

Perez v City of New York

2010 NY Slip Op 31242(U)

May 14, 2010

Supreme Court, New York County

Docket Number: 115636/04

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. Justice

PART 52

Index Number : 115636/2004
PEREZ, ROSARIO
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 115636/04
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

in 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.

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/14/10

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
ROSARIO PEREZ AND RITA PEREZ,

Plaintiff(s),

Index No. 115636/04

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

Defendant(s).

-----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 : _____

Papers

Notice of Motion and Affidavits Annexed.....
Answering Affidavits.....
Cross-Motion and Affidavits Annexed.....
Answering Affidavits to Cross-Motion.....
Replying Affidavits.....
Exhibits.....

Numbered
FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE
3

Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained when he allegedly tripped and fell in the roadway in the intersection of Houston Street and Baruch Drive on August 23, 2003. 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 as required by Administrative Code §7-201. For the reasons set forth below, defendant City's motion is denied.

Initially, it is undisputed that the City is required to have prior written notice of the subject condition pursuant to the prior written notice provisions of § 7-201(c)(2) of the

Administrative Code of the City of New York. That section provides as follows:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, 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, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Pursuant to § 7-201, a plaintiff is required to both plead prior notice and to prove that the City had prior written notice of the defective condition. Failure to plead compliance with the prior written notice statute requires dismissal of an action against the City. *See Baez v. City of New York*, 236 A.D.2d 305 (1st Dept 1997). Plaintiffs must prove that the City had prior written notice of the specific defect alleged in the complaint. *See Belmonte v. Metropolitan Life Ins. Co.*, 304 A.D.2d 471, 474 (1st Dept 2003).

Even if the City did not have prior written notice of a defective condition, it can still be held liable for injuries resulting from a condition that it created through an affirmative act of negligence or if the roadway was used for a "special use" which conferred a special benefit upon the City. *See Oboler v. City of New York*, 8 N.Y.3d 888, 889 (2007). If plaintiff claims that the City caused or created the condition, 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*

Bielecki v. City of New York, 14 A.D.3d 301 (1st Dept 2005).

In the instant case, the City makes out its prima facie case that it did not receive prior written notice of the defective condition. The City submitted the deposition testimony of Sherry Johnson-O'Neal, who testified that a two year search for records maintained by the Department of Transportation yielded no results for the subject location. The search included permits, cut forms, complaints, repair records, contracts, inspections, milling and resurfacing records, and two Big Apple Maps. There were no relevant DOT records to the location where plaintiff fell. The Big Apple Maps are not able to provide prior written notice in this case because it indicates only defects on sidewalks and not in roadways, which is where plaintiff allegedly fell.

However, plaintiff is entitled to discovery on the issue of whether the City caused or created the alleged defect. Plaintiff has provided photographs showing that the defect is on the border of a concrete pad, which would normally be maintained and repaired by the City. The City argues that the affirmative negligence exception does not apply because plaintiff cannot show that the City performed a repair that immediately resulted in a defect, relying on *Yarborough v. City of New York*, 10 N.Y.3d 726 (2008), where the Court held that the affirmative negligence exception is limited to work by the City that immediately results in a dangerous condition. However, plaintiff argues that the condition of the road suggests that the City's original installation of the concrete pad may have been negligent and immediately resulted in a dangerous condition. Plaintiff has not had access to records pertaining to the installation of the concrete pad on the roadway. Further discovery is therefore needed to determine whether the City may have caused or created the defect.

Accordingly, defendant City's motion for summary judgment is denied. This constitutes

