

**Morales v City of New York**

2015 NY Slip Op 30582(U)

March 4, 2015

Sup Ct, Bronx County

Docket Number: 304551/2011

Judge: Mary Ann Brigantti

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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15**

**PRESENT:** Honorable Mary Ann Brigantti

-----X  
ALTACRACIA MORALES,

Plaintiff,

-against-

THE CITY OF NEW YORK, et als.,

**DECISION / ORDER**

Index No. 304551/2011

Defendant  
-----X

The following papers numbered 1 to 4 read on the below motion noticed on October 17, 2014 and duly submitted on the Part IA15 Motion calendar of **December 17, 2014**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defs.' Notice of Motion, Exhibits	1,2
Pl.'s Aff. In Opp., Exhibits	3,4

Upon the foregoing papers, defendant The City of New York and the New York City Department of Transportation (collectively, the "City"), moves for an Order dismissing the complaint of the plaintiff Altagracia Morales ("Plaintiff") for failure to state a claim upon which relief may be granted, pursuant to CPLR 3211(a)(7), and/or for summary judgment, dismissing the complaint and all cross-claims against the City, pursuant to CPLR 3212. Plaintiff opposes the motion.

**I. Background**

This matter arises out of an alleged trip-and-fall accident that occurred on July 11, 2010, on the sidewalk abutting the property located at 294 East 163<sup>rd</sup> Street, Bronx, New York. The property at issue was owned by co-defendant Francisco Concepcion. At her deposition, Plaintiff testified that she tripped and fell on a "cracked" and "broken" sidewalk that was "dented" or had a depression. Mr. Concepcion testified, pertinently, that he recalled the City had planted trees in front of his property at some point in 2008. Street opening permits issued by the City granted the construction of "tree pits" on October 28, 2009, January 21, 2010, and April 30, 2010, and a permit for "plant and replace street trees" was granted on April 28, 2010.

The City now moves to dismiss the complaint, on the grounds that they had no prior written notice of the alleged defect, as required by New York City Admin. Code §7-201(c).

Moreover, there is no evidence that the City affirmatively created any dangerous condition at the accident location.

Plaintiff opposes the motion, and argues, *inter alia*, that there is an issue of fact as to whether the City's actions of planting trees in front of defendant Concepcion's property "negligently caused the cracked sidewalk and depression that plaintiff testified caused her to trip, fall, and become seriously injured."

## II. Standard of Review

### *CPLR 3211*

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 [1<sup>st</sup> Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1<sup>st</sup> Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1<sup>st</sup> Dept. 1997][on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 A.D.2d 98 [1<sup>st</sup> Dept. 1992]).

### *CPLR 3212*

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox*

*Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46<sup>th</sup> Street Development LLC.*, 101 A.D.3d 490 [1<sup>st</sup> Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

### III. Applicable Law and Analysis

Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries emanating from a dangerous roadway condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies ( see *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 [1999] ). Under New York City Admin. Code §7-201(c), no action may be maintained against the City for an allegedly defective condition on a sidewalk unless the City had written notice thereof, and failed to correct the condition within 15 days of receiving the notice

The Court of Appeals recognizes only two statutory exceptions to the prior written notice requirement: where the municipality itself created the defect through an affirmative act of negligence, or where the defect resulted from a special use by the municipality ( see *Amabile v. City of Buffalo*, 93 N.Y.2d 471 at 474; see also *Oboler v. City of New York*, 9 N.Y.3d 888, 889 [2007]; *Yarborough v. City of New York*, 10 N.Y.3d 726, 728 [2008] ). There is no actual or constructive notice exception to the prior written notice requirement (*Walker v. City of New York*, 34 A.D.3d 226 [1<sup>st</sup> Dept. 2006], *Campisi v. Bronx Water & Sewer Serv.*, 1 A.D.3d 166, 167 [1<sup>st</sup> Dept. 2003]).

