

Kennedy v City of New York

2011 NY Slip Op 30854(U)

April 7, 2011

Supreme Court, New York County

Docket Number: 107560/05

Judge: Barbara Jaffe

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

BARBARA JAFFE
J.S.C.

PRESENT: _____

PART 5

Index Number : 107560/2005

KENNEDY, JANE

vs
CITY OF NEW YORK

Sequence Number : 004

DISM ACTION/ INCONVENIENT FORUM

CAL # 63

INDEX NO. _____

MOTION DATE 2/19/11

MOTION SEQ. NO. _____

MOTION CAL. NO. 63

The following papers, numbered 1 to _____ were read on 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

FILED

APR 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 4/7/11

APR 07 2011

[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
JANE KENNEDY,

Plaintiff,

-against-

Index No. 107560/05

Motion Date: 2/8/10
Motion Seq. Nos.: 004,
Calendar No.: 63

DECISION & ORDER

THE CITY OF NEW YORK, RANA SAJID and
HARLINE REINHARDT,

Defendants.

-----X
BARBARA JAFFE, JSC:

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FILED
APR 08 2011
COUNTY CLERK'S OFFICE
NEW YORK

By notice of motion dated October 15, 2010, defendant City moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint, or pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes, and, by notice of cross-motion dated November 24, 2010, moves pursuant to CPLR 3018(b) and 3025 for an order striking City's answer to plaintiff's amended summons and complaint. City opposes the cross-motion. By notice of motion dated October 21, 2010, defendants Rana Sajid and Harline Reinhardt move pursuant to CPLR 3212 for an order summarily dismissing the complaint. At oral argument on February 8, 2011, I granted Sajid and Reinhardt's motion. For the reasons stated below, City's motion is denied and plaintiff's cross-motion is denied.

I. FACTS

Plaintiff was struck by a taxicab owned by Reinhardt and driven by Sajid, going southbound on Park Avenue, as she attempted to turn left onto 35th Street, around the median, from the northbound lane. She alleges that she passed a green light before she began the turn onto 35th Street, but could not see the red light on 35th Street which directed vehicles making left turns to stop, and that she could not see oncoming traffic because her view was obstructed by shrubbery in the median.

Park Avenue is a two-way street, going northbound and southbound, each side with two driving lanes and one parking lane. (Affirmation of Norma Giffords, Esq., dated Nov. 24, 2010 [Giffords Aff.], Exh. V). There is a median dividing the two lanes, which the parties refer to as a “mall.” (*Id.*). 35th Street is a one-way westbound street. To get to 35th Street from Park Avenue, a driver must first proceed through the green light on Park Avenue, and then, upon making the turn and before crossing the southbound lane, wait for another traffic light as the driver faces west. Beneath the traffic light is a sign reading “stop here on red signal.” Plaintiff alleges that this second traffic light cannot be seen by a driver before she makes her turn as the view is obstructed by trees in the mall, and that there is no spot on 35th Street designating where a driver must stop. (*Id.*).

By letter dated September 30, 1999, the City of New York Community Board 6 notified City’s Department of Transportation (DOT) that a resident had complained of a “large volume of accidents” at the intersection. (Giffords Aff., Exh. Q). The resident suggested the installation of a “no left turn sign” on Park Avenue. (*Id.*). An internal DOT memo in response, dated April 11, 2000, suggests the reinstatement of a “stop here on red signal” sign. (Affirmation of Jessica

Wisniewski, ACC, dated Oct. 15, 2010 [Wisniewski Aff.], Exh. Q). The sign was installed in both directions on May 18, 2000. (*Id.*).

On June 27, 2004, at around 8:25 am, plaintiff was traveling on her motorcycle going northbound on Park Avenue. (Giffords Aff., Exh. H). She was operating with a learner's permit, she wore a helmet, and she had never before driven through this intersection. As she approached the intersection, the traffic signal for northbound traffic was green. She looked for oncoming traffic proceeding in the southbound direction, but could not adequately see because trees in the median obstructed her view. She proceeded to make a left turn, slowing down but not stopping as she crossed through the southbound Park Avenue lane. As she crossed she was struck by the taxicab, which was proceeding south through a green light on the right driving lane of Park Avenue. The force of the collision propelled plaintiff into the air, and her motorcycle skidded thirty feet. (Giffords Aff., Exh. H). Sajid testified that he did not see plaintiff until she was approximately seven to eight feet from him, and although he applied his brakes and sounded his horn, he could not avoid the accident. (Giffords Aff., Exh. BB).

Danny Nguyen, a timing and traffic engineer for DOT, testified at a deposition held on March 26, 2008. Nguyen's duties include timing for traffic signals and placement of traffic signals and responding to complaints. He testified that a decision to install a traffic signal may derive from complaints from the public or from City employees. When the DOT receives a complaint, he visits the intersection and ensures that they are operating in accordance with the designated timing scheme. A decision to install a traffic signal is based on numerous factors, including a traffic count, and a search for NYPD records for accidents for a three-year period prior to the request. DOT also creates an intersection design, which determines a timing cycle

and position of maximum visibility for the traffic light. (Wisniewski Aff., Exh. I).

Nguyen also testified that traffic lights operate on a 90-day cycle. For the intersection at Park Avenue and 35th Street, a vehicle traveling on Park Avenue would encounter a green light for 45 seconds, a yellow light for 3 seconds, and then 2 seconds where the light is red for vehicles on Park Avenue and on 35th Street. Vehicles traveling on 35th Street encounter a green light 35 seconds, a yellow light for 3 seconds, and the 2 seconds where all lights are red.

Lawrence Malchie, a highway transportation specialist for DOT, testified at a deposition held on April 14, 2008. Malchie's duties include sign design and placement. He reviewed a traffic signal diagram for the intersection of Park Avenue and 35th Street, and testified that a driver proceeding northbound on Park Avenue would see two traffic signals. The diagram does not reflect whether there was a line on the street marking the spot where drivers should stop. A sign order reflects that the signs were last inspected on May 18, 2000. Malchie testified that the "stop here on red" sign, which was ordered on June 27, 2004, should be placed at the stop line. The standards for placement, inspection, and maintenance of traffic signs is set by the federal government's Manual of Uniform Traffic Control Devices, although Malchie was unable to testify as to whether the signs at 35th Street and Park Avenue conformed to those standards. (Wisniewski Aff., Exh. K).

Jeanette Saunds, DOT's safe team unit supervisor, testified at a deposition held on July 10, 2009, that following an accident, her department sends an inspector to the location to conduct an investigation which includes a determination as to whether the signage and traffic control is working properly. According to the search conducted by her department for fatal accidents at 35th and Park, in 1994 a driver stuck and killed a pedestrian at the intersection while running a

red light, although she did not know if the driver ran the light at 35th Street. She testified that another department determines whether an intersection is a “high accident intersection,” that she does not know the criteria for such a determination, and that her department investigates only fatalities.

Peter Ma, DOT’s deputy borough engineer for Manhattan, testified at a deposition held on July 10, 2009, regarding his department’s traffic studies and coordination of installation and planning of traffic signage. (Wisniewski Aff., Exh. Q.). When his department receives a request to investigate traffic signage at a designated area, it performs a field inspection and prepares a field sheet, which includes measurements, photographs and other factors that could contribute to the safety of the location. He reviewed the correspondence indicating that a “stop here on red signal” sign was installed on the corner of 35th and Park as a result of a complaint, and testified that the borough’s engineer’s office, and not his, conducts a study as to whether the sign is visible to drivers. (Wisniewski Aff., Exh. N). City did not comply with subsequent requests and orders to produce a study from the borough engineer’s office. (Giffords Aff.).

A DOT safety information management system report for the 35th and Park, obtained by plaintiff through a FOIL request, reveals that 109 accidents occurred at the intersection between June 26, 1999, and June 26, 2004. (Giffords Aff., Exh. Y). Plaintiff alleges without opposition that approximately 25 of these accidents involved a vehicle traveling south on Park Avenue and a vehicle traveling west on 35th Street. (Giffords Aff.).

II. PERTINENT PROCEDURAL BACKGROUND

On September 9, 2004, plaintiff served a notice of claim on City, and commenced this action by serving a summons and complaint on City on June 24, 2004. (Giffords Aff., Exh. A).

Plaintiff served a verified bill of particulars on July 26, 2005, alleging that City violated “applicable statutes, laws, rules, regulations” and “ordinances,” and that City failed to warn the public and give adequate notice of the danger. (*Id.*, Exh. E). On November 21, 2006, plaintiff served a supplemental summons and complaint, adding Sajid and Reinhardt. (*Id.*, Exh. A, B). City did not serve an answer to the amended complaint. (*Id.*). On August 19, 2010, plaintiff filed her note of issue and certificate of readiness. On October 18, 2010, City served an answer to the amended complaint, adding, *inter alia*, an additional defense that it is “immune from suit for their exercise of discretion in the performance of a governmental function and/or their exercise of professional judgment.” (*Id.*, Exh. N). By letter dated October 25, 2010, plaintiff notified City that the new answer is rejected. (*Id.*, Exh. M).

III. CONTENTIONS

City contends it cannot be held liable for its exercise of discretionary governmental functions concerning the design and operation of the intersection, that none of its actions was the proximate cause of plaintiff’s accident, and that the claims included in plaintiff’s verified bill of particulars are precluded as they were not included in her notice of claim. (Wisniewski Aff.). City submits an MV-104 completed by an investigator who did not witness the accident but, based on statements of Sajid and another witness that plaintiff passed through a red light, determined that the accident was caused by plaintiff’s “inattention/distraction” and disregard of traffic control. (*Id.*, Exh. B).

In opposition, plaintiff maintains that City failed to allege governmental immunity as an affirmative defense and is therefore precluded from raising it, that City may be held liable where its planning was plainly inadequate and lacked a reasonable basis, that City was aware of a

dangerous condition at the intersection and was thus obligated to investigate, that City's negligence was the proximate cause of her injuries and that any alleged negligence on the part of plaintiff may not be the basis for summary judgment. (Giffords Aff.). In support of its motion to deem City's answer a nullity, plaintiff argues that City served its amended answer after discovery was complete and plaintiff's note of issue had been filed, and four years after plaintiff served her supplemental summons and amended complaint, and that the additional defenses are prejudicial as plaintiff did not seek discovery pertaining to them.

IV. ANALYSIS

Leave shall be freely granted to amend an answer so long as it will not result in prejudice to the non-moving party. (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]). A amendment will be denied if it clearly lacks merit. (*Id.*).

Plaintiff fails to show what she would have been done differently if the affirmative defense of governmental immunity had been asserted earlier. Virtually all evidence submitted by both parties applies to City's maintenance and operation of the traffic signals and signage. Indeed, plaintiff's claims arise out of these governmental functions, and her discovery requests focus on them. No additional fact-finding is necessary is necessary to prove or disprove City's affirmative defense. It cannot be said that the defense is without merit. Likewise, any claims included in plaintiff's amended bill of particulars, to the extent that they differ from those already asserted, are not sufficiently distinct from those set forth in the notice of claim so as to prejudice defendant. Indeed, defendant characterizes many of them as "essentially extraneous definitions of the term negligence" (Wisniewski Aff.), and all are covered by City's assertion of governmental immunity. Thus, there is no prejudice to plaintiff in accepting City's affirmative

defense or to defendant in accepting the amended bill of particulars.

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 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.

It also well settled that “where power is conferred on public officers or a municipal corporation to make improvements . . . and keep them in repair, the duty to make them is quasi-judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power or an erroneous estimate of the public needs, no civil action can be maintained.” (*Weiss v Fote*, 7 NY2d 579, 584 [1960]). Thus, in *Weiss*, where plaintiffs sought to sue a municipality for negligently determining the “clearance time” for a traffic signal, the Court of Appeals held that the municipality was immune from suit. (*Id.*). However, once a municipality has been made aware of a dangerous condition it must take steps to alleviate the danger. (*Friedman v State*, 67 NY2d 271 [1986]). Thus, the Court of Appeals has held that a municipality may be held liable where it has been warned of a dangerous

intersection yet failed to act. (*Ernest v Red Creek Cent. School Dist.*, 93 NY2d 664) [1999]).

Plaintiff has submitted evidence that more than one hundred accidents occurred at the intersection in the five-year period before her accident, many of which may have occurred as a result of a vehicle attempting to make left turns from Park Avenue. Although it may not be determined whether this is an unusual amount warranting City's attention, or whether the accident report reflects problems with the traffic signal and the "stop here" sign that form the basis of plaintiff's complaint, none of City's witnesses testified as to this report or submitted an affidavit to resolve these questions. Indeed, City presented a witness who testified only to the number of fatalities at the location, and acknowledged that she would have no knowledge of any accident that did not result in death, regardless of the seriousness of injury. Likewise, no City witness testified as to whether this particular sign met the required federal standards or its governmental policy. Thus, notwithstanding the qualified immunity that City enjoys, plaintiff has demonstrated an issue of fact that City was on notice of a dangerous situation yet failed to conduct a study or rectify it.

Because plaintiff has raised an triable issue of fact that her injury was the results of City's negligence, any assertion that plaintiff contributed to injury by her own actions is not one to be resolved on a motion for summary judgment. (CPLR 1411).

V. CONCLUSION

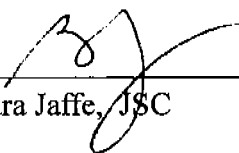
Accordingly, it is hereby

ORDERED, that the motion of defendants Rana Sajid and Harline Reinhardt is granted, and the complaint is dismissed against them with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

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

ORDERED, that plaintiff's cross-motion is denied.

This constitutes the decision and order of the court.



Barbara Jaffe, JSC

DATED: April 7, 2011
New York, New York

BARBARA JAFFÉ
J.S.C.

APR 07 2011

FILED
APR 08 2011
NEW YORK
COUNTY CLERK'S OFFICE