

Teixeira v City of New York

2011 NY Slip Op 31362(U)

May 20, 2011

Supreme Court, New York County

Docket Number: 116021/02

Judge: Cynthia S. Kern

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

PRESENT. CYNTHIA S. KERN J.S.C.

PART 52

Index Number : 116021/2002
TEIXEIRA, ELLEN
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 006
DISMISS

INDEX NO. 116021/02
MOTION DATE
MOTION SEQ. NO. 06
MOTION CAL. NO.

his 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 is decided in accordance with the attached decision. This action is hereby transferred to a non-city part as the City is no longer a party to the case.

FILED

MAY 24 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/20/11

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

ELLEN TEIXEIRA,

Plaintiff,

Index No. 116021/02

-against-

DECISION/ORDER

THE CITY OF NEW YORK, NEW YORK CITY,
DEPARTMENT OF TRANSPORTATION,
CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC., NICO ASPHALT, INC., FELIX
EQUITIES, INC. and FELIX INDUSTRIES, INC.,

Defendants.

FILED
MAY 24 2011
NEW YORK
COUNTY CLERK'S OFFICE

-----X

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.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u>3</u>
Answering Affidavits to Cross-Motion.....	<u>4,5,6</u>
Replying Affidavits.....	<u>7,8</u>
Exhibits.....	<u>9</u>

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell over an allegedly defective portion of the roadway while rollerblading in the middle of the intersection known as Fifth Avenue and East 72nd Street in the City, County and State of New York on April 22, 2001. The City of New York (the "City") now moves for summary judgment dismissing plaintiff's complaint and all cross-claims against it. Plaintiff cross-moves for summary judgment in favor of the plaintiff and against

defendant Consolidated Edison Company of New York, Inc. (“Con Ed”) on the issue of liability. For the reasons set forth below, the City’s motion is granted and plaintiff’s cross-motion is denied.

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 Big Apple Map. The Big Apple Map does not contain markings specifying the alleged defect at issue in this case - a large hole in the roadway located at the intersection of Fifth Avenue and 72nd Street. 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. Abraham Lopez, a record searcher for the City, testified that a two-year roadway search was performed for the location of East 72nd Street and Fifth Avenue. The search produced eight permits, some of which were issued to Con Ed, but none of which were issued to the City. Additionally, the search produced one repair order referring to a pothole in the intersection, which was subsequently fixed by a repair crew on March 23, 2001. In response, plaintiff has provided no evidence that the City did any work at the location of plaintiff's accident that immediately created the alleged hazard. Moreover, plaintiff's argument that the City was negligent in failing to supervise the alleged work done by Con Ed at the accident location is without merit as there is no evidence that Con Ed was acting as an agent or contractor under the supervision of the City. Thus, the City's motion for summary judgment should be granted.

This court now turns to plaintiff's cross-motion for summary judgment in favor of the plaintiff and against Con Ed on the issue of liability. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant action, plaintiff has not made out her prima facie right to summary judgment against Con Ed because there exists an issue of material fact as to plaintiff's own

