

<b>Diaz v City of New York</b>
2010 NY Slip Op 33104(U)
October 22, 2010
Supreme Court, New York County
Docket Number: 114182/05
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

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JUAN DIAZ, JR.,

Plaintiff,

-against-

THE CITY OF NEW YORK, CONSOLIDATED  
EDISON INC., and POWER CONCRETE CO., INC.,

Defendants.

-----X

BARBARA JAFFE, JSC:

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Index No. 114182/05  
Motion Date: 9/7/10  
Motion Seq. Nos.: 004,  
Calendar Nos.: 37,

**DECISION & ORDER**

**FILED**

**OCT 29 2010**

**NEW YORK  
COUNTY CLERK'S OFFICE**

By notice of motion dated June 11, 2010, defendant City moves pursuant to CPLR 3211(a)(7) dismissing the complaint against it, or alternatively, pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff and co-defendant Power Concrete Co., Inc. (Power Concrete) oppose. By notice of motion dated June 10, 2010, Power Concrete moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes. For the reasons that follow, City's motion is denied, and Power Concrete's motion is granted.

I. UNDISPUTED FACTS

On September 15, 2005, plaintiff testified at a 50-h hearing that on June 29, 2005, he tripped and fell on a raised portion of a large metal plate on the sidewalk on 181<sup>st</sup> Street at Laurel

Hill Terrace adjacent to High Bridge Park in Manhattan. (Affirmation of Peter C. Lucas, ACC, dated June 11, 2010 [Lucas Aff.], Exh. H).

At a deposition held on August 15, 2008, Leslie Smalls, a record searcher for the New York City Department of Transportation (DOT), testified about two searches conducted by unidentified individuals for two years prior to and including the date of the accident. The first search, for One Laurel Hill Terrace, yielded no permits, maintenance/repair orders or sidewalk violations or contracts, and no written notice. The other search, for Laurel Hill Terrace between 182<sup>nd</sup> and 186<sup>th</sup> Streets for two years prior to and including the date of the accident, yielded one permit, and no maintenance and repair records, sidewalk violations, or contracts. (Lucas Aff., Exh. I at 6-10). The permit was issued to Power Concrete for a sidewalk or street opening, valid from October 22, 2004, to November 15, 2004, "at Laurel Hill Terrace, West 182<sup>nd</sup>, West 186<sup>th</sup> Street for a maximum length of 300 feet for the purpose of DDC contractor major reconstruction." (*Id.* at 12-13).

At a deposition held on December 10, 2008, Jose Casamiro, vice-president and general superintendent for Power Concrete, testified that his company performed concrete work at curbs and sidewalks at Laurel Hill Terrace. (Affirmation of Steven D. Zecca, Esq., dated June 10, 2010 [Zecca Aff.], Exh. I). He testified that he visited the street at issue earlier that day and recalled that Power Concrete had removed and replaced sidewalk for City from 2002 to 2004, including the street at Laurel Hill Terrace opposite the metal plate, by contract, some time in 2004 when Power Concrete took over a project for the New York City Department of Design and Construction. (*Id.* at 15). According to Casamiro, the sidewalk is typically replaced soon after it is removed, and Power Concrete has not used metal plates to cover up portions of the sidewalk

during his jobs, nor does it own metal plates. (*Id.* at 13-14). He also denied that Power Concrete ever used subcontractors for sidewalk jobs. (*Id.* at 14-15, 21).

An investigator hired by plaintiff lifted the metal plate at the accident location and saw no excavation, hole, or defect. (Affirmation of Jonathan M. Goidel, Esq., dated July 19, 2010 [Goidel Aff.], Exh. A).

## II. PERTINENT PROCEDURAL BACKGROUND

Plaintiff timely served a notice of claim on City on August 12, 2005, and on October 11, 2005, served a summons and complaint on City. (Lucas Aff., Exhs. A, B). On March 1, 2007, Power Concrete and Consolidated Edison were added as defendants. (Zecca Aff., Exh. A). Plaintiff filed his note of issue and certificate of readiness on April 13, 2010.

## III. CITY'S MOTION TO DISMISS

### A. Contentions

City argues that absent any evidence as to how long the metal plate was on the sidewalk, plaintiff cannot prove that it had written notice of it. It also contends that there is no evidence that it caused or created a defective condition. (Lucas Aff.). In support, it relies on plaintiff's pleadings and testimony, Smalls's testimony, the search results, and the Big Apple Map. (*Id.*, Exhs. A-J).

