Rosenblum v City of New York

2010 NY Slip Op 32217(U)

August 17, 2010

Supreme Court, New York County

Docket Number: 109743/05

Judge: Barbara Jaffe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

[* 1]

SCANNED ON 8/20/2010

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

PRESENT: JAFFE Justice PART 5

Index Number : 109743/2005
ROSENBLUM, GLADYS
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT
CAL # 9

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

on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 20 2010
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 8/17/10

J.S.C.

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 5

----------x

GLADYS ROSENBLUM,

Plaintiff,

-against-

THE CITY OF NEW YORK, and DOES 1-10 inclusive,

Defendants.

----------x

Index No. 109743/05

Argued: 7/20/10
Mot. Seq. No.: 006
Cal. No.: 95

DECISION AND ORDER

BARBARA JAFFE, J.:

FILED
AUG 20 2010
NEW YORK
COUNTY CLERK'S OFFICE

For plaintiff:
Jeffrey Schwartz, Esq.
Law Offices of Jeffrey S. Schwartz
410 East Jericho Turnpike
Mineola, NY 11501
516-938-3888

For City:
Jessica Wisniewski, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St.
New York, NY 10007
212-788-0609

By notice of motion dated May 3, 2010, defendant City moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it or, in the alternative, an order vacating prior orders rendered on January 12, 2010 and April 20, 2010. Plaintiff opposes the motion.

I. BACKGROUND

On April 14, 2004, plaintiff was allegedly injured when she tripped on and fell into a pothole in the crosswalk at the intersection of Avenue C and Ninth Street in Manhattan. (Affirmation of Jessica Wisniewski, ACC, dated May 3, 2010 [Wisniewski Aff.], Exh. A). On or about July 8, 2004, plaintiff served City with her notice of claim. (*Id.*).

On or about July 14, 2005, plaintiff served her summons and complaint (*id.*, Exh. B), and on or about August 26, 2005, City served its answer (*id.*, Exh. C).

II. CONTENTIONS

City argues that it may not be held liable as it had no prior written notice of any defective condition in the crosswalk where plaintiff fell, nor did it create the condition. It asserts that a search of Department of Transportation (DOT) records for a two-year period prior to and including the date of plaintiff's accident and at the location of Avenue C between East Ninth Street and East Tenth Street, reveals that City issued two permits to DOT for in-house milling and paving between May 12, 2002 and June 12, 2002, and that DOT closed three potholes at the location between May 13, 2002 and May 23, 2002. (Wisniewski Aff., Exhs. F-H). City also submits two Big Apple maps which, it argues, reflect no defect in the crosswalk at the location. City thus denies having had notice of any defect in the crosswalk, as the issuance of permits does not constitute notice and as the maps show no defects, or that it created the defect as the potholes at the location were closed approximately two years before plaintiff's accident.

Plaintiff argues that having performed work at the location of her accident, City created the defect by failing to maintain it in good condition, that the maps reflect defects at the location, and that DOT's defective milling and paving work created the dangerous condition. (Affirmation of Jeffrey Schwartz, Esq., dated June 11, 2010). She also maintains that summary judgment is premature as City has not yet responded to her demand for DOT safety handouts, inspection procedures, or standard operating procedure materials.

In reply, City asks that plaintiff's opposition papers be disregarded, having been served untimely. (Reply Affirmation, dated June 24, 2010). It denies that the maps show any markings in the crosswalk where plaintiff fell, and argues that plaintiff merely speculates, without any supporting expert evidence, that City's allegedly improper milling and paving work caused the

defect, and observes that plaintiff failed to set forth how the documents she seeks are relevant to whether City had prior written notice of or created the defect.

III. ANALYSIS

The party seeking summary judgment must show prima facie entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the prima facie showing by submitting admissible evidence, demonstrating the existence of factual issues that requires a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, denial of the motion is required, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at 853).

Pursuant to New York City Administrative Code § 7-201(c)(2):

> No civil action shall be maintained against the city for . . . injury to person . . . sustained in consequence of any street . . . sidewalk or crosswalk, or any part or portion of any of the foregoing . . . 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 acknowledgment of from the city of the defective, unsafe, 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 reasonable safe.

