Johann v City of New York

2011 NY Slip Op 30977(U)

April 15, 2011

Supreme Court, New York County

Docket Number: 102567/07

Judge: Cynthia S. Kern

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SCANNED ON 4/18/2011

[* 1]

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

PRESENT: CYNTHIA S. KERN J.S.C. PART 57

Index Number : 102567/2007
JOHANN, CHRISTINE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
COMPEL

INDEX NO. 102567/07
MOTION DATE
MOTION SEQ. NO. 03
MOTION CAL. NO.

this motion to/for

FILED
APR 18 2011
COUNTY CLERK'S OFFICE
NEW YORK

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 is decided in accordance with the attached decision.

Dated: 4/15/11

CYNTHIA S. KERN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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 52

----------x

CHRISTINE JOHANN,

Plaintiff,

Index No. 102567/07

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

Defendant.

----------x

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	
Cross-Motion and Affidavits Annexed	2
Answering Affidavits to Cross-Motion	
Replying Affidavits	3
Exhibits	4

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell due to an alleged defect in the handicap ramp located at the northeast corner of West 50th Street and 7th Avenue, New York, New York on July 25, 2006. Plaintiff now moves for an order directing defendant the City of New York (the "City") to produce Shawn Rae, a City employee, for a deposition. The City cross-moves for summary judgment dismissing the complaint and all cross-claims against it. For the reasons set forth below, plaintiff's motion is denied and the City's cross-motion is granted.

The relevant facts are as follows. On July 25, 2006, plaintiff alleges she sustained

personal injuries when she tripped and fell due to an alleged defect in the handicap ramp located at the northeast corner of West 50th Street and 7th Avenue, New York, New York. Plaintiff alleges that the side of the handicap ramp forms a steep angle downward between the normal level of the curb and the bottom of the ramp. Additionally, plaintiff claims that according to the ADA accessibility guidelines for buildings and facilities, the flared side of the handicap ramp should have a maximum slope of no more than 1:10 (for every 10" of length of the flared side, the side should decline by 1"). Plaintiff alleges that because the slope of the flared side of the handicap ramp where plaintiff's accident occurred far exceeded the guidelines and thus was unreasonably dangerous, she was caused to pitch forward into the street, thereby fracturing her wrist.

Plaintiff claims that over a period of 17 months, four Supreme Court Justices issued five orders compelling the City to produce documents in its possession regarding construction of the handicap ramp which caused plaintiff's accident. The City failed to produce such documents until this court issued the following Order:

> Deft. shall within 30 days provide Pltf. with a detailed affidavit indicating what search was done to determine when and by whom the subject ramp installation was done and the results of that search. If the Deft. FAILS to comply, THEN the Deft's Answer is stricken without the need of a further motion.

Thereafter, plaintiff alleges that the City served upon her an affidavit signed by Shawn Rae which stated in its entirety:

> At the request of the New York City Law Department and pursuant to my position, I personally conducted a search of the Pedestrian Ramp Unit's records for ramp installation records, ramp installation contracts, the identity of who installed the pedestrian ramp, and when the ramp was installed for the Northeast corner of the intersection of

> West 50th Street and 7th Avenue, in the City, County and State of New York. My search covered from 1995 through July 25, 2006. The pedestrian ramp unit maintains records related to pedestrian ramps by means of a database. The database covered records dating back to 1995. The results of the search were negative.

At a Compliance Conference held on July 7, 2010, plaintiff claims she advised the City that she wanted to conduct a brief deposition of Shawn Rae to ascertain exactly what it is he searched in order to determine whether the search was sufficient and whether there are other records that should be searched. The City's counsel, however, refused to produce Shawn Rae for a deposition.

Initially, it is undisputed that the City is required to have prior written notice of the subject condition pursuant to the prior written notice provisions of § 7-201(c)(2) of the Administrative Code of the City of New York. That section provides as follows:

> No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, 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 acknowledgement from the city of the defective, unsafe, dangerous 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 reasonably safe.

Pursuant to Admin. Code § 7-201, a plaintiff is required to both plead prior notice and to

prove that the City had prior written notice of the defective condition. Plaintiffs must prove that the City had prior written notice of the specific defect alleged in the complaint. Simply alleging that a roadway is generally neglected or unsafe is not sufficient. *See Belmonte v. Metropolitan Life Ins. Co.*, 304 A.D.2d 471, 474 (1st Dept 2003). Moreover, the Court of Appeals has held that when a Big Apple Map is used to satisfy the prior written notice requirement, the type and location of the defect must be precisely noted on the map. *See D'Onofrio v. City of New York*, 11 N.Y.3d 581 (2008).

In the instant action, the City has made out its prima facie case that it did not receive prior written notice of the defective condition. In response, plaintiff has failed to raise an issue of fact as to whether the City had prior written notice of the defective condition based on the existence of the Big Apple Map. The Big Apple Map submitted by plaintiff contains markings corresponding to a portion of the curb where "extended section of broken, misaligned, or uneven curb" exists. However, the Big Apple Map does not specify that the section of the curb at issue in this case was "too sloped" or structurally deficient as plaintiff alleges. It is well-settled that the prior written notice given to the City must be for the specific defect involved, and not merely a similar or nearby condition. *Id; see also Belmonte*, 304 A.D.2d 471.

Even if the City did not have prior written notice of a defective condition, it can still be held liable for injuries resulting from a condition that it created through an affirmative act of negligence or if the roadway was used for a "special use" which conferred a special benefit upon the City. *See Oboler v. City of New York*, 8 N.Y.3d 888, 889 (2007). If plaintiff claims that the city caused or created the condition, plaintiff must show that the City created the defect through an affirmative act of negligence "that immediately result[ed] in the existence of a dangerous

condition." *Yarborough v. City of New York*, 10 N.Y.3d 726 (2008) (citations omitted); *see also Bielecki v. City of New York*, 14 A.D.3d 301 (1st Dept 2005). In *Yarborough*, the Court of Appeals held that the City should be granted summary judgment because plaintiff failed to establish that the City had negligently performed a pothole repair which immediately resulted in a dangerous condition. *See* 10 N.Y.3d 726.

In the instant action, plaintiff has failed to raise an issue of triable fact as to whether the City caused or created the condition through an act of affirmative negligence. Plaintiff is barred from asserting that the City caused or created the condition because plaintiff failed to assert a cause and create theory in her original Notice of Claim. Cause and create is an exception to the prior written notice rule and must be plead in the Notice of Claim. *See Mahase v. Manhattan and Bronx Surface Tr. Operating Auth.*, 3 A.D.3d 410, 411 (1st Dept 2004); *see also Semprini v. Village of Southampton*, 48 A.D.3d 543 (2d Dept 2008). In the instant action, plaintiff's Notice of Claim alleged that she was caused to fall "as a result of the negligence [of the defendant] in the ownership, operation, control, and maintenance of the public sidewalk." This language, however, is insufficient to inform the City of plaintiff's claim that the City caused and created the alleged structural defect in the handicap ramp. Thus, plaintiff's failure to include a cause and create theory in her Notice of Claim precludes that theory as a basis of liability against the City.

Accordingly, plaintiff's motion for an order directing the City to produce Shawn Rae for a deposition is denied and the City's cross-motion for summary judgment is granted. This constitutes the decision and order of the court.

FILED

APR 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/15/11

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.