The affirmative negligence exception is limited to work by the City or its retained contractors that immediately resulted in the creation of a dangerous condition, (*Yarborough v.*

*New York*, 10 N.Y.3d 726 [2008])... thus, the exception for affirmative acts cannot be invoked for allegedly negligent repairs, such as street re-paving or pothole repairs, which result in deterioration and the emergency of dangerous conditions over time (*Id*, see *Lopez v. G&J Rudolph Inc*, 20 A.D.3d 511 [2nd Dept. 2005]; *Bilecki v. New York*, 14 A.D.3d 301 [1st Dept. 2005]). "A municipality's nonfeasance, or passive negligence not rising to the level of affirmative negligence, does not invoke the exception" (*Monteleone v. Floral Park*, 74 N.Y.2d 917 [1989]).

The Court of Appeals has specifically directed that, "where 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, supra*, 10 N.Y.3d at 728).

In this matter, the City has established that it lacked any prior written notice of the allegedly defective condition. The map received from the Big Apple Pothole & Sidewalk Protection Corporation ("Big Apple Map") revealed nothing to indicate the existence of this defective condition at this accident location (see *D'Onofrio v. City of New York*, 11 N.Y.3d 581 [2008]). Records from the Department of Transportation indicate that various permits and street openings were issued to the area over the years, but these permits, alone, are insufficient to show "prior written notice" of any hazardous condition (*Levbarg v. City of New York*, 282 A.D.2d 239 [1<sup>st</sup> Dept. 2001]). Plaintiff, in opposition papers, does not dispute that the City lacked prior written notice of this allegedly defective condition. The burden, therefore, shifts to Plaintiff to raise an issue of fact as to whether the City either affirmatively created the defect through an act of negligence, or that a special use resulted in a special benefit to the City.

In opposition, Plaintiff argues that there is a factual issue as to whether the City affirmatively created this hazardous condition. In support, Plaintiff relies on her own deposition testimony, where she described the sidewalk condition as ... "cracked" and "broken." Plaintiff has submitted street opening permits for the subject location (that were provided by the City in its motion papers), which allowed for construction of, among other things, the installation of tree wells/pits in 2009 and most recently, April 2010. Co-defendant Francisco Concepcion testified that he recalled the City installing trees on the street "in 2008."

Plaintiff's submissions in opposition fail to raise an issue of fact as to whether the City

affirmatively caused or created a hazardous condition. First, at her deposition, Plaintiff does not state whether the “square hole” or depression at the sidewalk was at or near a tree, or in any way related to tree wells or pits on the sidewalk. Next, even accepting that the City installed trees and/or tree pits on the sidewalk approximately 2 ½ months before this accident, there is no evidence that the tree wells were installed negligently or immediately resulted in any hazardous condition (see *Vega v. City of New York*, 88 A.D.3d 497 [1<sup>st</sup> Dept. 2011]). It would therefore be mere speculation to conclude that the construction work immediately caused or created the complained-of condition (see *Hammond v. City of New York*, 100 A.D.3d 563 [1<sup>st</sup> Dept. 2012]). Moreover, “[t]he mere eventual emergence of dangerous conditions as a result of wear and tear, and environmental factors, does not constitute an act of affirmative negligence (*Rosenblum v. City of New York*, 89 A.D.3d 439 [1<sup>st</sup> Dept. 2011][internal citations omitted]). For these reasons, therefore, the City’s motion to dismiss is granted.

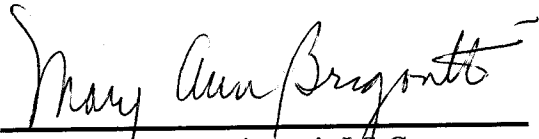
IV. Conclusion

Accordingly, it is hereby

ORDERED, that the motion for an Order dismissing Plaintiff’s complaint as to the City, pursuant to CPLR 3211 and 3212, is granted, and it is further,

ORDERED, that Plaintiff’s complaint, and any cross-claims asserted against the City are dismissed with prejudice.

Dated: 3/4/15

  
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Hon. Mary Ann Brigantti, J.S.C.