

**LaRocca v City of New York**

2011 NY Slip Op 31238(U)

May 5, 2011

Supreme Court, Richmond County

Docket Number: 102771/07

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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JEAN LAROCCA,

Plaintiff(s),

-against-

THE CITY OF NEW YORK, ANN PISCOPO,  
CHARLES V. FARINA and MARIA A. FARINA,  
JOSEPH DELUCA, SAM PERROTA, ROBIN  
PEROTTA and THERESA RUSSO,

Defendant(s).

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PART C-2

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 102771/07

Motion No. 3278 - 005

The following papers numbered 1 to 3 were marked fully submitted on the 21st day of March, 2011.

Papers  
Numbered

Notice of Cross Motion for Summary Judgment by  
Defendant THE CITY OF NEW YORK, with Supporting Papers and Exhibits  
(dated September 30, 2010) \_\_\_\_\_ 1

Affirmation in Opposition by Plaintiff JEAN LAROCCA, with Exhibits and  
Memorandum of Law  
(dated January 26, 2011) \_\_\_\_\_ 2

Reply Affirmation of Defendant THE CITY OF NEW YORK, with Exhibits  
(dated March 9, 2011) \_\_\_\_\_ 3

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LAROCCA v. THE CITY OF NEW YORK, et al.

Upon the foregoing papers, the cross motion of defendant THE CITY OF NEW YORK (hereinafter THE CITY) for summary judgment pursuant to CPLR 3212, and/or dismissal of the complaint and all cross claims against it pursuant to CPLR 3211(a)(7), is granted.

Plaintiff commenced this action to recover damages for injuries she allegedly sustained when she tripped and fell on a “nub” located in the dirt adjacent to the sidewalk between Bennett Place and Harold Avenue along Hylan Boulevard in Staten Island, New York. The “nub” is claimed to be a cement protrusion which remained in the dirt after a fence was removed at the aforementioned location. It appears that in 1994, THE CITY’s Department of Transportation (hereinafter DOT), had issued a Notice of Violation to the property owner of 105 Bennett Place, directing the removal of a fence that was encroaching on the sidewalk in the area where plaintiff fell. It further appears that a “release” was issued and the violation withdrawn by DOT in February 2000 after an inspection of the area indicated that the encroaching fence had been removed.

In moving for summary judgment dismissing the complaint, THE CITY contends that plaintiff has failed to establish that it received any prior written notice of the condition which allegedly caused her to trip and fall. THE CITY argues that §7-201(c)(2) of the Administrative Code of the City of New York indicates that prior written notice is a statutory condition precedent in a personal injury action against THE CITY, and that compliance with the statute must be pleaded and proved in order to maintain an action.

In support of its motion, THE CITY submits the EBT testimony of Cynthia Howard, a record searcher for DOT, who conducted a DOT, Highway Inspection and Quality Assurance

LAROCCA v. THE CITY OF NEW YORK, et al.

(HIQA) search, and a Big Apple Map search for the subject location covering the two years prior to October 19, 2006, the date of the claimed accident, in order to locate the filing of any permits, maintenance and/or repair records, contracts, sidewalk violations and/or complaints which would have given THE CITY prior written notice of the alleged defect in the sidewalk that purportedly caused plaintiff to fall. According to Ms. Howard, no such records were found establishing any such notice. While there were permits and repair orders issued for an area on Hylan Boulevard in the vicinity of Bennett Place and Harold Avenue, these records indicate (1) that no work was performed near the location of the alleged incident; (2) that the above work was not in any way related to the defect alleged by plaintiff; and (3) that no complaints were made with regard to the particular defect claimed to exist in that vicinity. In addition, the Big Apple Map failed to reveal the presence of any “nub” or other obstruction protruding onto the sidewalk at the subject location.

THE CITY also contends that there is no proof of any verbal complaints with respect the alleged defect, or that THE CITY itself caused the purported defect through its own affirmative negligence. According to THE CITY, the affirmative negligence exception to the notice requirement is limited to work done by THE CITY that *immediately* results in the existence of a dangerous condition. Here, there is no proof that THE CITY performed any work at said location which may have caused the subject defect. In fact, THE CITY argues that any work performed near the area where plaintiff claims to have fallen was done by the adjoining property owner in compliance with a DOT notice of violation requiring the removal of a chain link fence said to constitute an encroachment. Finally, THE CITY contends that the fence was removed, the

LAROCCA v. THE CITY OF NEW YORK, et al.

violation cleared and a release issued some six years before the date of the accident. According to THE CITY, if there is any liability for creating the defect, it lies with the owner of the property, who may have left the “nub” in ground when the fence was removed.

In opposition, plaintiff argues that THE CITY is not entitled to prior written notice under §7-201 of the Administrative Code because the area where she fell was NOT part of the sidewalk, but in an area of dirt adjacent to the sidewalk. According to plaintiff, the common-law principles of negligence apply here, and merely require that she show actual or constructive notice of the defective condition by THE CITY. In support, plaintiff argues that the photographs of the “nub” submitted by her clearly establish the existence of a defect, and that such a defect constitutes a dangerous condition. In addition, plaintiff contends that THE CITY must have been aware of the defect because it issued a notice of violation requiring the adjoining property owner to remove the fence from THE CITY’s property. Since the violation was cleared by THE CITY and a “release” was issued in 2000, plaintiff maintains that THE CITY should have seen the concrete nub left in the dirt when it returned to inspect the area before, *e.g.*, clearing the violation.

Finally, plaintiff contends that even if the prior written notice requirement of §7-201 of the Administrative Code was applicable, notice has been established through the DOT’s issuance of the violation notice, and the documented clearing of the violation once the fence was removed. In this regard, plaintiff argues that DOT is the municipal agency responsible for the sidewalk repairs, and that the documents issued by it regarding removal of the fence satisfy the prior written notice requirement.

The Court agrees with THE CITY.

LAROCCA v. THE CITY OF NEW YORK, et al.

It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. Accordingly, that party must initially produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden then shifts to the party opposing the motion to demonstrate by admissible evidence that a triable factual issue remains (*see Zuckerman v. City of New York*, 49 NY2d 557). Here, THE CITY has met its initial burden, while the plaintiff has failed to raise a triable issue of fact.

At the outset, it is the opinion of this Court that there is adequate case law addressing the issue of whether the dirt or grassy area immediately adjacent to a sidewalk is considered a part thereof for purposes of §7-201 of the Administrative Code. In accordance therewith, this Court finds that the area of dirt where plaintiff allegedly fell is, in fact, part of the sidewalk for purposes of the prior written notice requirement. Thus, THE CITY was entitled to prior written notice of any defective condition existing thereon before liability could attach (*see Zizzo v. City of New York*, 176 AD2d 722; *Gallo v. Town of Hempstead*, 124 AD2d 700; *accord LoCurto v. The City of New York*, 2 AD3d 277; *see also* Vehicle and Traffic Law §144 [which defines a “sidewalk” as “[t]hat portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians”]).

It is well settled that Administrative Code §7-201(c)(2), more commonly known as the “Pothole Law”, states that the City may not be held liable for any defect in, or obstruction to, a sidewalk or roadway unless it has received written notice of the condition at least 15 days prior to an occurrence and failed to remedy the defect (*see Bruni v. City of New York*, 2 NY3d 319).

LAROCCA v. THE CITY OF NEW YORK, et al.

In addition, such prior written notice is a condition precedent which a plaintiff is required to plead and prove in order to maintain an action in tort against the City (*see* Katz v. City of New York, 87 NY2d 241, 243). Here, THE CITY has sufficiently demonstrated the absence of any prior written notice of the alleged defect which caused plaintiff's injury by submitting (through the deposition testimony of Cynthia Howard) the results of DOT, HIQA and Big Apple Map searches, each of which failed to reveal, *e.g.*, any permits issued, work performed, or complaints made relative to the defect which may have caused plaintiff to fall.

There is also no proof establishing that THE CITY caused or created the purported defect (*see* Amabile v. City of Buffalo, 93 NY2d 471). In fact, THE CITY's records indicate that any work conducted by it or any one of its agencies in that vicinity was performed in the *street* in connection with a water main repair in June 2005. As this had nothing to do with the sidewalk, it clearly could not be held to constitute notice of the defect claimed by plaintiff. Finally, it is the opinion of this Court that the Notice of Violation issued by DOT in 1996 with regard to the improper placement of a fence by the adjacent property owner, as well as the subsequent "release" issued in 2000 with regard to the clearance of the violation, do not constitute proper notice of the defect which caused plaintiff to fall (*see* Bruni v. City of New York, 2 NY3d at 324).

Upon examination, it is clear that the Notice of Violation pertains solely to the placement of the fence on CITY property, and the "release" merely functions as an acknowledgment that the premises were inspected and the fence had been removed. In addition, plaintiff has presented no evidence that the above inspection should have or would have revealed the presence of "nubs" apparently left in the dirt. Neither would verification that the "nubs" had been removed be

LAROCCA v. THE CITY OF NEW YORK, et al.

relevant to the resolution of whether the encroachment posed by the fence had been cleared, thereby warranting the “release” and cancellation of the Notice of Violation.

Accordingly, it is

ORDERED that motion for summary judgment of defendant THE CITY OF NEW YORK is granted, and the complaint and any cross claims asserted against it are hereby severed and dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R:

/s/  
Hon. Thomas P. Aliotta  
J.S.C.

Dated: May 5, 2011