

**Dubowy v City of New York**

2011 NY Slip Op 31591(U)

June 10, 2011

Sup Ct, NY County

Docket Number: 110437/03

Judge: Barbara Jaffe

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 110437/2003

DUBOWY, EVE

vs

CITY OF NEW YORK

Sequence Number : 001

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

CAL # 30

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1
2
3

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

JUN 14 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/10/11  
JUN 10 2011

BARBARA JAFFE  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
EVE DUBOWY,

Plaintiff,

-against-

Index No. 110437/03  
Motion Date: 4/5/11  
Motion Seq. No.: 001  
Calendar No.: 30

**DECISION & ORDER**

CITY OF NEW YORK,

Defendant.

-----X  
BARBARA JAFFE, JSC:

**For plaintiff:**  
Joel L. Getreu, Esq.  
Law Offices of Joel L. Getreu, P.C.  
132 Nassau St., Ste. 310  
New York, NY 10038  
212-509-6888

**FILED**

**JUN 14 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

**For defendant:**  
Peter C. Lucas, ACC  
Michael A. Cardozo  
Corporation Counsel  
100 Church Street  
New York, NY 10007  
212-442-6851

By notice of motion dated August 12, 2010, defendant moves pursuant to CPLR

3211(a)(7) or 3212 for an order dismissing the complaint against it. Plaintiff opposes the motion.

I. BACKGROUND

On July 26, 2000, while walking on the sidewalk at the southwest corner of 19<sup>th</sup> Street and First Avenue in Manhattan, plaintiff allegedly tripped and fell due to a metal protrusion in the sidewalk. (Affirmation of Peter C. Lucas, ACC, dated Aug. 12, 2010 [Lucas Aff.], Exh. G).

On or about November 20, 2000, plaintiff served on defendant a late notice of claim, alleging that she tripped on a metal peg and that there were three pegs or spikes protruding approximately one inch out of the sidewalk, apparently the product of the removal of a street sign or some kind of box. (*Id.*, Exh. A).

By decision and order of another justice of this court, dated August 31, 2011, plaintiff's

petition for leave to serve a late notice of claim was denied. (*Id.*, Exh. B). However, the decision was reversed on appeal and plaintiff's notice of claim was deemed served *nunc pro tunc*. (*Id.*, Exh. C).

On or about June 6, 2003, plaintiff served a summons and complaint, and on or about June 27, 2003, defendant served its answer. (*Id.*, Exhs. D, E).

At a deposition held on June 17, 2009, plaintiff testified that she tripped on a metal peg protruding approximately two inches from the sidewalk, and that the peg was one of three pegs in the sidewalk that formed a square with one peg missing and appeared to have been part of a sign that had been removed. (*Id.*, Exh. G).

At another deposition held the same day, Cynthia Howard, an employee of the New York City Department of Transportation (DOT), testified that a co-employee conducted a search of DOT records for any permits, repair orders, contracts, written complaints, and sidewalk violations as well as corrective action reports, notices of violations, and inspections maintained by the Highway Inspection Quality Assurance unit related to the location of plaintiff's accident for the period of July 6, 1998 to July 6, 2000 and found only three permits related to work done by other entities. (*Id.*, Exhs. H, I).

On January 8, 2010, a fruitless DOT search was performed for the period of July 6, 2000 to July 26, 2000. (*Id.*, Exh. J).

## II. CONTENTIONS

Defendant denies having had prior written notice of the defect which caused plaintiff's accident, absent any evidence of the origin of the peg or how long it had been in the sidewalk before the accident, and as DOT records and the Big Apple Map do not reflect that defendant had

prior notice. Defendant also denies having created the defect, relying on the DOT records and counsel's assertion that the records reflect that defendant performed no work at the location of plaintiff's accident for two years prior to and including the date of the accident. (Lucas Aff.).

In opposition, plaintiff concedes that defendant had no prior written notice of the defect, but alleges that there are triable issues as to whether defendant created the defect as defendant submitted no evidence establishing that it did not negligently remove a sign and leave the metal pegs in the sidewalk. (Affirmation of Joel L. Getreu, Esq., dated Jan. 17, 2011).

In reply, defendant maintains that plaintiff's allegation that it created the defect is speculative and conclusory. (Reply Affirmation, dated Apr. 4, 2011).

### III. ANALYSIS

The party seeking summary judgment must show prima facie entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that requires a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, denial of the motion is required, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at 853).

Pursuant to New York City Administrative Code § 7-201(c)(2):

No civil action shall be maintained against the city for . . . injury to person . . . sustained in consequence of any street . . . sidewalk or crosswalk, or any part or portion of any of the foregoing . . . 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 acknowledgment of from the city of the defective, unsafe, 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 reasonable safe.

“[P]rior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City.” (*Katz v City of New York*, 87 NY2d 241, 243 [1995]).

Where City establishes a lack of prior written notice of a defect, the burden shifts to the plaintiff to demonstrate that an exception applies, either that City affirmatively created the defect through an act of negligence, which requires a showing that work performed by City immediately resulted in the existence of the defect, or that it made a special use of the place where the defect was located. (*Yarborough v City of New York*, 10 NY3d 726 [2008]).

Here, plaintiff argues that defendant did not establish that it did not create the defect and that a triable issue thus exists. However, it is plaintiff’s burden to demonstrate that defendant created the defect through an act of negligence, and plaintiff submits no evidence supporting her allegation that defendant may have created the defect by negligently removing a sign. (*See Pena v City of Yonkers*, 82 AD3d 728 [2d Dept 2011] [plaintiff, who fell on piece of metal protruding from sidewalk, failed to raise triable issue as she only offered speculation that defendant created defect]; *Regan v City of New York*, 8 AD3d 462 [2d Dept 2004] [plaintiff’s speculative and conclusory allegation insufficient to establish triable issue related to his allegation that City created hole in sidewalk]; *compare Santana v City of New York*, 56 AD3d 295 [1<sup>st</sup> Dept 2008] [evidence reflected that City created defect as plaintiff fell on sleeve protruding from pathway

that was missing pole that fit into sleeve and pole was regularly removed by City employees]; *Cabrera v City of New York*, 21 AD3d 1047 [2d Dept 2005] [where plaintiff tripped on metal pipe protruding from ground, testimony by City witness that City had performed construction work in area of plaintiff's fall and records indicating that City may have removed pole protruding from ground before accident created triable issue as to whether City created defect]).

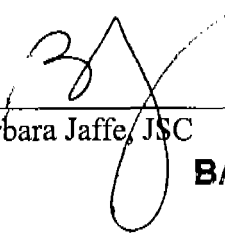
Nor does plaintiff claim that she needs discovery on this issue. Rather, in June 2010, she filed her note of issue alleging that discovery was complete, thus indicating that she had found no evidence demonstrating that defendant had created the defect. (*Compare Schuman v City of New York*, 304 AD2d 643 [2d Dept 2003] [triable issue existed as plaintiff, who tripped in hole, testified City parking sign was placed in location of hole but removed before accident and City failed to provide records relating to its installation, maintenance and/or removal of signs at location]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted and the complaint is hereby dismissed as against defendant City of New York, and the Clerk is directed to enter judgment in favor of said defendant.

ENTER:

  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.  
NEW YORK  
COUNTY CLERK'S OFFICE

**FILED**

**JUN 14 2011**

DATED: June 10, 2011  
New York, New York  
**JUN 10 2011**