

Beal v New York City Tr. Auth.
2015 NY Slip Op 30925(U)
June 2, 2015
Supreme Court, New York County
Docket Number: 155518/2012
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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MONIQUE BEAL,

Plaintiff,

- against -

Index No.
155518/2012

NEW YORK CITY TRANSIT AUTHORITY AND
CITY OF NEW YORK,

Defendants.

Decision and Order

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HON. MICHAEL D. STALLMAN, J.:

Defendant City of New York (the City) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against it, based upon the failure to provide prior written notice of an alleged defective condition, as required by the New York City Administrative Code. Plaintiff has crossed-moved for partial summary judgment on liability against the New York City Transit Authority (the TA). The motion and cross motion are consolidated for disposition and decided as noted below.

Underlying Allegations and Procedural Background

Plaintiff alleges that, on October 11, 2011, she was walking in the walkway area (the Accident Site) which abuts the entrance to the subway

located at West 72nd Street and Broadway, New York, New York, when she tripped and fell on a “raised uneven potholed section of sidewalk” (the Defective Condition) and suffered injuries, including torn ligaments in her right knee (Notice of Claim, item 3; bill of particulars, items 2-3). She later testified that the Defective Condition was a metal plate near the entrance to the subway station (plaintiff 50-H Hearing at 10-13; plaintiff EBT at 12-14).

The City presented evidence that there were no written complaints for conditions at the Accident Site filed with the Department of Transportation and permits issued for work in the area of the Accident Site were issued to non-City entities, thereby showing that the City had not created the Defective Condition (Williams affirmation, ¶¶ 4-5).

On September 16, 2014, plaintiff filed her note of issue. On January 13, 2015, the City made its motion for summary judgment, seeking dismissal of plaintiff’s complaint and any cross claims, based upon plaintiff’s failure to establish that the City had prior written notice of the Defective Condition. On February 11, 2015, which was one hundred and fifty eight days after the note of issue was filed, plaintiff made her cross motion against the TA, seeking partial summary judgment on the issue of

liability. The basis of the cross motion is the TA's purported responsibility for the Defective Condition, as owner of the metal plate. The four-page affirmation of Thomas Markovits (the Markovits Affirmation) does not address the City's motion at all. It also fails to present any reason for the failure to make a motion against the TA within the one hundred and twenty day time frame established by CPLR 3212 (a). The TA seeks denial of plaintiff's cross motion, based upon its untimeliness (Berkowitz affirmation, ¶¶ 4-5).

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering "sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"On a motion for summary judgment, all of the evidence must be viewed in the light most favorable to the party opposing the motion, and all

reasonable inferences must be resolved in that party's favor" (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563, 565 [1st Dept 2010]; see also *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]).

"Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Municipal Liability and Prior Written Notice Requirement

"Administrative Code of the City of New York § 7-201 (c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specific location" (*Katz v City of New York*, 87 NY2d 241, 243 [1995]). "Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon" (*id.*). Generally, "factual disputes regarding the precise location of the defect that allegedly caused the plaintiff's fall and whether the alleged defect is designated on the Big Apple map . . . should be resolved by the jury" (*Perez v City of New York*, 110 AD3d 777, 778-779 [2d Dept 2013]; *Mora v City of New York*, 103 AD3d 610, 610-611 [2d Dept 2013];

Sondervan v City of New York, 84 AD3d 625, 625 [1st Dept 2011]).

Uncontroverted Facts Deemed Admitted

“Facts appearing in the movant’s papers which the opposing party does not controvert, may be deemed to be admitted” (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314, 315 [1st Dept 2006]; *Tortorello v Carlin*, 260 AD2d 201, 206 [1st Dept 1999]).

Timeliness of Summary Judgment Motions

“CPLR 3212 (a) requires summary judgment motions to ‘be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown’” (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *lv dismissed*, 9 NY3d 862 [2007] [citation omitted]). The time frames “are not options, they are requirements” (*Miceli v State Farm Mutual Auto Ins. Co.*, 3 NY3d 725, 726 [2004]; *see also Brill v City of New York*, 2 NY3d 648, 652 [2004]). A movant must make “a showing of good cause for the delay in making the motion” (*Brill*, 2 NY3d at 652; *see also Pantojas v Niang*, 122 AD3d 524, 524 [1st Dept 2014]). A cross motion for summary judgment is subject to the same requirements of timeliness (*see Freire-Crespo v 345 Park Ave.*

L.P., 122 AD3d 501, 502 [1st Dept 2014]). “[A]n untimely cross motion may be considered on its merits when it and the timely motion address essentially the same issues. . . . [It must be] a true cross motion . . . [rather than] an improper vehicle for seeking relief from a nonmoving party” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 86-88 [1st Dept 2013]).

Discussion

The City has presented evidence that it neither created nor did it receive prior written notice of the Defective Condition (Williams Affirmation, ¶¶ 4-5). Plaintiff has failed to controvert this showing and, therefore, it “may be deemed to be admitted” (*Kuehne & Nagle*, 36 NY2d at 544; *Madeline D’Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 609 [1st Dept 2012]). Because proof of prior written notice, or actual creation of a defective condition is a prerequisite to liability against the City, plaintiff’s failure to controvert the City’s showing mandates granting of the City’s motion for summary judgment against it (see *Katz*, 87 NY2d at 243; *Fazzolari v City of New York*, 105 AD3d 409, 410 [1st Dept 2013]).

The Court notes that plaintiff’s application is not directed against the City, but rather against the TA. It is thus not a proper cross motion but “an

improper vehicle for seeking relief from a nonmoving party” and is not based on the same issue the City raised, the lack of prior written notice (*Kershaw*, 114 AD3d at 88).

More significantly, plaintiff has not made “a showing of good cause for the delay in making the motion” (*Brill*, 2 NY3d at 652; *Group IX, Inc. v Next Print. & Design Inc.*, 77 AD3d 530, 530 [1st Dept 2010]). The Markovits Affirmation does not present any reason for waiting one hundred and fifty eight days after filing of the note of issue. CPLR 3212 (a)’s time frames for summary judgment motions “are not options, they are requirements” and plaintiff’s application was made well beyond the one hundred and twenty days CPLR 3212 (a) allows (*Miceli*, 3 NY3d at 726; see also *Torres v Zara Realty Holding Corp.*, 113 AD3d 538, 539 [1st Dept 2014]; *Perini Corp. v City of New York(Dept. of Env’tl. Protection)*, 16 AD3d 37, 40 [1st Dept 2005]). In this case, plaintiff has “set forth no explanation, let alone good cause for [her] delay” (*Freire-Crespo*, 122 AD3d at 502) and, accordingly, plaintiff’s purported cross motion must be denied.

Conclusion

It is, therefore,

ORDERED that the motion of the City of New York for summary


judgment is granted and the plaintiff's complaint is dismissed in its entirety, together with any cross claims, as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

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

ORDERED that plaintiff's cross motion is denied.

Dated: June 2, 2015
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLER