Torres v City of New York
2014 NY Slip Op 31998(U)
June 5, 2014
Sup Ct, Bronx County
Docket Number: 350152/2011
Judge: Lizbeth Gonzalez
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[* 1]
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(e)

---X

Robel Torres, Infant by his Mother and Natural Guardian, Balbina Torres and Balbina Torres, Individually,

Plaintiffs,

-against-

The City of New York and The New York City Department of Parks and Recreation,

Defendants.

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DECISION and ORDER
Index No 350152/2011

Recitation of the papers considered in reviewing the underlying motion for summary judgment as required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits..1
Affirmation in Opposition and annexed Exhibits...2
Reply Affidavits..3

The plaintiffs claim that infant-plaintiff Robel Torres ("infant-plaintiff") sustained serious injuries including a fractured left tibia and fibula as a result of the defendants' negligence. The plaintiffs allege that the infant-plaintiff tripped on a defective sidewalk and fell at the intersection of West 205th Street and Goulden Avenue in the Bronx on 8/20/10. Defendant The City of New York ("City") moves for summary judgment pursuant to CPLR 3212 on the ground that it lacked prior written notice pursuant to the New York City Administrative Code § 7-201[c].

DISCUSSION

CPLR 3212 provides that summary judgment is warranted if the movant shows through the submission of admissible evidence that the opposing party has no defense to the cause of action or that the cause of action or defense has no merit. (CPLR 3212[b].)

The New York City Administrative Code § 7-201[c][2] states the following:

> 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.

In support of its motion, defendant City submits the results yielded from a search of the relevant sidewalks; the affidavits of Fulu Bhowmich and Fatima Rosas; the Big Apple map; and excerpts of the infant-plaintiff's 50-h hearing transcript.

The plaintiffs maintain that the infant-plaintiff's accident occurred on 8/20/10 at West 205th Street and Goulden Avenue. In support of its motion, defendant City contends that a search was performed for the period of 8/20/08 through 8/20/10 for applications, permits, cut forms, complaints/repair orders, contracts and milling/resurfacing records relative to the accident location. The search for the sidewalk located at Goulden Avenue between West 205th Street and Bedford Park Boulevard yielded five applications, fourteen inspections including eight permits of which seven were issued to Picone-Schiavone JV and one to Con Edison. The search for the sidewalk located at West 205th Street between Goulden and Paul Avenues yielded one permit issued to Vales Construction.

Fatima Rosas and Fulu Bhowmich are Department of Transportation ("DOT") Record Searchers. Defendant City proffers the affidavit of Ms. Bhowmich; it contends that the plaintiff never provided her deposition transcript. The City also proffers the 1/24/12 affidavit of Ms. Rosas. In their respective 1/24/13 affidavits, Ms. Bhowmich and Ms. Rosas confirm search results for the two aforementioned sidewalks.

Defendant City submits infant-plaintiff Robles' 11/18/10 50-h hearing transcript wherein he states that he observed the ground after he fell and observed a "cracked" and unhealthy sidewalk;

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he does not identify the cause of his fall as a "raised, uneven sidewalk," the marking designated by the Big Apple Map at the accident location.

Based on its search results and the proffered evidence, the defendant maintains that it neither caused nor created and lacked written notice of the alleged defective condition.

In opposition to defendant City's motion, the plaintiffs contend that infant-plaintiff Torres fell on a "raised, uneven sidewalk abutting a public park owned by defendants." The plaintiffs maintain that the Big Apple Map showing the raised defect at the exact accident location provides the City with prior written notice and argue that the City proffers nothing to establish that it neither caused nor created the condition.

In support of their position, the plaintiffs proffer the infant-plaintiff's 50-h hearing transcript and affidavit, the deposition transcript of Ms. Bhowmich, photographs marked at the infant-plaintiff's deposition and the Big Apple Map.

During his 11/18/10 50-h hearing, infant-plaintiff Robles was shown photographs of the accident location and confirmed that they fairly and accurately depict where he fell. He identified the raised portion of the sidewalk shown in the photograph as the cause of his fall and described the defect's height as "a little smaller" than the length of his thumb. A ruler, used against his thumb, measured at approximately two inches high.

During her 8/14/12 deposition, DOT Record Searcher Fulu Bhowmich, defendant City's witness, testified that the Big Apple Map showing the sidewalk defects is date stamped 6/26/03, when the Map was received by the New York City DOT from the Big Apple Sidewalk Pothole Protection Corporation. Ms. Bhowmich states that she is not qualified to interpret the Map or its key legend.

CONCLUSION

It is undisputed that Big Apple Maps filed with the New York City DOT serve as prior written notice of an alleged defect. (*Paterson v City of New York*, 1 AD3d 139 [1st Dept 2003].) The parties agree that the location of the infant-plaintiff's accident is marked on the pertinent Map by the symbol for a "raised, uneven sidewalk." The Court notes that the Notice of Claim alleges "broken and uneven sidewalks."

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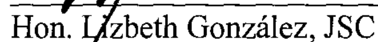
At issue is whether the City had notice of the alleged defect because the Map indicates a raised, uneven sidewalk whereas the infant-plaintiff described the defect as a crack that was a little smaller than his thumb in height, measuring approximately two inches tall. Defendant City proffers no rebuttal photographic or expert evidence. A jury must determine credibility and the dimensions of the crack. (*Sondervan v City of New York*, 84 AD3d 625 [1st Dept 2011]; *Reyes v City of New York*, 63 AD3d 615 [1st Dept 2009].)

Based on the foregoing, defendant City's motion for summary judgment is denied. The plaintiffs shall serve the defendant with a copy of this Decision and Order with notice of entry within 20 days.

This is the Decision and Order of the Court.

Dated: June 5, 2014

So ordered,



Hon. Lizbeth González, JSC