"[P]rior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City." (*Katz v City of New York*, 87 NY2d 241, 243 [1995]). A notation of a defect on a Big Apple map constitutes notice to City of the defect. (*Id.* at 243-244).

Where City establishes a lack of prior written notice of a defect, the burden shifts to the plaintiff to demonstrate that an exception applies, either that City affirmatively created the defect through an act of negligence, which requires a showing that work performed by City immediately resulted in the existence of the defect, or that it made a special use of the place where the defect was located. (*Yarborough v City of New York*, 10 NY3d 726 [2008]).

That plaintiff's opposition papers are untimely does not preclude their consideration as City has replied to them. (*Kavakis v Total Care Sys.*, 209 AD2d 480 [2d Dept 1994] [court did not improvidently exercise discretion in considering plaintiff's untimely opposition papers as defendant submitted reply]).

A. Did City receive prior written notice?

The maps on which plaintiff relies do not evidence any pothole in the crosswalk where plaintiff fell. Consequently, City has established, *prima facie*, that it had no prior written notice of the pothole, and plaintiff has failed to demonstrate that a triable issue of fact remains on this issue. (*See D'Onofrio v City of New York*, 11 NY3d 581 [2008] [as defect shown on map was not defect on which plaintiff allegedly fell, claim properly dismissed]; *Roldan v City of New York*, 36 AD3d 484 [1st Dept 2007] [map did not reflect hole on which plaintiff fell; "the awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident"]; *Khemraj v City of New York*, 37 AD3d 419 [2d Dept 2007] [prior written notice not established as map did not show pothole at subject location]; *Kempler v City of New York*, 272 AD2d 584 [2d Dept 2000] [City established *prima facie* entitlement to judgment by submitting Big Apple map which did not show defect at location where plaintiff fell]).

B. Did City affirmatively create the defect?

While City closed several potholes at the location and milled and paved the street in May and June 2002, plaintiff's accident occurred in April 2004 and there is no evidence that City performed any other work between June 2002 and April 2004. City has thus established, *prima facie*, that any work performed by it did not result immediately in the creation of the pothole.

In opposition, plaintiff fails to submit any proof, beyond counsel's speculation, that City's work was defective or that it immediately resulted in the pothole. (*See Kiszenik v Town of Huntington*, 70 AD3d 1007 [2d Dept 2010] [plaintiff submitted no evidence that defendant's work was performed defectively or that it resulted immediately in creation of defect]; *Regan v City of New York*, 8 AD3d 462 [2d Dept 2004] [plaintiff's speculative and conclusory allegations failed to raise triable issue as to whether defendant created hole in sidewalk]; *Walker v City of New York*, 34 AD3d 226 [1st Dept 2006] [no proof that City affirmatively created defect as pothole repair was made four years before accident and no evidence that repair immediately resulted in defect]; *Hyland v City of New York*, 32 AD3d 822 [2d Dept 2006] [assuming that repair was made less than one year before accident, no evidence submitted that negligent repair, as opposed to other factors, caused dangerous condition]; *Kruszka v City of New York*, 29 AD3d 742 [2d Dept 2006] [plaintiff's speculation that defendant's work caused defect insufficient to raise triable issue]).

Moreover, the failure to maintain a roadway constitutes an act of omission rather than one of affirmative negligence. (*Farrell v City of New York*, 49 AD3d 806 [2d Dept 2008]). Plaintiff has thus failed to demonstrate that any triable issues remain as to whether City affirmatively created the pothole.

Plaintiff also fails to set forth an evidentiary basis for her assertion that more discovery is needed, nor does she allege how the specific documents she seeks are relevant to whether City created the defect. (CPLR 3212[f]; *see eg Flores v City of New York*, 66 AD3d 599 [1st Dept 2009] ["the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion"]; *Goldes v City of New York*, 19 AD3d 448 [2d Dept 2005] [hope that discovery may yield evidence of defendant's affirmative negligence insufficient to deny motion]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted, and the complaint is dismissed against defendant City of New York with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: August 17, 2010
New York, New York

AUG 17 2010

FILED
AUG 20 2010
NEW YORK
COUNTY CLERK'S OFFICE