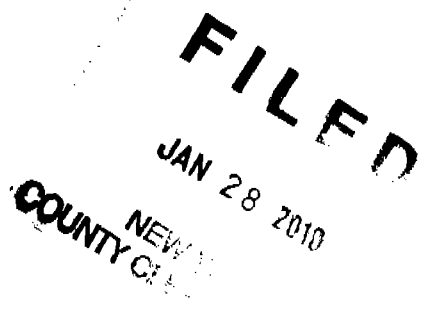
Papers considered in review of this motion for summary judgment:

- Notice of Motion 1
- Aff in Opp 2
- Replies 3, 4

Index No.: 111986/05

Submission Date: 12/9/09

DECISION AND ORDER



HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants The City of New York and New York City Department of Transportation (collectively referred to as "City") move for summary judgment dismissing the complaint insofar as

asserted against them.¹

On December 15, 2004, plaintiff June Lazerus ("Lazerus") tripped and fell in a pothole located in the crosswalk on the east side of 8th Avenue between the north and south corners of West 39th Street. She was crossing West 39th Street from south to north on the east side of 8th Avenue when she stepped off of the curb into a pothole in the southeast corner. On or about August 29, 2005, Lazerus commenced this action seeking to recover damages for the injuries she sustained as a result of her fall.

The City now moves for summary judgment dismissing the complaint insofar as asserted against it on the grounds that Lazerus did not plead and can not prove that the City had prior written notice of the subject defect and the City did not cause or create the alleged defect. Specifically, the City argues that it did not have prior written notice of the defect upon which Lazerus fell because (1) the Big Apple map for the subject intersection does not depict any defects in the subject crosswalk; and (2) searches conducted by the New York City Department of Transportation ("DOT") for the area of Lazerus' fall yielded only permits not issued to the City, and FITS reports, which do not

¹ Frank Basile Contracting Corp. is no longer a party to this action. In addition, in an interim order dated December 9, 2009, the court granted defendant Consolidated Edison Company of New York's unopposed motion for summary judgment dismissing the complaint and cross claims asserted against it and granted plaintiff June Lazerus' cross motion for leave to amend the notice of claim to correct the date of accident to 12/15/2004 and deemed the notice of claim so amended.

As the court has accepted the amended notice of claim, the City of New York's argument that plaintiff's notice of claim was not timely is moot.

[* 4]

constitute prior written notice and in any event, do not relate to the specific location of Lazerus' accident.

In support of its motion, the City submits the examination before trial testimony of DOT principal administrative assistant Sherry Johnson-O'Neal ("O'Neal") who testified that there were three searches conducted for the general area of Lazerus' fall.

O'Neal testified that the first search conducted was a roadway block search of West 39th Street between 7th and 8th Avenues for the two years prior to the date of the accident ("first search"). That search yielded 54 permits (none of which were issued to the City) and two repair orders (FITS reports). The first FITS report related to defect DM2003125009 located in front of 225 West 39th Street between 7th and 8th Avenues in the center of the street near a sewer cover. The second FITS report related to defect DM2003352013 located in front of 205 West 39th Street between 7th and 8th Avenues. When asked, "in conducting that search on West 39th Street between Seventh and Eighth. Does that search include any of the intersection of either side of 39th Street; the intersection of 39th and Eighth or the intersection of 39th and Seventh?" O'Neal responded, "No, it's just that one crosswalk."

The second search conducted was for DOT records for the roadway at the intersection of West 39th Street and 8th Avenue for two years prior to the accident ("second search"). That search yielded two FITS reports. One of the FITS reports produced by the City as a result of that search was for Defect Number DM2004092034.

That FITS report was generated after a citizen reported the presence of a defect to the City on April 1, 2004. On that FITS report form, the defect was described as “one big pothole located on s/e corner.”²

DOT Bureau of Street Maintenance supervisor Joseph Ajar (“Ajar”) testified at an examination before trial that he was responsible for supervising different types of “gangs” including “pothole gangs,” which consisted of groups of workers who performed pothole repairs. He explained that a gang sheet is used to keep track of the workers that are in the gang, the equipment that is used, and the different locations that the gang visits when they are repairing potholes. He testified that according to the relevant gang sheet, on April 13, 2004, at approximately 9:40 p.m., he and his crew arrived at 8th Avenue and 39th Street to look for Defect Number DM2004092034. He and his crew could not find the defect and left at 9:45 p.m.

