

Matthews v City of New York
2014 NY Slip Op 32059(U)
July 31, 2014
Supreme Court, New York County
Docket Number: 118668/06
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 118668/2006
MATTHEWS, PATRICIA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 118668/06
MOTION DATE 5/2/14
MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion for dismissal / summary judgment

Notice of Motion; Affirmation in Support — Exhibits A-J	█ No(s). 1; 2
Affirmation in Opposition — Exhibits 1-3	█ No(s). 3
Reply Affirmation	█ No(s). 4

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision and order.

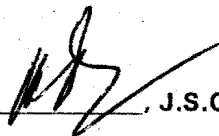
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

AUG 06 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/31/14
New York, New York


_____, J.S.C.

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....
- | | | | |
|---|---|--|--------------------------------|
| <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | | |
| <input checked="" type="checkbox"/> GRANTED | <input type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART | <input type="checkbox"/> OTHER |
| <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER | | |
| <input type="checkbox"/> DO NOT POST | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE | |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

FILED

AUG 09 2014

COUNTY CLERK'S OFFICE
NEW YORK

-----X
PATRICIA MATTHEWS,

Plaintiff,

- against -

Index No. 118668/06

THE CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY and MANHATTAN AND
BRONX SURFACE OPERATING AUTHORITY,

Decision and Order

Defendants.
-----X

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, defendants New York City Transit Authority (NYCTA) and Manhattan and Bronx Surface Operating Authority (MABSTOA) (collectively the Transit defendants) move for dismissal and for summary judgment dismissing plaintiff's complaint as against them (Motion Seq. No. 001). The City of New York (City) separately moves for dismissal and for summary judgment dismissing the action as against it (Motion Seq. No. 002).

BACKGROUND

Plaintiff alleges that, on September 18, 2005, she was injured when she tripped and fell on a defective sidewalk adjacent to 721 Lenox Avenue on the north side of West 146th Street in Manhattan.

The Transit defendants move for summary judgment on the ground that they do not own or control the area of the alleged incident. The City moves for summary judgment, or in the alternative, moves to dismiss on the ground that plaintiff has failed to demonstrate that the City had prior written notice of the alleged defect as is required under Administrative Code of the City of New York § 7-201 (c) (2).

DISCUSSION

"When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . "the benefit of every possible favorable inference.'" *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 (2005) (citation omitted).

The standards for summary judgment are well-settled.

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

The Transit defendants have provided sufficient evidence demonstrating that they did not own, maintain or control the area in dispute. In support of their motion, the Transit defendants submit the deposition testimony of Robert D. Williams, Assistant General Superintendent of Transportation for the NYCTA (Coffey Affirm. Ex. H. [Williams EBT]), whose duties at the time of the alleged incident were to monitor the operators and dispatchers in the Mother Clara Hale Bus Depot, which was located at the alleged incident site until January 2008 when it was closed. When asked who was responsible for maintenance of the sidewalk outside of the bus depot, Williams testified that the City was responsible. (Coffey Affirm. Ex. H. [Williams EBT] at 18-19.) Even plaintiff concedes that the “City owns the property adjacent to 721 Lenox Avenue” (Edmonds Opp. Affirm. ¶ 6.) Thus the Transit defendants have demonstrated prima facie entitlement to summary judgment as a matter of law.

As to the City’s motion, section 7-201 (c) (2) of the Administrative Code provides that, to maintain an action against the City for personal injury arising out of an alleged defective condition, the claimant must demonstrate prior written notice of the alleged defect. (*Schleif v City of*

New York, 60 AD3d 926, 927-928 [2d Dept 2009].) In support of its motion, the City provides the affidavit of Dmitriy Surkov, an employee of the Department of Transportation, who avers that he performed a record search for the day of, and two years prior to, the alleged incident, of the subject location, which revealed no records demonstrating that the City or its contractors performed work where plaintiff allegedly fell. (Marville Affirm. Ex. H. [Surkov Aff].)

The City also provides the Big Apple Map for the subject location and a legend or key for the map, exchanged by the City during discovery. (Marville Affirm. Ex. G.) The City argues that no symbols that pertain to broken, misaligned or uneven curbs and cracks or holes in the sidewalk in the key or legend appear on the north side of West 146th Street where plaintiff allegedly fell, and, therefore, is not notice of a defect in the sidewalk, as the presence of marks in other areas of the map, are not sufficient to demonstrate notice. (*See id.*)

The City has not definitively demonstrated that the markings in the map, did not provide the required notice of the defect of which plaintiff complains. The map is a reduced size with no scale, and the area where plaintiff allegedly fell is not specifically marked on the map. Thus, the Court cannot determine whether there are relevant symbols at the exact location

where plaintiff allegedly fell. Therefore, a triable factual question remains as to whether or not the City had prior written notice of the specific alleged defect.

CONCLUSION

Accordingly, it is hereby

ORDERED that Transit defendants' motion for summary judgment (Motion Seq. 001) is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and all cross claims by and against said defendants are dismissed, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the City's motion for summary judgment, or in the alternative, motion to dismiss (Motion Seq. 002) is denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that this action is referred to the Trial Support Office for reassignment to a general IAS part.

Dated: 7/31/14
New York, New York

ENTER:



J.S.C.

FILED

AUG 06 2014

COUNTY CLERK'S OFFICE⁵
NEW YORK