

Gegam v City of New York

2015 NY Slip Op 31329(U)

January 28, 2015

Supreme Court, Queens County

Docket Number: 18926/2008

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

ROSHAN ARA BEGAM, Administratrix of the Estate of MOHAMMED M. ROHAM, Deceased, Plaintiff, - against -
Index No.: 18926/2008
Motion Date: 01/14/15
Motion No.: 164
Motion Seq.: 4

THE CITY OF NEW YORK and THE NYC DEPARTMENT OF TRANSPORTATION,

Defendants.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by defendant, THE CITY OF NEW YORK and THE NYC DEPARTMENT OF TRANSPORTATION, for an order pursuant to CPLR 3212(b) granting said defendant summary judgment and dismissing the plaintiff's complaint:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Affirmation in Opposition-Affidavits.....7 - 10
Reply affirmation.....11 - 13

This is the defendant's second motion for summary judgment on the ground that the City of New York did not have prior written notice of an alleged roadway defect that allegedly caused the plaintiff's accident. The first motion was denied without prejudice to renew following the completion of depositions. The procedural posture of the case was set forth by this court in its prior decision dated July 30, 2013 as follows:

In this negligence action, the plaintiff, ROWSHAN ARA BEGAM, Administratrix of the Estate of MOHAMMED M. ROHAM, seeks to recover damages for personal injuries that Mr. Roham sustained as a result of an accident in which he fell off his bicycle when the

front wheel of the bicycle allegedly got stuck in a pothole. The accident took place near the intersection of 168th Street and Jamaica Avenue in Queens County, New York, on May 9, 2007.

The plaintiff, age 48 at the time of the accident, filed a Notice of Claim with the City of New York on July 31, 2007. The notice of claim states that the accident occurred on May 9, 2007 at approximately 12:00 noon on 168th Street near the intersection of Jamaica Avenue in front of the premises known as 91-21 168th Street, Jamaica, Queens. The notice states that "the plaintiff was riding his bicycle and was caused to fall as the bicycle wheel struck a large hole in the roadway causing him to fall." Plaintiff states that he sustained serious injuries, including a fractured ankle as a result of the fall.

On September 20, 2007, plaintiff Mohammed Roham appeared for a 50-H hearing. He testified that he was employed as a security guard for Summit Security Service. On the date of the accident he was going from his home to his work place approximately one mile away. He was riding on the right side of 168th Street, 25 feet from Jamaica Avenue and four to five feet away from the curb. As he was riding, his front wheel struck and became encumbered in a deep hole and he was thrown off the bicycle causing a trimalleolar fracture to his right ankle for which he was in a cast for two months. He also injured his head, right elbow, right shoulder, right knee, lower back and neck.

The plaintiff commenced this action by service a summons and complaint dated July 29, 2008. Defendant served a verified answer dated August 21, 2008 and a verified bill of particulars dated August 20, 2009. On April 14, 2010 plaintiff died as the result of an unrelated accident. Pursuant to the order of the Court dated December 7, 2011, Rowshan Ara Begam, decedent's wife, the Administratrix of the Estate of Mohammed M. Roham was substituted as plaintiff in this matter and the caption amended accordingly. On May 18, 2012, Plaintiff filed a note of issue. In an affirmation annexed the note of issue plaintiff states that the note of issue was filed at the direction of the court although all discovery, including depositions of all parties, had not been completed. Thereafter, the parties agreed by so ordered stipulation dated August 30, 2012 to complete discovery including depositions while the matter remained on the trial calendar. It was agreed that depositions would take place before November 16, 2012 and it was also agreed that motions for summary judgment would be stayed until the completion of discovery. On June 13, 2013, as substantial discovery was still outstanding, the note of issue was vacated in the Trial Scheduling Part by Justice Weinstein.

As stated above the defendant's first motion for summary judgment was denied without prejudice to renew following discovery. The defendant's witness on the issue of prior written notice was Ms. Stacey Williams who was deposed on September 4, 2013.

Defendant, City of New York, now moves, following the completion of depositions, for an order pursuant to CPLR 3212(b), granting summary judgment in favor of said defendant and dismissing the plaintiff's complaint on the ground that there was no prior written notice of the alleged defect in the subject roadway given to the City of New York as required under Administrative Code of the City of New York § 7-201. Pursuant to Administrative Code of the City of New York § 7-201(c)(2), a plaintiff must plead and prove that the City had prior written notice of a roadway defect, or dangerous or obstructed condition before it can be held liable for its alleged negligence related thereto" (Minew v City of New York, 106 AD3d 1060 [2d Dept. 2013]). Defendant's counsel cites the Court of Appeals holding in Yarborough v City of New York, 10 NY3d 726 [2008], which states 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." Also see Marshall v City of New York, 52 AD3d 586 [2d Dept. 2008][where a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies]).

