Thana v City of New York
2014 NY Slip Op 33562(U)
October 9, 2014
Supreme Court, Bronx County
Docket Number: 302340/2011
Judge: Mitchell J. Danziger
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FILED Oct 20 2014 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

ADA THANA AND ALEKSANDER THANA,

Plaintiff(s),

- against -

THE CITY OF NEW YORK AND THE NEW YORK DEPARTMENT OF TRANSPORTATION,

Defendant(s).

DECISION AND ORDER

Index No: 302340/2011

In this action for the negligent maintenance of a manhole cover on a public roadway, defendants move for an order granting them summary judgment thereby dismissing the complaint. Defendants aver that because the City had no prior written notice of the defect alleged, summary judgment in its favor is warranted. Plaintiffs oppose the instant motion alleging that defendants fail to establish prima facie entitlement to summary judgment insofar as they fail to establish the absence of prior written notice with respect to the missing manhole cover alleged. Moreover, plaintiffs allege that questions of fact exist with respect to whether defendants are liable under the doctrines of special use and res ipsa loquitur.

For the reasons that follow hereinafter defendants' motion is granted.

The instant action is for personal injuries allegedly

sustained by plaintiff ADA THANA (Thana) on April 10, 2010 September 28, 2008 while traversing the roadway - within her vehicle - located at the intersection of East Tremont and Morris Park Avenue, Bronx, NY. Within their complaint, plaintiffs allege that as Thana traversed the aforementioned roadway, she drove into an open manhole. Plaintiffs allege that defendants were negligent in the maintenance of the roadway and the manhole, such negligence causing Thana's accident and the injuries resulting therefrom.

Defendants' motion for summary judgment is granted insofar as they establish that they had no prior written notice of the open manhole alleged to have caused Thana's accident, that the manhole at issue did not confer a special use upon defendants as a matter of law and because insofar as defendants did not have exclusive control of the manhole, the doctrine of res ipsa loquitur is inapplicable.

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, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense,

and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets the initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

It is well settled that "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" (*Gorman v Town of Huntington*, 12 NY3d 275, 279 [2009]). Prior written notice provisions, thus, seek to strike a balance between a municipality's duty to maintain its roadways and sidewalks in a reasonably safe condition, and the reality that municipalities, due to the sheer number of sidewalks and roadways they are charged to maintain, cannot be aware of "every dangerous condition on its streets and public walkways" (*Poirier v City of Schenectady*, 85 NY2d 310, 314 [1995]; *Gorman* at 279). Hence, compliance with the prior written notice provision is a condition precedent to sue, which to the extent "enacted in derogation of common law, [must] always [be] strictly construed," (*Gorman* at 279; *Poirier* at 313). Unless a plaintiff establishes the that the municipality had prior written notice of the defect alleged to have caused injury for the period of time prescribed by

the relevant provision and that the municipality failed to or neglected to remedy the defect within a reasonable time thereafter, a municipality is excused from liability absent proof of a cognizable exception (*Poirier* at 313; *Barry v Niagara Frontier Tr. Sys.*, 35 NY2d 629, 633-634 [1974]).

Pursuant to section 7-201(c)(2) of the New York City Administrative Code,

> [n]o 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 acknowledgment 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.

Accordingly, generally, a municipal defendant bears no liability

under a defect falling within the ambit of section 7-201(c) "unless the injured party can demonstrate that a municipality failed or neglected to remedy a defect within a reasonable time after receipt of written notice" (*Poirier* at 313). One exception to the foregoing is where it is claimed that the municipal defendant affirmatively created the condition alleged to have caused plaintiff's accident, in which case, the absence of prior written notice is no barrier to liability (*Elstein v City of New York*, 209 AD2d 186, 186-187 [1st Dept 1994]; *Bisulco v City of New York*, 186 A.D.2d 85, 85 [1st Dept 1992]). A plaintiff seeking to proceed on a theory that the municipality created the defect alleged, however, must establish that the defective condition was improperly installed so as to bring the defect out of the ambit of ordinary wear and tear (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Oboler v City of New York,* 8 NY3d 888, 890 [2007]). Stated differently, the proponent of a claim that a municipal defendant created a dangerous condition must establish that work performed by the municipal defendant was negligently performed such that it "immediately result[ed] in the existence of [the] dangerous condition" alleged (*Yarborough* at 728 [internal quotation marks omitted]).

On a motion for summary judgment,

> [w]here the City establishes that it lacked prior written notice under the

> Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality

(*Yarborough* at 726).

The other exception to the prior written notice requirement is where it is established that the municipal defendant enjoyed a special use of the accident causing instrumentality (*Oboler v City of New York,* 8 NY3d 888, 889 [2007] ["We have recognized only two exceptions to prior written notice laws--where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality" (internal quotation marks omitted).]; *Perez v City of New York*, 116 AD3d 1019, 1019 [2d Dept 2014]; *Methal v City of New York*, 116 AD3d 743, 743 [2d Dept 2014]). The proponent of this exception has to establish a "special benefit from that property unrelated to the public use" (*Poirier* at 315; *Schleif v City of New York*, 60 AD3d 926, 926 [2d Dept 2009] ["However, even assuming the special use exception was applicable here, in order to avail himself of the benefit of that exception, the plaintiff was required to show that the City derived some special benefit from that alleged special use. Here, the plaintiff presented no proof as to the alleged special use of the manhole, let alone what special benefit the City

derived from it" (internal citations omitted).]; *Ocasio v City of Middletown*, 148 AD2d 431, 433 [2d Dept 1989]). When it is established that the municipality derived a special use of the accident causing instrumentality or appurtenance the requirement to establish prior written notice is obviated (*Perez* at 1019).

As the Court in *Posner v New York City Transit Authority* (27 AD3d 542, 544 [2d Dept 2006]), noted

> This doctrine authorizes the imposition of liability against any entity that installs an object onto the sidewalk or roadway, for injuries arising out of circumstances where the entity has been permitted to interfere with a street solely for private use and convenience which is in no way connected with the public use. Liability may [thus] be imposed since the special user has exclusive access to and control of the special use structure or appurtenance. This creates a duty to properly maintain the structure or appurtenance in a reasonably safe condition

Because the private use of an otherwise public appurtenance is an essential element to the applicability of the doctrine of special use, is it is pretty well settled that a municipal defendant can never derive a special use from the manholes within its limits because manholes and their covers are maintained by a municipality "in the discharge of its duty to create safe streets and cannot be considered a special use for [its] benefit" (*ITT Hartford Ins. Co. v Village of Ossining*, 257 AD2d 606, 607 [2d Dept 1999]; *Patterson*

v City of New York, 1 AD3d 139, 139 [1st Dept 2003] ["In any event, the presence of a manhole cover does not establish a special use so as to obviate notice."]).

Here, in support of the instant motion defendants tender sufficient evidence to establishing that they had no prior written notice of the defective condition alleged - an open manhole - thereby, demonstrating prima facie entitlement to summary judgment. Specifically, Thana at her 50-h hearing, which testimony defendants submit, testified that her accident occurred on April 15, 2010 at 9am, as she was operating a Nissan Maxima on East Tremont Avenue. As she entered the intersection of East Tremont Avenue and Morris Park Avenue, she heard a bump, felt the car shake and then observed the air bags deploy. Thereafter, she observed that the rear passenger wheel of her vehicle had entered an open manhole, meaning a manhole with no lid or cover. Defendants also tender an affidavit from Kourtney Collins (Collins), a Paralegal employed by DOT, wherein she details the results of a search conducted of DOT's records. Specifically, DOT conducted a search of its records for the roadway located at the intersection of East Tremont and Morris Park Avenues. The search was for a period of two years prior to and including April 15, 2010. The search yielded five permits, one application, one corrective action request, seven inspections, two maintenance and repair records three complaints, two gangsheets, and a Big Apple Map served upon DOT on August 28, 2003. A review

of the relevant documents unearthed by the search described within Collins affidavit fails to yield any complaints, inspections or repair records related to a missing manhole cover at the intersection of East Tremont and Morris Park Avenues for a period of two years prior to and including the date of plaintiff's alleged accident. Lastly, defendants tender an affidavit from Bruce Robinson (Robison), Principal Administrative Assistant employee by the New York City Department of Environmental Protection (DEP), who details the results of a search conducted by DEP of its records for the roadway located at the intersection of East Tremont and Morris Park Avenues. The search included records for manholes located thereat and spanned a period of two years prior to and including the location of plaintiff's alleged accident. Robinson states that the search yielded five work orders. A review of the work orders evinces that there were two complaints regarding manhole covers at the intersection of East Tremont and Morris Park Avenues. The first was on June 16, 2009 wherein DEP received a complaint about a sunken manhole cover, which was confirmed and fixed on July 22, 2010. The second complaint was for a missing manhole cover which DEP received on April 15, 2010 at 9:07am. The same was confirmed and repaired that day.

Contrary to plaintiffs' assertion, defendants evidence sufficiently establishes entitlement to summary judgment in that it negates the existence of prior written notice. While is it is true

that Collins and Robinson's affidavits do not allege or state that defendants had no prior written notice of the missing manhole cover, the documents which they incorporate by reference and provide establish the absence of prior written notice. Indeed the very case upon which plaintiffs rely for the proposition that the City is required to expressly negate the existence of prior written notice by way of an affidavit fails to support their assertion. In *Martinez v City of New York* (105 AD3d 1013,1014 [2d Dept 2013]), it is true that the court noted "[t[he City failed to submit any affidavit from any City official or employee demonstrating that a search of the appropriate records had been done and that there was no prior written notice of the alleged dangerous condition that caused the plaintiff's accident." However, this was not meant to mean - as averred by plaintiffs - that the absence of notice had to be expressly asserted by the City's witness, and was merely a reiteration of the general rule, which the court noted at the outset, namely that

> [a]s the party moving for summary judgment, in order for the defendant City of New York to demonstrate its prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against it on the ground that it had no prior written notice of the alleged defective or dangerous condition (see Administrative Code of the City of New York § 7-201 [c]), it was required to submit proof that it did not receive the notice required by the statute

(*id.* at 1014). Thus, the key is - as in any motion for summary judgment - proof, which defendants provide in abundance.

Here, the absence of prior notice was sufficiently established inasmuch as none of the records unearthed by the defendants' two searches established the prior written notice of a missing manhole cover. With respect to Collin's search, the contents of the permits are irrelevant and merit no discussion inasmuch as it is well settled that permits do not, as a matter of law, constitute prior written notice to a municipality under § 7-201 (*Levbarg v City of New York*, 282 AD2d 239, 242 [1st Dept 2011]). Moreover, none of the other documents found, such as the gangsheets, inspection reports and complaints establish a complaint about or an inspection or repair related to a missing manhole cover at the location herein. The same is true with respect to the records yielded by Robinson's search of DEP's records. The first of the two complaints prior to Thana's accident involve a dissimilar defect - a sunken manhole rather than a missing manhole cover. The second complaint does involve a missing manhole cover but was received either immediately before or after plaintiff's accident and, thus, cannot constitute prior written notice (§ 7-201 requires at least 15 days notice of any alleged defective condition).

Plaintiffs' opposition fails to raise any triable issues of fact and thus summary judgement must be granted. Contrary to plaintiffs' assertion, the doctrine of special use is inapplicable here, insamuch as it is well settled that a municipal defendant cannot derive a special use from manholes because they are for the benefit of the public and not the municipality (*ITT Hartford Ins. Co.* at 607; *Patterson* at 139). Moreover, plaintiff's assertion that liability here springs from the doctrine of res ipsa loquitur is meritless.

It is well settled that

> [t]he doctrine res ipsa loquitur represents an application of the ordinary rules pertaining to circumstantial evidence in negligence cases stemming from accidents having particular characteristics. When the doctrine is invoked, an inference of negligence may be drawn solely from the happening of the accident upon the theory that "certain occurrences contain within themselves a sufficient basis for an inference of negligence. The rule simply recognizes what we know from our everyday experience: that some accidents by their very nature would ordinarily not happen without negligence. Res ipsa loquitur does not create a presumption in favor of the plaintiff but merely permits the inference of negligence to be drawn from the circumstance of the occurrence. The rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may--but is not required to--draw the permissible inference

(*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986] [internal citations and quotation marks omitted]). Thus, the doctrine permits an inference of negligence to be drawn when the instrumentality causing injury to the plaintiff is within a defendant's exclusive possession or control and the accident alleged is not one which ordinarily occurs in the absence of negligence (*Flebot v New York Times Company*, 32 NY2d 486, 495 [1973]; *Abbott v Page Airways, Inc.*, 23 NY2d 502, 510 [1969]. The doctrine is applicable if (1) the event is one not ordinarily occurring without negligence; (2) the accident causing instrumentality in the exclusive control of the defendant; and (3) the accident was not due to voluntary action or contribution on the part of the plaintiff (*Corcoran v Banner Super Market, Inc.*, 19 NY2d 425, 430 [1967]; *Cacciolo v Port Authority of New York and New Jersey*, 186 AD2d 528, 528-529 [2d Dept 1992]). Exclusive control is an essential element and as the Court in *Corcoran* noted

> [i]t is never enough for the plaintiff to prove merely that he has been injured by the negligence of someone unidentified. Even though there is beyond all possible doubt negligence in the air, it is still necessary to bring it home to the defendant. On this too the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where it is clear that it is at least equally probable that the negligence was that of another, the court must direct the jury that the plaintiff has not proved his case

(*id.* at 431). Accordingly, in the case of manholes it is clear that since they are exposed and accessible to the public at-large, the doctrine of res ipsa loquitur generally does not apply to an alleged injury caused by a manhole (*Clark v City of Rochester*, 25 AD2d 713, 714 [4th Dept 1966]; *Godfrey v County of Nassau*, 24 AD2d 569, 569 [2d Dept 1965]).

Here, where the manhole at issue was in the middle of an intersection, and more importantly where, contrary to plaintiffs' assertion, the evidence belies that it was in defendants' exclusive control, res ipsa loquitur does not apply. Specifically, at his deposition, a transcript of which defendants submit, John Lobello (Lobello), a supervisor employed by the New York City Department of Environmental Protection (DEP), testified that the condition existing at the location where plaintiff alleges to have had her accident was a missing manhole casting. With respect to removing the same - the lid or cover - Lobello testified - in response to a question about lifting the manhole's cover - that the cover had two holes, which allowed the cap to be lifted using a hook. Accordingly, it is clear that anyone with a hook could have removed the cap herein and that given the manhole's location, defendants did not have exclusive control of the manhole. It is hereby

ORDERED that the complaint against defendants be dismissed, with prejudice. It is further

ORDERED that the defendants serve a copy of this Decision and Order with Notice of Entry upon plaintiffs within thirty (30) days hereof.

Dated : October 9, 2014
Bronx, New York

Mitchell J. Danziger, ASCJ