

Hessler v City of New York

2011 NY Slip Op 31224(U)

March 25, 2011

Supreme Court, Queens County

Docket Number: 11739/08

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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Robert Hessler,

Plaintiff,

- against -

Index
Number: 11739/08

Motion
Date: 3/15/11

Motion
Cal. Number: 10&11

Motion Seq. No.: 1&2

The City of New York and Consolidated
Edison Company of New York, Inc.,

Defendant.

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The following papers numbered 1 to 19 read on this motion by defendant, The City of New York, for summary judgment; and motion by defendant, Consolidated Edison Company of New York, Inc., for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion(City)-Affirmation-Exhibits.....	1-4
Notice of Motion(Con Ed)-Affirmation-Exhibits.....	5-8
Affirmation in Opposition to City-Exhibits.....	9-11
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Reply(Con Ed).....	18-19

Motion by the City for summary judgment (calendar No 10) and motion by Con Edison (calendar No 11) are consolidated for disposition.

Upon the foregoing papers it is ordered that the motions are decided as follows:

Motion by the City for summary judgment dismissing the complaint and all cross-claims against it is granted.

Plaintiff, an employee of the NYC Department of Sanitation, allegedly sustained injuries as a result of tripping and falling in a pothole in the roadway on 41st Avenue between Fuller Place and Haight Street in Queens County on December 15, 2007 as he stepped

down from his garbage truck. The pothole at issue was located in front of 131-42 41st Avenue.

The City moves for summary judgment upon the ground that no prior written notice of the condition was filed and that it did not create the condition.

Pursuant to Administrative Code §7-201(c)(2), prior written notice is a condition precedent to maintaining an action against the City for damages relating to a street or sidewalk defect (see Katz v. City of New York, 87 NY 2d 241 [1995]; Quinn v. City of New York, 305 AD 2d 570 [2nd Dept 2003]); Campisi v. Bronx Water & Sewer Service, Inc., 1 AD 3d 166 [1st Dept 2003]). Plaintiff must both plead and prove that the City had prior written notice of the condition, otherwise no liability may be imposed upon the municipality (see Estrada v. City of New York, 273 AD 2d 194 [2nd Dept 2000]; Quinn v. City of New York, supra). The only exceptions to the requirement of prior written notice are where the municipality created the defect or hazard through an affirmative act of negligence and where it made a special use of the area (see Amabile v. City of Buffalo, 93 NY 2d 471 [1999]).

The City has proffered evidence that it did not receive prior written notice of the condition.

Cynthia Howard, record searcher for the Department of Transportation, testified in her deposition that a block search of 41st Avenue between Fuller Place and Haight Street was conducted for the period December 15, 2005 to December 15, 2007. The documents searched for were permits, corrective action reports (CAR), notices of violation (NOV), Highway Inspection and Quality Assurance inspection reports (HIQUA), repair orders, contracts and Big Apple Maps. The search yielded two repair orders that were generated as a result of telephone complaints to 311 by a citizen by the name of John Chen.

The first repair order indicated that a complaint was received on April 26, 2007 by Chen relating to a pothole in front of 131-47 Fuller Place. That complaint generated a defect number DQ2007116057 and the repair order was referred to the DOT maintenance crew, which went out with a Supervisor Najdek on May 2, 2007.

The second repair order, defect number DQ2007071230, was the result of a complaint by Chen received on March 12, 2007. Howard testified that the repair order indicated that a work crew went out to that location on March 13, 2007.

Howard testified that the repair orders did not indicate, and

she did not know, what the crews found and what they did when they went to these reported defects, but that the gang sheets, handwritten documents prepared by the work crew, would so indicate.

In this regard, the City also annexes to its moving papers an affidavit by Robert Najdek, crew supervisor for the DOT, in which he avers that he went out with a DOT repair crew to effectuate a pothole repair pursuant to defect number DQ2007116057 on May 2, 2007, that they arrived at the location of the complaint, 131-42 41st Avenue, at 1:15 P.M., repaired three potholes by filling them with asphalt and sealing them with asphalt cement and departed at 1:20 P.M. Annexed to his affidavit are the gang sheets prepared by him.

Also annexed to the moving papers is an affidavit by Joseph Inzauto, crew supervisor for the DOT, in which he avers that he went out with a DOT repair crew to effectuate a pothole repair pursuant to defect number DQ2007071230 on March 13, 2007, that they arrived at the location of the complaint, 41st Avenue/ Fuller Place - Haight Street, at 9:34 A.M., repaired 8 potholes by filling them with asphalt and sealing them with asphalt cement and departed at 10:09 A.M. Also annexed to his affidavit are the gang sheets prepared by him.

The City has thus established a prima facie entitlement to summary judgment by showing evidence that the only notices the City had of any pothole conditions at the subject location for the two-year period prior to and including the date of plaintiff's accident were the two repair orders of 2007 and that the potholes reported therein were, in fact, repaired on March 13 and May 2, 2007.

Although Howard refers to a Big Apple Map that was found, she testified that said Map was prepared in 2003 and was the last Map received by the City. Whatever conditions it may show, therefore, would not reflect any conditions occurring after 2003 and is, thus, not probative or relevant to the issue of notice in this case.

The same testimony by Howard as to the lack of any permits, contracts or other documents relating to the subject accident location, other than the two aforementioned repair orders for potholes that were, in fact, repaired, is also sufficient prima facie evidence that the City did not create the subject pothole.

In opposition, plaintiff fails to demonstrate that the City had prior written notice of the condition and fails to raise an issue of fact as to whether the City created the subject pothole.

The argument of counsel for plaintiff that the aforementioned

work orders and complaints by Chen constituted prior written notice of the subject pothole is without merit, since, as heretofore stated, the potholes that were the subjects of those complaints and work orders were repaired. There is no evidence of any notice given to the City of the subsequent pothole that allegedly caused plaintiff's trip and fall. Likewise, counsel's argument that the City created the subject pothole by an affirmative act of negligence is without merit. His speculative suggestions that the March 13 and May 2, 2007 repairs were ineffectual and that said repairs exacerbated the instability of the road surface and increased the likelihood of pothole formation fail to raise an issue of fact.

No evidence was presented indicating that the City created the condition through an affirmative act of negligence.

It is well-established that "the affirmative negligence exception to the notice requirement [is] limited to work by the City that *immediately* results in the existence of a dangerous condition" (Oboler v. City of New York, 8 NY 3d 888, 889, quoting Bielecki v. City of New York, 14 AD 3d 301 [1st Dept 2005]) rather than a condition that develops over time.

Even if these repairs did not last and the potholes formed again over time or even if other potholes subsequently formed over time for whatever reason, the un rebutted evidence presented, on this record, is that the potholes at the subject location that were the subject of the prior written notice to the City (the work orders) to which the DOT work crews were dispatched to repair on March 13 and May 2, 2007 were repaired.

Finally, no issue has been raised in this matter concerning the applicability of the special use exception.

Therefore, the City is entitled to summary judgment as a matter of law.

Motion by Con Edison for summary judgment dismissing the complaint and all cross-claims against it is also granted. Con Edison has met its prima facie burden of showing that it did not create the subject pothole by offering the same evidence proffered by the City in support of its motion, namely, the deposition testimony of Howard that no permits, contracts or other records were found for the subject location for the two-year period prior to and including the date of the accident except two pothole repair orders and the affidavits of the supervisors of the DOT work crews that repaired these potholes on March 13 and May 2, 2007.

In opposition, plaintiff annexes two street opening permits issued to Con Edison on October 31, 1995 and November 3, 1997 covering the subject location. These permits, which were issued over 12 years and 10 years prior to the date of the accident, fail to raise an issue of fact as to whether Con Edison created the subject pothole, especially in light of the unrebutted evidence that whatever potholes existed at the subject location were repaired on May 2, 2007 and that, therefore, the pothole in which plaintiff allegedly tripped and fell did not exist until after that date.

Again, plaintiff's counsel engages in pure speculation in arguing that the trench that Con Edison may have dug more than a decade prior to the date of the accident was negligently filled in by it and that such negligence caused recurring pothole problems at that location. No proof of such assertions, by expert affidavits or otherwise, is annexed to the opposition papers. Even were such evidence proffered that Con Edison dug a trench at the subject location in 1995 and 1997 and filled the trench upon completion of whatever work it did, and even had it submitted the affidavit of an expert averring that the filling in of the trench was done in some improper manner, plaintiff still fails to demonstrate that Con Edison had any actual or constructive notice of the formation of potholes years later.

Accordingly, the motions are granted and the complaint is dismissed in its entirety.

Dated: March 25, 2011

KEVIN J. KERRIGAN, J.S.C.