

Charwa v City of New York

2011 NY Slip Op 33340(U)

November 14, 2011

Supreme Court, Richmond County

Docket Number: 104073/08

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X

NADIA CHARWA and SAMIR CHARWA,

DCM Part 1

Plaintiffs,

Present:

-against-

HON. THOMAS P. ALIOTTA

THE CITY OF NEW YORK, MICHEL MICHAEL,
SARAH MICHAEL and ROSEMARIA LIPARI,

DECISION AND ORDER

Index No. 104073/08

Defendants.

Motion No. 967-003

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The following papers numbered 1 to 3 were fully submitted on the 7th day of September, 2011.

	Papers Numbered
Notice of Motion of Defendant the City of New York (Affirmation in Support).....	1
Plaintiffs' Affirmation in Opposition to Defendant the City of New York's Motion for Summary Judgment.....	2
Reply Affirmation in Further Support of City's Motion.....	3

Upon the foregoing papers, the motion of defendant the City of New York (hereinafter the "City") for, *inter alia*, summary judgment dismissing the complaint and all cross claims against it is denied.

This matter arises out of a January 8, 2008 trip-and-fall on a City sidewalk located between 385 and 389 Nome Avenue, Staten Island, New York. To the extent relevant, plaintiff Nadia Charwa claims to have sustained extensive personal injuries as a result of the above occurrence, which was allegedly caused by a "dangerous and hazardous condition consisting of a hole, cracked, unlevelled,

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raised, uneven and unsafe portion of the sidewalk”, *i.e.*, “a hole immediately adjacent to the manhole cover that is on the property between 389 and 385 Nome Avenue, Staten Island, New York”¹ (see Plaintiffs’ February 12, 2008 Notice of Claim, City’s Exhibit A).

In moving to dismiss the complaint pursuant to CPLR 3211 (a)(7) or, in the alternative, for summary judgment, the City argues that: (1) no prior written notice of the subject condition had been furnished, as required by section 7-201(c)(2) of its Administrative Code (*i.e.*, the so-called “Pothole law”)²; (2) no active negligence on the part of City has been established which created an immediate hazard; and (3) no special use exception to the prior written notice law applies under the facts of this case.

In opposition to the motion, plaintiffs argue, in pertinent part, that while the “Pothole law” limits the City’s liability for failing to maintain sidewalks and roadways, it does not free the

¹As shall presently appear, plaintiffs maintain that the manhole cover was located *in the driveway* of 389 Nome Avenue.

²While the City acknowledges that a search of Department of Transportation and Department of Environmental Protection records for the previous two years at the subject location disclosed “four permits, four hard copy permits, one Corrective Action Report, one inspection record, and one Big Apple Map” (*see* City’s Affirmation in Support, p 5), it claims that none of these documents constitute prior written notice since the permits and Corrective Action Report were issued to Con Edison, and the Big Apple Map fails to reflect the “circle marking” which, according to its legend, indicates a “hole or hazardous depression” at the subject location (*id.* p 8; *see also* City’s Exhibit D).

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City from liability for negligently maintaining gratings, manhole covers and the area surrounding them. In this regard, plaintiffs note that under the "New York City Rules & Regulations, Title 34, Department of Transportation, Chapter 2, Highway Rules" (34 RCNY 2-07 (b)[2]), the owners of such covers or gratings are required to monitor the condition thereof for "the area extending *12 inches outward from the perimeter* of the hardware" [emphasis supplied]. In addition, contrary to the City, plaintiffs claim that the instant Big Apple Map dated February 2, 2004 includes a circle at the precise location of the subject accident (see Plaintiffs' Exhibit B). Lastly, plaintiffs cite the "special use" doctrine as an exception to the prior written notice requirement, which allows a municipality such as the City to be held liable without prior notice when it installs an object into a sidewalk or roadway for its individual benefit, or where it may be found by its actions to have created a dangerous condition.

Here, plaintiffs allege that it was the City that placed the manhole cover *in the driveway* of 389 Nome Avenue, where cars were repeatedly compelled to drive over it, and that the ensuing exertion "of [extra] force on the manhole cover" may well be found to have created the defect of which plaintiffs complain. In support, plaintiffs have annexed the December 8, 2008 expert

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narrative report of Stanley H. Fein, P.E. (Plaintiffs' Exhibit C), which concludes that "the subject defect created a dangerous and unexpected trap and was caused by the negligence of both the owner of the premises and the City of New York". In this expert's opinion, the "defect developed...due to the fact that cars were riding over the driveway for the special use of the homeowner and created forces on the manhole cover which created the defective condition".

As previously indicated, the City's motion, *inter alia*, for summary judgment is denied.

Looking strictly within the "four-corners" of the complaint, it is clear that plaintiffs have stated a cause of action against the City sufficient to withstand dismissal under CPLR 3211(a)(7) (see Cohn v. Lionel Corp., 21 NY2d 559, 562). As for the balance of the City's motion, it is well settled that the "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hosp., 68 NY2d 320, 324). "As a general rule, a party does not carry its burden...by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (Mennerich v. Esposito, 4 AD3d 399, 399,

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quoting Larkin Trucking Co. v. Lisbon Tire Mart, 185 AD2d 614, 615).

In this case, the City has tried to minimize the disputed interpretations of the markings on the Big Apple Map by pointing to plaintiffs' failure to request the production of "a DOT witness to interpret these records." According to the City, this "shows that they are not relevant...to [support] plaintiffs' claim...of prior written notice" (see City's Affirmation in Support, p 5). Regardless of its dubious merit, this speculative assertion is an insufficient basis upon which to award the City summary judgment. Neither has the City attempted to address the "special use" exception to the prior written notice requirement insofar as it may relate to the instant manhole cover. Rather, its comments are limited to the general assertion that "sidewalks are for the public and do not exist for the special use of the City" (see City's Affirmation in Support, p 12). In no way can this response be said to negate, as a matter of law, plaintiffs' claim that the special use exception applies in this case.

The presence of factual issues regarding, e.g., the exact location and nature of the conceded markings on the Big Apple Map proffered by plaintiffs precludes summary judgment (see Reyes v.

