

Stoller v City of New York

2013 NY Slip Op 31328(U)

June 14, 2013

Sup Ct, New York County

Docket Number: 114510/10

Judge: Kathryn E. Freed

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SCANNED ON 6/24/2013
[* 1]
**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 114510/2010
STOLLER, GLENDA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS *Case # 85*

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED
JUN 24 2013
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 6-17-13

JUN 14 2013

[Signature]
HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
GLENDA STOLLER,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

DECISION/ORDER
Index No. 114510/10
Seq. No. 002

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

FILED

JUN 24 2013

X
**NEW YORK
COUNTY CLERKS OFFICE**

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-4.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....5.....
REPLYING AFFIDAVITS..... 6.....
EXHIBITS.....7-14.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant City moves for an order pursuant to CPLR §3211(a)(7) dismissing the complaint, or in the alternative, pursuant to CPLR§ 3212, granting summary judgment, dismissing the complaint, or for an order pursuant to CPLR§ 3126, dismissing the complaint for failure to comply with two courts, or for an order compelling fresh medical authorizations and an extension of its time to hold an Independent Medical Exam.

Plaintiff opposes. After a review of the papers presented, all relevant statutes and case law, the Court denies the motion.

Factual and procedural background:

Plaintiff seeks the recovery of monetary damages for a fractured hip she allegedly sustained on April 6, 2010, when she tripped and fell in a pothole located at the southwest corner of the intersection of Canal Street and Bowery Street, in New York County. Consequently, plaintiff commenced the instant action via Summons and Complaint on November 4, 2010. Issue was subsequently joined via service of defendant's Answer on December 22, 2010. Plaintiff served her Bill of Particulars on February 10, 2011. On June 7, 2011, defendant exchanged its "Response to the Case Scheduling Order."

Defendant alleges that at both her General Municipal Law §50-h hearing and her EBT, plaintiff consistently testified that she was walking north on Canal Street, and was "halfway into the crosswalk," when she fell in the pothole (see §50-h transcript annexed as Exhibit "B," pp. 43-44). At her GML§ 50-h hearing, she identified the pothole in a series of photographs annexed to the instant motion as Exhibit "B." Plaintiff testified that she perceived the pothole to be about "2 or 3 feet" in diameter and about "3 to 4 inches" deep (see GML§ 50-h transcript §25).

In response, defendant produced three Department of Transportation ("DOT"), witnesses to testify concerning the DOT searches that were conducted with reference to the subject pothole/defect. DOT witnesses Abraham Lopez, Victor Green and Frank Bocchichio all testified at an EBT. Additionally, because three of the permits pertained to a contract between JLR Enterprises and the New York City Department of Design and Construction ("DDC"), for "DDC Major Reconstruction," defendant produced the Engineer in Charge at DDC, who explained that the work JLR performed on behalf of DDC pursuant to said three work permits which authorized work

on "Canal Street between Bowery and Elizabeth," was for the installation of a catch basin off of the northeast corner of the intersection at Bowery and Canal. Defendant asserts that this is actually the opposite side of the intersection wherein plaintiff claims to have sustained her injury.

Thereafter, on June 9, 2011, Mr. Lopez testified that the DOT search results included seven permits, fourteen corrective action requests, one notice of violation, six inspections, two repair orders, two complaints, two gang sheets and two Big Apple maps. In response to plaintiff's demand for a witness possessing a more detailed knowledge of the search results, particularly HIQA inspections, defendant produced Mr. Green, a Highway Inspection Quality Assurance Senior Inspector for a deposition on September 1, 2011. Mr. Green interpreted the aforementioned permits that were found and testified that three permits issued to JLR for the purposes of DDC major reconstruction were all pursuant to the same contract.

Additionally, defendant asserts that the DOT search also indicated that there were two potholes, reported by citizens, which were located within the general vicinity of plaintiff's accident. These potholes were given and identified by their "defect numbers." Based on this, defendant then conducted a search for handwritten "gangs" sheets-documents generated by work crews assigned to repair potholes. Mr. Bocchichio, Senior Director at the DOT, testified as to results of this search. Mr. Bocchichio is responsible for co-creating the "field inspection tracking system," which tracks complaint reports. He testified that there is a numerically designated pothole "in front of 165 Canal Street, between Bowery and Elizabeth Street" (see Exhibit "H," pp.8-9).

Mr. Bocchichio testified that this particular pothole does not correlate with plaintiff's alleged accident location in the crosswalk because the complaint indicates that said pothole was in front of a street address and residential and business addresses do not extend through a city corner such that they would in front of a crosswalk (see Exhibit "H," p. 8, lines 21-230). The other noticed pothole

was “in front of 150 Canal Street.” Thus, this pothole was also not located in the crosswalk where plaintiff allegedly fell.

Finally, as part of defendant’s April 25, 2012 Supplemental Response to the Case Scheduling Order, it exchanged a DDC schematic which DDC created to indicate the exact location where their contractor, JLJ Enterprises, performed construction work, pursuant to the DOT permit. On May 9, 2012, Sanjay Modi, Engineer in charge of the DDC project testified about re-paving orders, which indicate that the catch basin project was completed on October 8, 2009, when their construction site was backfilled.