In opposition, Lazerus argues that the City had prior written notice of the defect as evidenced by the Litigation Support Intake form (the FITS report) for Defect Number DM2004092034, which described the location and nature of the defect as “one big pothole located on s/e corner” reported by a citizen on April 1, 2004. Lazerus further argues that in any event, the City performed a negligent repair by failing to locate the subject defect on April 13, 2004, by leaving the subject area after only five minutes,

² The other FITS report generated for that search is not relevant to this action.

without making any attempts to get assistance in locating the defect, and by allowing the defect to worsen over the next eight months until Lazerus' accident.

Discussion

In a case like this where plaintiff alleges a defect in the crosswalk of a roadway, pursuant to Administrative Code §7-201(c) (2), plaintiff must plead and prove that the City had prior notice of the defect, unless it is claimed that the City was affirmatively negligent in causing or creating the defective condition. *See Elstein v. City of New York*, 209 A.D.2d 186 (1st Dept. 1994). The affirmative negligence exception to the notice requirement is limited to work by the City that immediately results in the existence of a dangerous condition. *See Oboler v. City of New York*, 8 N.Y.3d 888 (2007).

The City argues that it had no prior written notice of the alleged defect because the FITS reports generated from the applicable segment search (the first search) yielded no defects in the area of Lazerus' fall, the FITS reports generated from the second search are inapplicable because that search did not include crosswalks, and, in any event, FITS reports can not serve as prior written notice.

First, contrary to the City's contention, O'Neal did not clearly testify that the second search did not include crosswalks and that the first search did include crosswalks on 39th Street between 7th and 8th Avenue. Rather, when asked about the first search, she testified "no, it's just that one crosswalk" without giving any further explanation. Based on the evidence presented, it is unclear whether the first search or the second search

included the area of Lazerus' fall, i.e. the crosswalk on the east side of 8th Avenue between the north and south corners of West 39th Street.

In any event, although FITS Report Number DM2004092034 does refer to a pothole in the general area in which Lazerus fell, a citizen complaint made eight months before the accident which is reduced to writing by the City does not satisfy the prior written notice requirement of §7-201. *See McCarthy v. City of White Plains*, 54 A.D.3d 828 (2nd Dept. 2008); *Akcelik v. Town of Islip*, 38 A.D.3d 483 (2nd Dept. 2007); *Khemraj v. City of New York*, 37 A.D.3d 419 (2nd Dept. 2007); *Dalton v. City of Saratoga Springs*, 12 A.D.3d 899 (3rd Dept. 2004).³

In addition, Lazerus has failed to present any evidence that any affirmative negligence on the part of the City caused or created the subject defect. Accordingly, Lazerus has failed to raise an issue of fact as to any exception to the prior written notice requirement.

In accordance with the foregoing, it is hereby

ORDERED that defendants The City of New York and New York City Department of Transportation's motion for summary judgment dismissing the complaint insofar as asserted against them is granted; and it is further

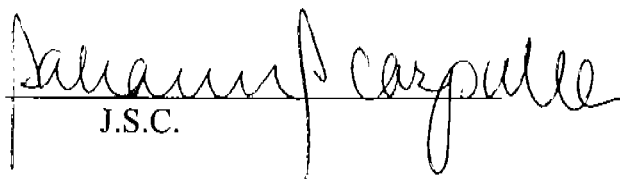
³ The court can not discern from the photocopies of the Big Apple Map submitted by the City whether there was a marked defect in the specific area of Lazerus' fall. However, as Lazerus does not submit a copy of the Big Apple Map and does not argue that the Map depicted a defect sufficient to give the City prior written notice, the court does not specifically address this issue.

ORDERED that in accordance with this court's interim order dated December 9, 2009, the Clerk of the Court is directed to dismiss the complaint as to all remaining defendants.

This constitutes the decision and order of the court.

Dated: New York, New York
January 12 2010

ENTER:


J.S.C.

FILED
JAN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

PRESENT: SCARPULLA
Justice

PART 19

BHPC ASSOC

- v -

ENE GROUP

INDEX NO.

600614/09

MOTION DATE

1/25/10

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

①

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiff BHPC Associates, LLC, for summary judgment on its complaint against defendant ENE Group, LLC is granted on default.

The Clerk of the Court is directed to enter judgment in favor of Plaintiff BHPC Associates, LLC and against defendant ENE Group, LLC, in the amount of \$197,746.56, with interest from September 3, 2009.

This constitutes the decision and order of the Court.

FILED

JAN 28 2010

Dated: 1/26/10

COUNTY CLERK'S OFFICE
NEW YORK

SALIANN SCARPULLA
J.S.C.

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):