

<b>Diaz v City of New York</b>
2010 NY Slip Op 31063(U)
May 3, 2010
Sup Ct, NY County
Docket Number: 102086/04
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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

PART 52

Index Number : 102086/2004

DIAZ, YOLANDA

vs

CITY OF NEW YORK

Sequence Number : 001

STRIKE ANSWER

INDEX NO. 102086/04

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the attached decision.*

**FILED**  
MAY 04 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/3/10

CK  
CYNTHIA S. KERN 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: Part 52

-----X  
YOLANDA DIAZ,

Plaintiff,

Index No. 102086/04

-against-

**DECISION/ORDER**

THE CITY OF NEW YORK,

Defendant.

-----X  
HON. CYNTHIA S. KERN, J.S.C.

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

**FILED**  
MAY 04 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	3
Answering Affidavits to Cross-Motion.....	4
Replying Affidavits.....	5
Exhibits.....	6

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell in a crosswalk near 29 Avenue A (near 2<sup>nd</sup> Street) on December 1, 2002. She now moves to compel discovery or, in the alternative, strike defendant's answer. Defendant the City of New York (the "City") cross-moves for summary judgment. For the reasons set forth below, plaintiff's motion is granted to the extent described below and defendant's cross-motion is denied.

Plaintiff is entitled to further discovery to the extent described as follows. Initially, she claims that a "proper" search for relevant documents has not yet been conducted. The City has

conducted four separate searches for Department of Transportation ("DOT") documents for the relevant area from the date of accident to two years prior to that date and four DOT witnesses have testified regarding these various searches. The documents reflect, and DOT witnesses have testified, that at least some of these searches included the relevant crosswalk. Plaintiff is not entitled to a further document search, whether of computerized or hard copy records, nor is she entitled to any depositions of any other DOT witnesses.

Plaintiff also seeks witnesses who can interpret the codes on the documents produced by the DOT and the Department of Environmental Protection ("DEP") and/or code sheets which explain the various codes. She is entitled to be able to understand the documents which were produced. She is correct that each of the DOT witnesses and the one DEP witness professed ignorance as to at least some of the coded information on the documents with which they were presented at deposition. Therefore, the City is ordered to produce the code sheets, to the extent they exist, which explain the codes on the produced documents.

Plaintiff is not, however, entitled to a witness from the City who can interpret the symbols on a Big Apple map. As an initial matter, the City does not create or produce the Big Apple map and, as such, it cannot produce a witness to testify regarding it. In addition, the Big Apple map in this case contains no markings in the crosswalk, where plaintiff's accident allegedly occurred. Finally, the City has produced a key to the Big Apple map. Therefore, plaintiff's motion for a City witness to interpret the Big Apple map is denied.

Plaintiff also seeks a DEP witness from the Sewer Unit. The City has previously produced a DEP employee from the Water Unit for deposition. That witness, Kevin Patton, testified that an employee of the Sewer Unit would be more familiar with repairs at the subject

location. Plaintiff's basis for requesting this witness is that any sewer or water repairs done may result in the damage to the blacktop above and thus that the City "caused or created" the defective condition. However, to prove that the City "caused or created" the defective condition, the plaintiff must show that the City created the defect through an affirmative act of negligence "that immediately result[ed] in the existence of a dangerous condition." *Yarborough v City of New York*, 10 N.Y.3d 726 (2008) (citations omitted); *see also Scavuzzo*, 47 A.D.3d 793, 794-95. Because the type of damage alleged here would occur over time, plaintiff would be unable to meet this standard. Accordingly, plaintiff is not entitled to a DEP witness from the Sewer Unit. For the same reason, her motion seeking a DEP detailed map identifying manholes and underground utilities and DEP manuals and guidelines regarding the processing of repairs is also denied.

In the instant case, because, as outlined above, discovery is still outstanding, the City's motion for summary judgment is premature. A motion for summary judgment should be denied as premature where the party opposing the motion has not had an opportunity to conduct discovery into issues within the exclusive control of the moving party. *See* CPLR 3212(f). In the instant case, plaintiff seeks and is entitled to further discovery which could provide evidence of prior written notice, which is a requirement for a claim against the City pursuant to Administrative Code §7-201(c)(2). Therefore, the City's cross-motion is denied.

Accordingly, plaintiff's motion to compel discovery is granted to the extent that the City is directed to produce code sheets for the DOT and DEP documents already produced within thirty days of the date of service of a copy of this order with notice of entry granted. Plaintiff's remaining discovery requests as well as her motion to strike defendant City's answer are denied.