In opposition, plaintiff argues that City has not established that it had no written notice of the metal plate on which he fell which, he surmises, could be represented on the Big Apple Map as a raised sidewalk. (Affirmation in Opposition of Jonathan M. Goidel, Esq. [Goidel Aff.], dated July 16, 2010).

Power Concrete asserts that City has not established a lack of written notice and that there

exist issues of fact as to the location of plaintiff's fall. It contends that the location of plaintiff's fall is not clear and that absent a specific location, City cannot establish an absence of written notice. (Affirmation in Opposition of Steven D. Zecca, Esq., dated July 12, 2010).

In reply, City contends that if there are issues as to the location of plaintiff's fall, then it is entitled to summary dismissal, denies that the raised sidewalk marking on the Big Apple Map represents the metal plate at issue, and observes that both parties concede that it did not create the alleged condition. (Reply Affirmation of Peter C. Lucas, ACC, dated July 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 to establish that there exists a triable issue of fact.

Pursuant to New York City Administrative Code § 7-201(c), no civil action may be maintained against City arising from a dangerous condition on a street unless the plaintiff demonstrates that City had written notice of the condition or of a prior injury. Whereas plaintiff

bears the burden of establishing at trial that City had written notice of the defective condition (*Katz v City of New York*, 87 NY2d 241, 243 [1995]), on a motion for summary judgment, City as movant bears the burden of establishing an absence of notice. (*See McNeill v City of New York*, 40 AD3d 823 [2d Dept 2007]). Where City establishes that it lacked prior notice, the burden shifts to plaintiff to establish that City “affirmatively created the defect through an act of negligence” or that it enjoyed a “special use” of the area in which the defect is located. (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

Here, City presents no evidence pertaining to 181<sup>st</sup> Street and Laurel Hill Terrace. Moreover, the searches were conducted by unknown individuals and City’s witness had no personal knowledge of the pertinent facts and did not address whether any other City agency may have received written notice of a dangerous condition. (*See McNeill*, 40 AD3d 823). Thus, having failed to show that it searched the location of plaintiff’s fall or that the searches it conducted eliminated the possibility of written notice, City has not met its *prima facie* burden. (*Id.*). Thus, it is unnecessary to determine whether the Big Apple Map reflects the condition or whether there is evidence that City caused or created it. (*See Santiago v New York City Health and Hospitals Corp.*, 66 AD3d 435 [1<sup>st</sup> Dept 2009] [defendant did not show absence of notice, summary judgment denied regardless of sufficiency of opposition papers]).

In any event, the Big Apple Maps provided by City do not appear to include 181<sup>st</sup> Street.

#### IV. POWER CONCRETE’S MOTION TO DISMISS

##### A. Contentions

Power Concrete argues that it is entitled to summary dismissal absent any duty owed to plaintiff and as it did not own or use the metal plate on which plaintiff fell, and did not perform

any work on the sidewalk where the accident occurred. (Affirmation of Steven D. Zecca, Esq., dated June 10, 2010). In support, it relies on its witness' testimony that it performed no work at that location, that it does not use metal plates in its work, and that it does not use subcontractors. (*Id.*, Exh. I.).

In opposition, plaintiff maintains that Power Concrete has not established that it did not leave the metal plates on the sidewalk. (Affirmation in Opposition of Jonathan M. Goidel, Esq., dated July 19, 2010).

#### B. Analysis

Power Concrete has established, without challenge, that it neither owns nor uses metal plates. It has thus established, *prima facie*, that it did not create the defect on the sidewalk. Additionally, it proved, without contradiction, that there was no excavation work under the metal plate, and thus any allegation of Power Concrete's negligence is speculative. (*See DeSilva v City of New York*, 15 AD3d 252, 254 [1<sup>st</sup> Dept 2005] [plaintiff offered only speculation that defendant caused defect where defendant testified that it did not own manhole cover]).

#### V. CONCLUSION

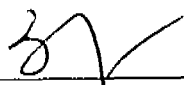
Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is denied, and it is further

ORDERED, that defendant Power Concrete Co., Inc.'s motion for summary judgment is granted, and the complaint against it is dismissed, with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the remainder of this action shall continue.

This constitutes the decision and order of the court.

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

DATED: October 22, 2010  
New York, New York

**OCT 22 2010**

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