

Beatty v City of New York

2010 NY Slip Op 30608(U)

March 22, 2010

Supreme Court, New York County

Docket Number: 115495/2007

Judge: Cynthia S. Kern

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3-24-10

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

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART 52

Index Number : 115495/2007
BEATTY, THOMAS
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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 is decided in accordance with the attached decision.

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

FILED
MAR 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/22/10

CYNTHIA S. KERN J.S.C.
C.K.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----x
BEATTY, THOMAS,

Plaintiff;

Index No. 115495/2007

-against-

CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION,

Defendants.

-----x

HON. CYNTHIA KERN, J.S.C.

FILED
MAR 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u>3</u>

Plaintiff commenced the instant action to recover damages for personal injuries sustained when he tripped and fell in a tree well on March 30, 2007 in front of 2657 Frederick Douglass Boulevard. Defendant City of New York (the "City") now moves for summary judgment dismissing the complaint on the ground that it did not have prior written notice of the condition. For the reasons set forth below, the City's motion for summary judgment dismissing the complaint is denied.

The first issue the court must resolve is whether the City is required to have prior written notice pursuant to § 7-201(c)(2) of the Administrative Code of the City of New York when a plaintiff's accident occurs in a tree well. Plaintiff argues that prior written notice is not required

for accidents in tree wells, relying on the Court of Appeals holding in *Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d 517 (2008). In *Vucetovic*, the Court of Appeals held that a tree well is not part of the sidewalk for purposes of liability under § 7-210 of the Administrative Code, which states that the abutting property owner rather than the City is responsible for the maintenance of sidewalks. However, the Court of Appeals did not address the issue of whether prior written notice is required to maintain an action against the City for failing to maintain a tree well. Administrative Code § 7-201(c)(2), which is the section of the code containing the written notice requirement, specifically states that prior written notice is required for defects on a sidewalk or “encumbrances thereon or attachments thereto.” This language is much broader than the language in § 7-210 as it is not limited solely to sidewalks. Based on the broader language of § 7-201(c)(2), another court has specifically found that written notice is required for injuries that occur in tree wells and that *Vucetovic* did not overrule previous holdings requiring prior written notice in tree well accident cases. See *Tucker v City of New York*, Index No. 101463/04 (Sup. Ct. New York County, 2009). This court agrees with the foregoing analysis and finds that prior written notice is required when the plaintiff’s injuries occur in a tree well.

However, the City is not entitled to summary judgment as there are disputed issues of fact as to whether the City received prior written notice of the allegedly defective condition. § 7-201(c)(2) of the Administrative Code provides as follows:

No civil action shall be maintained against the city for damage...in consequence of any sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the

defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency.

In the instant case, there are disputed factual issues as to whether the city received prior written notice of the empty tree well through a Big Apple map. "It is well settled that Big Apple maps filed with the New York City Department of Transportation serve as prior written notice to the city of the defective conditions indicated on the maps." *Weinreb v. City of New York*, 193 A.D.2d 596, 598 (2d Dept. 1993); *see also Acevedo v. New York*, 128 A.D.2d 488 (2d. Dept. 1987). However, "[w]here there are factual disputes regarding the precise location of the defect that allegedly caused a plaintiff's fall, and whether the alleged defect is designated on the map, the question should be resolved by a jury." *Quinn v. City of New York*, 305 A.D.2d 570 (2d Dept. 2003).

In the present case, there is a Big Apple map on file with the New York City Department of Transportation that shows what appears to be a circle (which would represent a hole or depression) at 2657 Frederick Douglass Boulevard at the location where plaintiff claims he was injured. Although the map does not specifically indicate that there is a defect in the tree well itself, the map is sufficient to create a factual issue as to whether it indicates a defect in the area where plaintiff allegedly was injured.

There is also a factual issue as to whether the City had prior written notice of a previous injury as a result of the same defective condition. The written notice requirement can be satisfied by a city agency receiving prior written notice of previous injury to a person as a result of the condition. Administrative Code § 7-201 (b)(2). The courts have held that a written notice of claim can satisfy the prior written notice requirement of a previous injury. *See Bruni v. City of*

