

Wittorf v City of New York

2010 NY Slip Op 30261(U)

February 4, 2010

Supreme Court, New York County

Docket Number: 103233/06

Judge: Saliann Scarpulla

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

PRESENT **SALIANN SCARPULLA**

PART 52

Index Number : 103233/2006

WITTORF, RHONDA

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 004

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

| PAPERS NUMBERED | |
|-----------------|-------|
| 1 | _____ |
| 2 | _____ |
| 3 | _____ |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

This constitutes Decision and Order of the Court

FILED

FEB 05 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/4/2010

Saliann Scarpulla

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):

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

----- X
RHONDA WITTORE,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

-----X

Index Number 103233/06
Submission Date 12/16/09
Mot. Seq. No. 004

DECISION & ORDER

Appearances: For Plaintiff :
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For Defendant the City of New York:
New York City Corporation Counsel
By Ashley Hale, Esq.
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212-788-0303

Papers considered in review of this motion for reargument:

Papers
Notice of Mot. and Affirm. in Supp.....
Affirm. in Opp.....
Reply Aff. in Further Supp.....

FILED
Numbered
FEB 05 2010
NEW YORK
COUNTY CLERKS OFFICE

HON SALIANN SCARPULLA, J.:

Defendant the City of New York (“the City”) moves pursuant to CPLR 2221 for leave to reargue this Court’s denial of the City’s summary judgment motion by an order dated July 14, 2009. On December 16, 2010, the Court held oral argument on the matter and reserved opinion on the City’s motion.

The City argues that in its original decision, the Court misapplied Administrative Code § 7-201(c) in finding that issues of fact existed with regard to whether the City had received adequate written notice or acknowledgment of the defective condition at issue.

At the December 16 oral argument, the City clarified that it was not challenging the Court's ruling that the FITS and MOSAIC reports together could satisfy the prior written notice requirement under Administrative Code §7-201. The City also did not argue this point in its submissions.

The City contends only that the FITS/MOSAIC reports submitted by plaintiff Rhonda Wittorf ("Wittorf") did not specifically identify the defective condition in question. The City argues that while the July 13, 2005 FITS/ MOSAIC reports placed the defect in the eastbound lane underneath an overpass on the 65th Street Transverse, plaintiff fell in the westbound lane. Further, the City argues that the Court misunderstood deposition and other testimony submitted by the parties.

Discussion

A motion pursuant to CPLR 2221 to reargue is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *See Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel*, 203 A.D.2d 72 (1st Dept. 1994). Absent mistake on the Court's part, the Court must adhere to its original decision. *Pahl Equipment Corp. v Henry Kassis*, 182 A.D.2d 22, 27-28 (1st Dep't 1992). Here, reviewing the submissions of the parties for a second time, the Court once again finds issues of fact which must be resolved at trial.

The earliest FITS/MOSAIC report identifies the defective condition as "pothole e/b underneath overpass," which is located on "the 65th Street transverse," "between the

5th Avenue and the Central Park West.” Plaintiff’s accident occurred over a series of closely clustered potholes and suppressions under an overpass on the 65th Transverse.

In its original motion, the City argued that because there were three underpasses on the 65th transverse, and this FITS report does not say under which of the four overpasses the defect is located, this FITS report does not constitute notice of the defective condition. On this motion, the City has amended the number of overpasses to four.

While the FITS report does not specify a particular underpass, the City has not offered any evidence that each overpass on the 65th Street Transverse is assigned a separate, reasonably visible identifying name sign. More importantly, when Bowles was asked whether the overpasses are “designated off at all,” he answered “you know, they have no destination [sic] as far as I know.” (Bowles Dep., p. 31:20, 21). Thus, the City has not shown that a more exacting description of the defect is even possible.

Additionally, there is an issue of fact as to whether the eastbound or westbound lane contained the defective condition that caused plaintiff’s injury. Wittorf testified that when she entered under the overpass, she saw numerous holes to her right and moved left. (Wittorf 50-h, p. 21:11-19). The second she moved left, she fell into the hole. (Wittorf 50-h, p. 21:11-19). Wittorf did not testify in which lane she fell.

The City relies on Bowles’ testimony that only the westbound lane contained the defect, and that is where the accident happened. Below is the relevant part of Bowles’ testimony:

Q: Was any portion of the work that you performed outside of the westbound lane?

A: No.

Q: And could you tell us how you know that, as you sit here today?

A: Because I remember standing over the hole and I had Ritchie Solomon (phonetic) next to me and I pointed out the fact this hole doesn't extend beyond the normal yellow line there is a double yellow line there and the northern yellow line there that is the edge of where this condition was so everything to the right of those double lines was not something that came into play.

(Bowles Dep., p, 54: 3-16).

Bowles testimony, however, is not consistent. Later Bowles testified to the following:

Q: Does that reflect your recollection, as if that work was done on both sides of the highway or one?

A: We might have when we finished the job; I don't know how far we might have gone over if in fact we did go over to the other lane, but I do recall getting there that the existing condition was entirely within the westbound lane but we made this condition bigger when we fixed the condition we took it out and I just--there is a very good possibility that we came into the eastbound lane by the time we finished up.

(Bowles Dep., p. 91:17-25, p. 92:2).

On the day of the repair work, hours after the accident, Bowles filled out a capital production crew sheet, also known as a gang sheet. The evidence is uncontroverted that at the time he was filling out the November 5, 2005 gang sheet, Bowles was aware of Wittorf's accident and where it happened, and that it happened precisely where he shortly thereafter did the repair work. (Bowels Dep., pp 41-47). In the location section of the gang sheet, Bowles noted that the repair work was on the 65th Street Transverse. Bowles omitted any information about the overpass and the lane in which the work was done.

Plaintiff submitted a copy of the report that the City Department of Environmental Protection issued regarding the subject repair work on the day of the accident, November 5, 2005. (Plaint. Rearg. Mot. Ex. D).¹ The report states that “Crew met DOt [sic] & Parks on Transverse road & W 65 st.” This report identifies the location as “9' N/S C/L W 65 Street Pipe is under the East Bound Roadway under the 2nd overpass.” (Plaint. Rearg. Mot. Ex. D). Consistent with the report, the photographs of the repaired condition show that the work straddled the double-yellow line and was done in both lanes. Wittorf also testified that as she entered under the underpass, there were potholes on both sides of her. (Wittorf 50-h, p. 29).

The City further objects to the Court’s finding of the relevant defect as “uniquely conspicuous” within the discussion of the sufficiency or specificity of the notice requirement as set out in *Walker v City of New York*, 34 A.D.3d 226, 227 (1st Dep’t 2006), *Roldan v City of New York*, 36 A.D.3d 484, 484 (1st Dep’t 2007), and, currently, in *Ortiz v City of New York*, 67 A.D.3d 21, 29 (1st Dep’t 2009). The City argues that the Court’s description of the relevant hole as being about three feet wide and four feet long is not born out by the evidence, because the measurements plaintiff offered at her deposition (Wittorf 50-h Dep., p.26) and the photographs are unreliable, as plaintiff testified she did not remember well the events of that day (Wittorf 50-h Dep., p.26) and it was dark under the overpass.

¹Bowles testified that the DEP was present during the repair work.

However, Bowles gave a vivid description of the defect (fully relayed in the original order) and said he was immediately able to identify the defect and did not have to look under each overpass. (Bowles Dep., p. 37:9-13, 20-25, p. 38:2).² Bowles' gang sheet lends support to Wittorf's description of the hole as being very big. It reads "2.75 tons [of materials]." It describes the area of the work as "6' x 11'; 5' x 14'; 3' x 2' x 2'; 1' x 1'," with the total work area of "16.4 sy [square yards]."

The City's last objection is to the Court's finding that an issue of fact arose as to the closing of the defects, noted on the July 13 FITS/MOSAIC reports, due to the absence of the gang sheets showing the repair work and Bowles' testimony that he could not explain why the reports were closed out. The City maintains that the missing gang sheets behind the closing of the defects described in the July 13, 2005 FITS/MOSAIC reports are not relevant to the Court's analysis, because these FITS/MOSAIC reports do not relate to the defect at issue. This argument is circular and simply reiterates the City's previous argument. It is also important to note that the gang sheets the City submitted with both the original and present motions were not for the July 13, 2005 FITS/MOSAIC reports the Court found relevant, but for the unrelated reports.

²While Bowles testified that his repair work at the 65th Street Transverse on November 5, 2005 was not in response to the July 13, 2005 FITS/MOSAIC reports, he could not explain how DOT otherwise learned of the defect at this location. (Bowles Dep., p 23:19-25, p. 24:2-7).

There are numerous inconsistencies in the documents and testimony submitted concerning the location of the potholes and the location of Wittorf's accident. There are also disputed issues of fact concerning whether the July 13, 2005 FITS/MOSAIC reports constituted adequate written notice of the defect. These factual issues must be decided at trial. *See Reyes v The City of New York*, 63 A.D.3d 615, 616 (1st Dep't 2009). Therefore, upon reexamination of the evidence and the law, the Court adheres to its initial ruling.

In accordance with the foregoing, it is

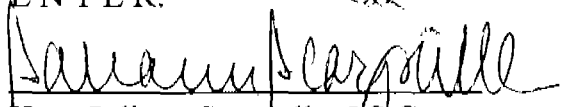
ORDERED that the motion by defendant the City of New York pursuant to CPLR 2221 for leave to reargue the order of this Court dated July 14, 2009 is granted; and it is further

ORDERED that, upon reargument, the City's motion for summary judgment is denied, and the Court adheres to its original order dated July 14, 2009; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this decision upon the Clerk of Trial Support (60 Centre St., Rm. 158), who shall schedule this matter forthwith for a date in Part 40 for jury selection and a trial.

This constitutes the decision and order of the Court.

Dated: New York, New York
February 4, 2010

ENTER:

Hon. Saliann Scarpulla, J.S.C.

FILED
FEB 05 2010
NEW YORK
COUNTY CLERKS OFF