

**Vasquez v City of New York**

2011 NY Slip Op 30733(U)

March 25, 2011

Supreme Court, New York County

Docket Number: 104245/1996

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE  
J.S.C.  
Justice

PART 5

Index Number : 104245/1996  
VASQUEZ, ANA  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
DISMISS  
  
CAL # 135

INDEX NO. \_\_\_\_\_  
MOTION DATE 2/1/11  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. 135

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

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

MAR 30 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/25/11  
MAR 25 2011

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  
ANA VASQUEZ and BOLIVAR VASQUEZ,

Plaintiff,

-against-

Index No. 104245/96

Motion Date: 2/1/11

Motion Seq. No.: 001

Calendar No.: 84

**DECISION & ORDER**

THE CITY OF NEW YORK,

Defendants.

-----X  
BARBARA JAFFE, JSC:

**For plaintiff:**

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**FILED**

**MAR 30 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

**For defendant City:**

Peter C. Lucas, ACC  
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Corporation Counsel  
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212-442-6851

By notice of motion dated April 23, 2010, City moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint, or in the alternative, pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. UNDISPUTED FACTS

Plaintiff alleges that on April 12, 1995, she slipped and fell on a "hole in the ground" with a "piece of metal or plywood over it," on the sidewalk on East 110<sup>th</sup> Street between Lexington and Third Avenues. (Affirmation of Peter C. Lucas, Aff., dated Apr. 23, 2010 [Lucas Aff.], Exh. F.; Affirmation of Thomas L. Bondy, Esq., dated Nov. 22, 2010 [Bondy Aff.], Exh. 2). At a deposition held on July 22, 2009, plaintiff testified that the defect on the sidewalk was adjacent to one of several of the buildings between 160 East 110<sup>th</sup> Street and 174 East 110<sup>th</sup> Street. (Lucas Aff., Exh. F).

Abraham Lopez, a record searcher for the New York City Department of Transportation (DOT), testified at a deposition as to the results of a search conducted by unidentified DOT employees for records relating to East 110<sup>th</sup> Street between Lexington and Third Avenues for the two years preceding and including the date of plaintiff's accident. (Lopez Aff., Exh. H). The search yielded five permits, no applications, no corrective action requests, no notices of violations, no maintenance and repair records, no sidewalk violations, no contracts and no complaints. The search did, however, yield a Big Apple Map, received by City on February 16, 1995. None of the permits correspond to the area in front of 170 East 110<sup>th</sup> Street, although one street opening permit, to "repair electric/communications," was issued to Con Edison to open a roadway or sidewalk in front of 161 East 110<sup>th</sup> Street and 167 East 110<sup>th</sup> Street, for a maximum length of 26 feet. Lopez was unable to determine if 26 feet extend beyond 161-167 East 110<sup>th</sup> Street. According to him, when such work is conducted, City inspects the area as reflected on a cut sheet, and the cut sheet would be in the permittee's possession. A City inspector signs the cut sheet, and, before April 11, 2004, the permittee was required to submit a copy to City. However, Lopez testified that City ceased maintaining the copies of the cut sheets and he was unable to explain a computer printout of a permit issued to Con Edison, effective October 18 to November 17, 1993, in front of 174 East 110<sup>th</sup> Street, recovered by plaintiff through a FOIA request, for a "transformer vault in sidewalk area." (*Id.*).

## II. PERTINENT PROCEDURAL BACKGROUND

On June 30, 1995, plaintiff served a notice of claim on City (Lucas Aff., Exh. A), and on March 7, 1996, commenced this action by serving a summons and verified complaint (*id.*, Exh. B). Issued was joined when defendant served its answer on March 27, 1996. (*Id.*, Exh. C). On

November 14, 2006, plaintiff served her verified bill of particulars. (*Id.*, Exh. D). She testified at a deposition on July 22, 2009 (*id.*, Exh. F), and Lopez testified at a deposition on February 18, 2010 (*id.*, Exh. H). The notice of claim, complaint, and bill of particulars each reflect that the defect was adjacent to the building on 170 East 110<sup>th</sup> Street. (Lucas Aff., Exhs. A, B, D).

Plaintiff filed her note of issue and certificate of readiness on March 8, 2010.

III. CONTENTIONS

City contends that it may not be held liable for a defect in the sidewalk absent written notice, and denies that it caused or created the alleged defect. (Lucas Aff.). In support, it relies on plaintiff’s pleadings, Lopez’s testimony, and the results of the records search. (*Id.*, Exh. A through D).

In opposition, plaintiff argues that the Big Apple Map reflects a “hole or hazardous depression” thus establishing that City had prior written notice of the defect, that the permits issued to Con Edison also reflect prior written notice, that the absence of the Con Edison permit obtained in plaintiff’s FOIL request calls into question the comprehensiveness of City’s search, and that a jury could determine by City’s inability to provide cut forms, that those cut forms would reflect notice. (Bondy Aff.).

IV. 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 a triable issue of fact.

Pursuant to Administrative Code § 7-201(c), no civil action may be maintained against City arising from a dangerous condition on a sidewalk unless the plaintiff demonstrates that City had written notice of the condition "to the commissioner of transportation or any person or person or department authorized by the commissioner to receive such notice," or "written notice" of a prior injury to a city agency. 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]), at the pleading stage she bears no such burden. Rather, 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]). The Big Apple map, provided by the New York State Trial Lawyers Association for the purpose of providing the written notice required under the Administrative Code, may establish prior written notice so long as the precise defect appears on the map. (*D'Onofrio v City of New York*, 11 NY3d 581 [2008]). Although liability for sidewalks now lies with abutting landowners pursuant to Administrative Code § 7-210, City remains liable for accidents that occurred before September 14, 2003. (*Rodriguez v City of New York*, 12 AD3d 282 [1<sup>st</sup> Dept 2004]).

Here, the evidence offered by City in support of its contention that it had no notice of the claimed dangerous condition is Lopez's testimony and the records which were the product of a

search performed by unidentified individuals. Absent Lopez's personal knowledge of the pertinent facts, an explanation of the positive search results, testimony that the search was comprehensive, or even a conclusion that the search reveals that there was no written notice, his testimony does not satisfy City's burden. (*Cf McNeill*, 40 AD3d 823 [DOT employee's testimony not based on personal knowledge]; *Mancilla v City of New York*, 2010 NY Slip Op 32748[U] [Jaffe, J.]). Counsel's conclusion as to the results of the search is of no evidentiary value (*Kelly v Rubin*, 224 AD2d 262 [1<sup>st</sup> Dept 1996] [facts alleged only in counsel's affirmation are without evidentiary value]), and City's search for records failed to unearth at least one pertinent document obtained by plaintiff through a FOIL request, which further calls into question the adequacy of the search. In any event, Lopez acknowledged that he is not qualified to testify as to the substance of that permit and thus City cannot meet its *prima facie* burden that it had no written notice of a defect at the accident's location. It is therefore unnecessary to reach the merits of plaintiff's opposition papers. (*Delarosa v City of New York*, 61 AD3d 813, 814 [2d Dept 2009]).

V. CONCLUSION

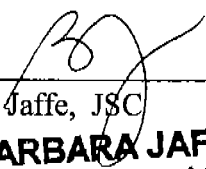
Accordingly, it is hereby

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

This constitutes the decision and order of the court.

DATED: March 25, 2011  
New York, New York

**MAR 25 2011**

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

**FILED**

**MAR 30 2011**

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