

Quinones v City of New York
2011 NY Slip Op 33846(U)
July 6, 2011
Sup Ct, Bronx County
Docket Number: 6924/2007
Judge: Nelida Malave-Gonzalez
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JUL 26 2011

NEW YORK SUPREME COURT - COUNTY OF BRONX

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

PART 18

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

-----X
MARIA QUINONES,

Plaintiff,

Index No. 6924/2007
Present:

-against-

Hon. Nelida Malave-Gonzalez, A.J.S.C.

THE CITY OF NEW YORK and CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,

Defendant(s).

-----X

The following enumerated papers were submitted on the instant motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion - Order to Show Cause - Cross Motion - Exhibits and Affidavits Annexed - Memo of Law	1
Opposing / Answering Papers - Affidavit and Exhibits	2
Reply Papers	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant, THE CITY OF NEW YORK, moves pursuant to CPLR §3212 for an Order granting it summary judgment and dismissing Plaintiff's, MARIA QUINONES (hereinafter "QUINONES") complaint. Co-Defendant, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (hereinafter "CON EDISON") cross-moves pursuant to CPLR §3212 for an Order granting it summary judgment and dismissing Plaintiff's complaint, and all cross-claims by the Defendant. Plaintiff submitted written opposition pertaining to CON EDISON's cross-claims. For the reasons set forth below, THE CITY OF NEW YORK's motion is granted to the extent that Plaintiff's claims and Co-Defendant's cross claims against THE CITY OF NEW YORK are dismissed. Co-Defendant, CON EDISON's cross-motion is denied.

PROCEDURAL HISTORY

This is an action by Plaintiff, QUINONES, to recover monetary damages for personal injuries allegedly sustained in slip and fall accident on or about October 20, 2006 on the roadway located in front of 471 Swinton Avenue, Bronx, New York. (See Defendant Affirmation motion

Exhibit A). Plaintiff filed a notice of claim against THE CITY OF NEW YORK on or about January 23, 2007. Defendant, CITY OF NEW YORK filed an answer on or about March 19, 2007. Plaintiff commenced this action against CON EDISON on or about January 23, 2007. Co-Defendant, CON EDISON filed an answer on or about February 16, 2007.

THE CITY OF NEW YORK moves for dismissal of the Plaintiff's complaint pursuant to C.P.L.R. § 3212 for failure to state a cause of action and for summary judgment on the grounds that Plaintiff failed to comply with prior written notice requirement of the New York City Administrative Code of § 7-201 (c). CON EDISON cross moves for summary judgment pursuant to C.P.L.R. § 3212 on the grounds that no triable issues of fact exist.

BACKGROUND

On July 17, 2007 the Examination Before Trial (hereinafter "EBT") was conducted and Plaintiff testified that on December 5, 2006 the Plaintiff submitted the Notice of Claim, Plaintiff testified that at approximately 5:00am she was walking in front of the roadway of 471 Swinton Avenue, Bronx New York, when she her entire right foot went into the hole and caused her to fall. Plaintiff stated that the accident occurred in front of her home as she was walking to her car which was parked on the other side of Swinton Avenue. (See Plaintiff affirmation in opposition, Exhibit A).

In support of this motion, Defendant, THE CITY OF NEW YORK submitted *inter alia* the following: a) pleadings (Motion Exhibit A); b) a copy of the New York City Department of Transportation Response Sheet (Motion Exhibit B); and c) deposition transcript of Dorothy Rozier's dated July 17, 2007 from the Department of Transportation, who testified to the Big Apple Pothole and Sidewalk Protection Corp. Map (Motion Exhibit C).

In support of the cross-motion, Co-Defendant, CON EDISON submitted *inter alia* the following a) pleadings (Cross-Motion Exhibit A); b) Bill of Particulars (Cross-Motion Exhibit C); c) Plaintiff's deposition dated July 17, 2007 (Cross-Motion Exhibit D); and d) deposition transcript of Robert O'Brien dated July 17, 2007, the Senior Coordinator of Con Edison (Cross-Motion Exhibit F).

Plaintiff submitted a written opposition solely pertaining to the cross-motion of Co-Defendant, CON EDISON. Plaintiff submitted *inter alia* the following a) an affidavit of Carol Neville; b) an affidavit of Mayra Carasquillo; c) a sworn report from A. Mendez an investigator for Satellite Investigation (Plaintiff Opposition Exhibit E); d) an affidavit of Denise Bekert, a registered architect (Plaintiff Opposition Exhibit F); d) copies of the photographs of the subject location; and e) a copy of THE CITY OF NEW YORK history defects of the subject location (See Opposition Exhibit G and H).

STANDARD OF REVIEW

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). Summary judgment is a drastic remedy, and it should not be granted when there is any doubt as to the existence of a triable issue of fact. Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 (1978). The court's function on this motion for summary judgment is issue finding, not issue determination. Krupp v. Aetna Life & Cas. Co., 103 A.D.2d 252, 479 N.Y.S.2d 992 (2nd Dept. 1984). If the moving parties fail to meet this standard, the court must deny summary judgment, regardless whether the opposition is sufficient. Nix v. Yang Gao Xiang, 19 A.D.3d 227, 798 N.Y.S.2d 5; Roman v. Hudson Tel. Assoc., 15 A.D.3d 227, 228, 791 N.Y.S.2d 6 (1st Dept 2005); Bowie v. 2377 Creston Realty, LLC, 14 A.D.3d 457, 459, 788 N.Y.S.2d 375 (1st Dept 2005); Prenderville v. International Serv. Sys., Inc., 10 A.D.3d 334, 338, 781 N.Y.S.2d 110 (1st Dept. 2004). Only if the moving parties satisfy this standard, does the burden shift to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 315, 819 N.E.2d 998, 786 N.Y.S.2d 382 (2004); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81, 790 N.E.2d 772, 760 N.Y.S.2d 397 (2003).

I. THE CITY OF NEW YORK'S MOTION

THE CITY OF NEW YORK raises the issue that Plaintiff failed to comply with the prior written notice of defects requirement of §7-201(c) of the New York City Administrative Code and therefore moves for summary judgment. This Court finds that Defendant, THE CITY OF NEW YORK, has met its burden by making a prima facie showing entitlement to summary judgment. The New York City Administrative Code requires that the City receives written notice of defects in the public way so that it may repair a problem before there is liability. In pertinent part § 7-201(c)(2) provides:

“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 ... sidewalk ..., 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 . . . and written notice thereof was given to a city agency.”

Prior written notice provisions, enacted in derogation of common law, are always strictly construed. Gorman v. Town of Huntington, 12 NY3d 275, 907 N.E.2d 292 (2009); *citing*, Porrier v. City of Schenectady, 85 N.Y.2d 310, 314; 48 N.E.2d 1318 (1995); Doremus v. Inc.

Vil. Of Lynbrook, 18 N.Y.2d 362, 366. The Court recognizes “the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways” Tucker v. City of New York, 84 A.D.3d 640; 923 N.Y.S.2d 525 (1st Dept. 2011). The purpose of a prior written notice provision is to place a municipality on notice that there is a defective condition on publicly-owned property which, if left unattended, could result in injury. This ensures that a municipality, which is not expected to be cognizant of every crack or defect within its borders, will not be held responsible for injury from such defect unless given an opportunity to repair it. The policy behind this rule is to limit a municipality's duty of care over its streets and sidewalks. Gorman v. Town of Huntington, 12 N.Y.3d 275, 907 N.E.2d 292 (2009), *citing*, Porrier v. City of Schenectady, 85 N.Y.2d 310, 314; 48 N.E.2d 1318 (1995). Defendant, THE CITY OF NEW YORK has met its burden by making a prima facie showing entitlement to summary judgment.

The Plaintiff failed to demonstrate compliance with prior written notice provision of the N.Y.C. Administrative Code § 7-201(c), the Defendant, THE CITY OF NEW YORK, did not have written notice of the obstruction prior to Plaintiff's accident as mandated by the N.Y.C. Administrative Code § 7-201(c). THE CITY OF NEW YORK's motion for summary judgment is granted and the complaint is dismissed.

II. CON EDISON'S CROSS-MOTION

Co-Defendant, CON EDISON has met its burden by making a prima facie showing entitlement to summary judgment. Specifically, CON EDISON's witness, Mr. Robert O'Brien, a Senior Coordinator testified that he conducted a search of CON EDISON's records and found no records of any work performed on the location of the accident where Plaintiff claims she fell. Moreover, the affirmation of Adam Lerman, Esq. on behalf of THE CITY OF NEW YORK's motion for summary judgment, THE CITY OF NEW YORK performed a search of its records and found no records of any permits issued to CON EDISON for a two year period of time prior to the date of Plaintiff's accident.

Plaintiff, QUINONES through her submission raises a triable issue of fact in regards to CON EDISON performed work at the site of her alleged accident. At this juncture, Plaintiff's contends that because CON EDISON performed prior work on the roadway and caused/created the condition and therefore, could be responsible for the hole in the roadway where she fell and is sufficient to raise a triable issue of fact (See Plaintiff's EBT Transcript Exhibit A). Plaintiff submitted the affidavit of Carol Neville and Mayra Carasquillo who both reside at 471 Swinton Avenue Bronx New York. Both testified at their deposition that CON EDISON performed work in October 2006. (See Plaintiff's Exhibits C and D). Moreover, Plaintiff annexed a sworn report of investigator Jorge A. Mendez who is associated with Satellite Investigations located in the Bronx (See Plaintiff's Exhibit E). Mr. Mendez avers that he interviewed four (4) witnesses that live in the vicinity who testified that CON EDISON worked in the subject location on or about October 2006. Plaintiff also submitted the affidavit of Denise Bekert, a registered architect who provides technical investigations, analyses and reports concerning slip, and fall accidents who states that she was unable to perform a suite investigation because the subject roadway depression had been repaired.

Accordingly, Co-Defendant CON EDISON's motion for summary judgment is hereby denied as Plaintiff adequately rebut Co-Defendant CON EDISON's prima facie case and raise triable issues of fact.

CONCLUSION

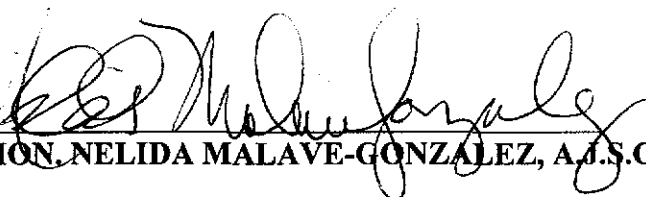
It is **Ordered** that the Defendant, THE CITY OF NEW YORK are hereby severed and complaint against it is dismissed, and it is further

Ordered that the remainder of the action against Co-Defendant CON EDISON shall continue.

Moving Party to serve copy of Order with Notice of Entry upon all parties and file same with the Clerk.

This decision constitutes the Order of the Court.

Dated: July 6, 2011


HON. NELIDA MALAVE-GONZALEZ, A.J.S.C.