

Simpson v City of New York

2010 NY Slip Op 31296(U)

May 20, 2010

Sup Ct, NY County

Docket Number: 0116523/05

Judge: Barbara Jaffe

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5-26-10

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

PRESENT: JAFFE ^{BARBARA JAFFE} ~~BARBARA JAFFE~~ _{J.S.C.}
Justice

PART 5

Index Number : 116523/2005
SIMPSON, VANESSA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
DISMISS

CAL # 114

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

this motion to/for _____

PAPERS NUMBERED

1

2

3

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
MAY 26 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/20/10
MAY 20 2010

[Signature]
BARBARA JAFFE
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 5

-----X

VANESSA SIMPSON,

Plaintiff,

Index No. 116523/05
Motion Date: 04/27/10
Motion Seq. No.: 002
Calendar No.: 114

-against-

DECISION & ORDER

THE CITY OF NEW YORK, CONSOLIDATED
EDISON OF NEW YORK, INC., and
MANHATTAN BUSINESS INTERIORS,

Defendants.

-----X

BARBARA JAFFE, JSC:

For plaintiff:
Ian Asch, Esq.
Greenberg & Stein, P.C.
275 Madison Avenue, Suite 1100
New York, NY 10016
212-681-2535

FILED
MAY 26 2010
NEW YORK
COUNTY CLERK'S OFFICE

For defendant City:
Andrew Lucas, Esq.
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-442-6855

By notice of motion dated March 11, 2010, defendant City of New York (City) moves for an order summarily dismissing the claims and cross-claims against it. Plaintiff opposes the motion; co-defendants do not. For the reasons that follow, City's motion is denied.

I. FACTUAL BACKGROUND

On September 1, 2004, plaintiff fell into an uneven and depressed area of the roadway adjacent to the curb in front of 300 West 125th Street in Manhattan. (Affirmation of Ian Asch, Esq., dated April 8, 2010 [Asch Aff.]). Immediately after her fall, her co-workers took photographs of the area which appears to be a utility cut. (Affirmation of Andrew Lucas, Esq.,

dated March 11, 2010 [Lucas Aff.]; Asch Aff.).

On November 15, 2006, Sherry Johnson, principal administrative associate for the New York City Department of Transportation (DOT), testified at a deposition as to the results of a search by her department. (Lucas Aff., Exh. E). According to her, a search was conducted for applications for permits, permits, cut forms, complaints/repair orders, contracts and milling and resurfacing records for the block where plaintiff fell. (*Id.* at 8). Seven permits and two repair orders were located. (*Id.*). One of the repair orders was for a pothole, as reported on January 21, 2004 by the Highway Inspection Quality Assurance unit (HIQA) of the DOT, which also indicated that the pothole was repaired, or closed out, on January 23, 2004. (*Id.* at 9-10).

On January 16, 2009, Ian Camacho, DOT supervisor of highway repairs, testified at a deposition that the defect reflected in the record search was a pothole. (Lucas Aff., Exh. H at 20). He explained that if the DOT receives a complaint, and a crew is sent to the location and finds that a trench has not been properly filled in, a report would classify it as a utility cut, for which contractors are generally responsible. (*Id.* at 28-29). Under that circumstance, the cut would be reported to HIQA, which would then have the contractor repair it. (*Id.* at 29-33). If HIQA determines that the cut is more than two years old, it would be designated "out of guarantee," and the DOT would be responsible for its repair. (*Id.* at 33-34).

II. PERTINENT PROCEDURAL BACKGROUND

On November 3, 2004, plaintiff served a notice of claim on City, and on November 25, 2005, served a summons and complaint. (Lucas Aff., Exhs. A, B).

During Camacho's deposition, plaintiff's counsel requested a deposition of someone from HIQA and of Tom Bachurek, Camacho's area supervisor. (*Id.* at 37). In a written demand for

production of documents and information, dated February 18, 2009, plaintiff again requested a deposition of a HIQA representative and of Bachurek. (Asch Aff., Exh. A).

III. CITY'S MOTION TO DISMISS

A. Contentions

City contends that it cannot be held liable for plaintiff's injuries absent prior written notice of the condition, and denies that it either caused or created the condition. (Lucas Aff). In support, it relies on the deposition testimony of Johnson and Camacho, and the DOT records search. (*Id.*; Exhs. E, F, H).

In response, plaintiff maintains that discovery from HIQA is necessary, as evidence may reveal that HIQA had notice pursuant to New York City Administrative Code § 7-201(c). (Asch Aff.). She relies on *Bruni v City of New York*, 2 NY3d 319 (2004), and the deposition testimony of Johnson and Camacho that a utility cut would be reported to HIQA. (Lucas Aff., Exhs. E, H).

Alleging that all of the evidence hereto produced does not indicate any inspection or notification by HIQA of the utility cut, defendant argues in reply that plaintiff has not shown that further discovery will lead to relevant information. (Affirmation in Reply of Andrew Lucas, Esq., dated Apr. 30, 2010).

B. Analysis

It is well-settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated*

Fur Mfrs, Inc., 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853). Accordingly, it is City's burden here, as movant, to demonstrate its entitlement to judgment, and must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). If shown, the burden shifts to plaintiff.

Pursuant to Administrative Code § 7-201 "no civil action shall be maintained against the city" arising from a dangerous condition unless plaintiff can demonstrate that City had written notice of the dangerous condition.

In *Bruni*, the Court of Appeals held that the "written acknowledgment" requirement may be satisfied by an internal document from an agency other than the DOT where it shows that the "responsible agency . . . had knowledge of the condition and the danger it presented." (2 NY3d at 326-327).

As the evidence demonstrates that a written acknowledgment of a utility cut may derive from HIQA, and given plaintiff's photograph showing a utility cut, documents in HIQA's possession may reflect knowledge of a defective condition and its responsibility to repair. Therefore, discovery is in order prior to a determination of City's motion, albeit discovery limited to a HIQA records search and deposition testimony, which plaintiff previously requested. (CPLR 3212[f]).

IV. CONCLUSION

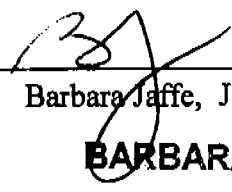
Accordingly, it is hereby

ORDERED, that the motion for summary judgment is denied without prejudice; it is further

ORDERED, that City produce a representative from HIQA for deposition within 60 days of the date of this order; and it is further

ORDERED, that the compliance conference scheduled for June 8, 2010 is hereby designated the final conference. The parties must bring to that final conference a list of any and all outstanding discovery, or it will be deemed waived.

This constitutes the decision and order of the court.



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: May 20, 2010
New York, New York

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