In order to demonstrate, prima facie, that it did not have prior written notice of the defect, defendant submits an affidavit from Stacey Williams, a Supervisor of Litigation Services at the New York City Department of Transportation who conducted a search for prior written notice of the alleged condition on 168th Street as described by the plaintiff at his 50-H hearing and in his Notice of Claim. Ms. Williams states in her affidavit dated November 14, 2014, that she is presently employed by the City of New York Department of Transportation as a Supervisor of Litigation Services. She states that, as such, she is personally familiar with the records kept and maintained by the NYC DOT in the regular course of business. She states that she conducted a search for any maintenance and repair records, permits, inspection reports, complaints, and contracts for the location of plaintiff's alleged incident, specifically the

intersection of 168th Street and Jamaica Avenue, for the two year period prior to May 9, 2007. She states that based upon her search she found no such records relative to the subject location. She states that on January 28, 2014 she conducted an additional search of the NYC DOT's Highway Inspection and Quality Assurance (HIQA) division's database for any complaints or reports of potholes or roadway defects in the roadway located at 168th Street and Jamaica Avenue, County of Queens. The search for the two year period prior to and including May 9, 2007 did not reveal any potholes or roadway defects on or before the date of the plaintiff's accident. Thus, she states, her search revealed no records to indicate that the NYC DOT received any written notification including any complaints, corrective action requests, or violations of any pothole or roadway defects such as the one allegedly involved in the plaintiff's accident.

In her examination before trial, taken on September 4, 2013, Ms. Williams stated that her search revealed no records for maintenance and repair records that would encompass the time period from May 9, 2007 and prior thereto. She stated that no permits, contracts or inspection reports were issued for any entities for that location during that time period. She also found no record of complaints with regard to roadway conditions at the subject location.

Defendant argues that pursuant to NYC Administrative Code §7-201, the plaintiff must plead and prove that the City received prior written notice of a condition that allegedly caused the subject accident and that it failed to repair or remove the condition within 15 days after receipt of such notice. Defendant contends, based upon the deposition testimony and affidavit of Ms. Williams that the City has shown, prima facie, that it did not receive any written notification of the alleged pothole or roadway defect that precipitated plaintiff's alleged accident. Defendant contends that the testimony shows that Ms. Williams conducted a search for maintenance and repair records, permits, inspection reports, complaints and contracts for the location of the plaintiff's accident and found no such records. Additionally, she conducted a search of reports of complaints or reports of potholes or roadway defects at the subject location and her search did not reveal any notice or records of potholes or roadway defects at the subject location on or before the date of the plaintiff' accident.

Defendant also requests that the complaint against the New York City Department of Transportation be dismissed as the NYC DOT is not an entity capable of being sued. Counsel contends that pursuant to the New York City Charter § 396, agencies of the City

are not legal entities for the purpose of suit and should not be named as a party in the caption (citing Funt v Human Resources Admin. of the City of New York, 68 AD3d 490 [1st Dept. 2009]).

In opposition, plaintiff's counsel asserts that the defendant has failed to establish, prima facie, that the City was not on notice of the allegedly defective condition which caused the plaintiff's accident. He states that although the affidavit of Ms. Williams establishes that she conducted a search of the records her testimony does not definitively demonstrate that the City was without proper notice. Plaintiff asserts that where there is evidence that the offending hazard was created by or resulted from the negligent repair undertaken by the defendant and there is a triable issue of fact as to whether the hazard was created by the negligent repair work of the defendant, summary judgment may not be granted.

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and defendant's reply thereto, this court finds that the defendant's motion for summary judgment is granted.

"Where a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by a defective condition in the roadway unless it either has received written notice of the defect or an exception to the written notice requirement applies" (Pallotta v City of New York, 121 AD3d 656 [2d Dept. 2014]; Amabile v City of Buffalo, 93 NY2d 471 [1999]; Braver v Village of Cedarhurst, 94 AD3d 933 [2d Dept. 2012]; Pennamen v Town of Babylon, 86 AD3d 599 [2d Dept. 2011]). Recognized exceptions to the prior written notice requirement exist where the municipality has created the defect through its affirmative negligence, or where a special use of the property has conferred a special benefit upon the municipality (see Amabile v City of Buffalo, supra, at 474; Braver v Village of Cedarhurst, 94 AD3d at 934 [2d dept. 2012]).

Here, the City succeeded in establishing its prima facie entitlement to judgment as a matter of law by submitting, inter alia, the affidavit of a Department of Transportation employee, which indicated that she had conducted a search of the relevant records covering the period of two years prior to the date of the accident and had found no prior written notice of a defective condition corresponding to the condition alleged by the plaintiff.

In opposition, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact (see Bryan v City of Peekskill, 74 AD3d 1115 [2d Dept. 2010]; Denio v City of New Rochelle, 71 AD3d 717 [2d Dept. 2010]; McCarthy v City of White Plains, 54 AD3d 828 [2d Dept. 2008]).

Accordingly, based upon the foregoing it is hereby,

ORDERED, that the branch of the motion to dismiss the action against NYC Department of Transportation, an agency of the City, is dismissed without opposition pursuant to § 396 of the New York City Charter. and it is further,

ORDERED, that the motion by defendant, The City of New York, for summary judgment dismissing the complaint of the plaintiff on the ground of lack of prior notice is granted, and it is further,

ORDERED, that the Clerk of Court shall enter judgment accordingly.

Dated: January 28, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.