Positions of the parties:

Defendant argues that it is entitled to summary judgment because it did not have any prior written notice for the subject condition. Defendant asserts that the gravamen of plaintiff’s claim against defendant is that defendant permitted the roadway in the western crosswalk of Canal Street at its intersection with Bowery to remain in a defective condition. However, this allegedly defective condition comes under the purview of the written notice provision set forth by §7-201(c)(2) of the Administrative Code of the City of New York. Defendant also argues that this specific provision was created to prevent any possibility of liability for nonfeasance, except where the municipality fails or refuses to remedy the dangerous condition within a reasonable time after notification.

Defendant also argues that it is plaintiff who bears the burden of pleading and proving that defendant had prior written notice of the alleged condition and her failure to do so necessitates dismissal of the complaint. Defendant argues that no evidence of any work done by it or its contractors in the southwest corner of Bowery and Canal exists. However, even if could be proven that defendant or its contractors did cause/create the defect, normal deterioration of a sidewalk, pathway or roadway through the passage of time is insufficient to establish the affirmative

negligence exception to § 7-201(c)(2).

Defendant further asserts that plaintiff has “willfully” failed to provide fresh HIPAA complaint authorizations in violation of the July 12, 2011 and December 13, 2011 so-ordered compliance conference stipulations. In the absence of same, defendant argues that it cannot conduct an Independent Medical Examination (“IME”), without plaintiff’s compliance. Hence, defendant argues that this on its own justifiably warrants dismissal of the complaint. However, defendant urges the Court that if it is unwilling to dismiss the case based on plaintiff’s lack of cooperation, perhaps it can compel plaintiff to provide “fresh” authorizations.

Plaintiff argues that defendant is not entitled to summary judgment because it has failed to demonstrate as a matter of law that it did not have prior written notice of the subject defect. Plaintiff argues that defendant’s own internal records demonstrate that it had prior notice of and purportedly repaired as many as seven potholes in front of 150 Canal Street on March 20, 2010, merely two and a half weeks prior to and in the immediate vicinity of her accident.

Plaintiff also argues that it cannot be determined with any semblance of certainty from defendant’s records whether the pothole causing her accident in the southwest corner of the intersection, was among those that were allegedly repaired. Plaintiff argues that a pothole of the size, shape and depth of that which caused her accident could not have developed in a mere two and a half weeks prior to her accident. In support of her position, plaintiff annexes the affidavit of Jacques Wolfner, P.E., a professional engineer, as her Exhibit “E.” In his affidavit, Mr. Wolfner opines that the subject pothole had to have previously existed, thus being apparent to the work crew on March 20, 2010 (*id.* at 11). Additionally, he opines that according to photographs taken of the defect on April 29, 2010, only three weeks subsequent to plaintiff’s accident, the subject pothole shows no signs of having been repaired in the interim. Thus, plaintiff argues that defendant must have had

prior written notice of the subject pothole on March 19, 2010, but failed to repair it, despite what its records may or may not indicate.

Plaintiff also argues that defendant is not entitled to summary judgment since it has not negated, as a matter of law, the possibility that it created the defective condition which caused her accident. She argues that there is no dispute that defendant, via the DDC, retained a contractor, JJJ Enterprises, to act on its behalf to perform the construction work. Plaintiff next addresses the testimony of defendant's experts and emphasizes what she perceives to be contradictions in their respective testimony and the records said testimony emanates from and is reliant upon.

Conclusions of law:

“The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation” (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

In the case at bar, the Court finds that defendant has not met its initial burden of proving that it did not have prior written notice of said defect, nor caused or created said pothole. Undermining

plaintiff's arguments and its expert's opinion, as a mere "exercise in speculation," (Reply Aff. ¶ 5), defendant extols the expertise and capabilities of its own alleged experts, attempting to convince the Court to give credence to their testimony, while disregarding that of plaintiff's expert. However, the bottom line is that regardless of how many credentials a purported expert possesses or how many years he/she has been performing a particular job, where conflicting opinions and facts exist, summary judgment should be denied, in that any existing material issues of fact are more appropriately reserved for a jury's determination.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the City's motion for summary judgment is denied; and it is further

ORDERED that plaintiff shall provide the City with fresh authorizations within thirty (30) days from this decision; and it is further

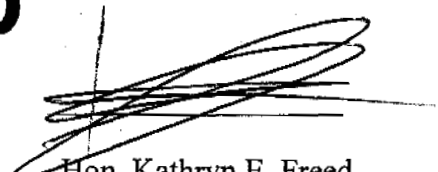
ORDERED that counsel is directed to appear for a compliance conference on July 23, 2013, at 80 Centre Street, Room 103 at 2 pm; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: June 14, 2013

JUN 14 2013

FILED
 JUN 24 2013
 NEW YORK
 COUNTY CLERK'S OFFICE

ENTER:

 Hon. Kathryn E. Freed
 J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT