

Talley v City of New York
2015 NY Slip Op 32157(U)
October 14, 2015
Supreme Court, Bronx County
Docket Number: 308736/11
Judge: Howard H. Sherman
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 04

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SHANTEL TALLEY,

Plaintiff,

Index No.308736/11

-against-

Decision and Order

THE CITY OF NEW YORK, NEW YORK TRANSIT
AUTHORITY, and MANHATTAN and BRONX SURFACE
OPERATING AUTHORITY, "JOHN DOE,"

Present:

Hon. Howard H. Sherman
J.S.C.

Defendants.

-----X
The following papers numbered 1 to 4 read on this motion by the defendant City of New York for an order pursuant to CPLR 3212 dismissing the complaint and any all cross-claims noticed on July 3, 2014 and fully submitted on the Motion Calendar of September 1, 2014.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Affirmation in Support - Exhibits A-H	1	
Affirmation in Opposition - Exhibits A - D	2	
Affirmation in Reply, Exhibit A	3	
Subsequent Correspondence of Parties, collectively	4 ¹	

Upon the foregoing papers this motion by defendant City of New York for an order pursuant to CPLR 3212 and/or CPLR 3211 dismissing the complaint and all cross-claims due to plaintiff's failure to comply with the prior written notice requirements of §7-201[c] of the Administrative Code of the City of new York is granted for the reasons set forth below.

Procedural Background

By Notice of Claim filed October 4, 2010, Shantel Talley ("Talley") notified the City of New York that on August 6, 2010 at 3:00 p.m. , while alighting from a bus on eastbound Fordham Road in Bronx, New York , she stepped into a hole in the street approximately 25 feet from the corner of Third Avenue. The claimant maintained that the City caused/permitted/allowed the dangerous

¹ The court will consider the subsequent submissions to the extent that as they discussed the Appellate decision upon review of a Supreme Court case cited as authority by plaintiff.

condition in the roadway having failed to repair, back-fill, level or pave the hole. It was also claimed that actual notice of the condition was filed with the Department of Transportation more than 15 days prior to the date of the accident and the City had failed to timely repair the condition. Photographs of the location and the condition were annexed to the Notice.

On December 14, 2010, a hearing pursuant to Section 50-h of the General Municipal Law was held, and on October 31, 2011, this action was commenced, plaintiff alleging *inter alia* that the subject location was rutted, broken, depressed, unpaved and unlevelled, and that the City was negligent in creating, causing, permitting and allowing this condition to become dangerous.

Motion/Contention of Parties

The City of New York moves for an order pursuant to §§ 3212 and/or CPLR 3211 dismissing the complaint and all cross-claims insofar as asserted against it on the grounds that plaintiff failed to plead or to prove that the City had prior written notice of the pothole that plaintiff alleged caused her to fall (see, New York City Administrative Code §7-201[c]).

The motion is supported by a copy of the deposition testimony of Danny Garcia, a records searcher for the New York City Department of Transportation (“DOT”), and the affidavit of Paul Cividanes, a DOT paralegal, who conducted a search of the electronic databases and paper records, including permits, and applications for permits, and inspections, repair orders, and complaints, and Big Apple Maps for the roadway located at East Fordham Road between Third Avenue (Mill River Rd.) and Washington Avenue that were generated for a two year period preceding the incident. The search revealed nine hard-copy permits, and three applications, and twenty inspections, and one maintenance and repair record, as well as three complaints and one “gang sheet” for roadway defects. Two Big Apple maps were found, the most recent served upon DOT on July 30, 2003 [Exhibit F]. Fatima Rosa, a DOT records searcher also conducted a search and the results are tendered as Exhibit

E hereto.

The City maintains that this action falls within the purview of Administrative Code §7-201[c] [2], and it is argued that the testimony, in conjunction with the search documents including the Big Apple Map revealing only sidewalk, curb, and pedestrian crosswalk defects, demonstrate as a matter of law that the City did not have prior written notice of the causative defect alleged here.

Nor, it is maintained, is there a triable issue fact that defendant caused or created the condition through an affirmative act of negligence that immediately resulted in the existence of the dangerous condition (see, Yarborough v City of New York, 10, NY 3d 726, 882 N.E. 2d 873 [2008]).

In opposition, plaintiff argues that compliance with Administrative Code § 7-201[c] was pleaded in the Notice of Claim, and that there is an issue of fact as to whether the specific pothole on which plaintiff tripped was among the conditions addressed by a City work crew in February 2010, and whether the City work crew created the causative defect by virtue of negligent repair work.

In reply, the City maintains that plaintiff has acknowledged the failure to plead prior written notice of the dangerous condition alleged, and cannot substitute the term “actual notice” as employed in the Notice of Claim for such purpose.

The City also maintains that even had plaintiff properly pleaded her cause of action, defendant has met its burden to prove as a matter of law the lack of prior written notice of the causative defect alleged here, as any reliance on the FITS report for such purpose is unavailing. Nor, it is argued, does plaintiff come forward with probative evidence to raise an issue of fact that her claim falls within the category of those exempted from the written notice requirement because

the DOT repair at the location was commenced and completed in a day, six months prior to the accident, and , as such, cannot qualify as work that “immediately results in the existence of a dangerous condition” (Bielecki v City of New York 14 AD 3d 301, 788 NYS 2d 67 [1st Dept. 2005]).

Discussion and Conclusions

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.

It is the finding of this court that the City is entitled to summary judgment having met its prima facie burden of demonstrating that plaintiff did not plead, nor is there an issue of fact that the City received prior written notice of the pothole that plaintiff identified as the causative defect here . The FITS report and associated gang- sheet for a specifically enumerated defect consisting of a pothole in front of 454 East Fordham Road, which was repaired on 02/01/10 , does not constitute prior written notice of the specific dangerous condition here (see, Haulsey v. City of New York, 123 A.D.3d 606, 999 NYS2d 400 [1st Dept. 2014], Stoller v. City of New York, 126 A.D.3d 452, 2 NYS3d 357 [1st Dept. 2015]). Nor, on this record is there raised an issue of fact that the City through an affirmative act of negligence caused or created the subject pothole virtue of that work

as there is no evidence here that the work “immediately result[ed] in the existence of a dangerous condition .” (Yarborough v. City of New York , 10 N.Y.3d 726, 728, 882 N.E.2d 873 [2008]; quoting Oboler v. City of New York, 8 N.Y.3d 888, 889,864 N.E.2d 1270 [2007]; see also, Wald v. City of New York , 115 A.D.3d 939, 982 NYS 2d 534 [2d Dept. 2014] [“evidence that the City, repaired potholes in the subject street on April 17, 2009, more than 10 weeks prior to the happening of the accident, did not raise a triable issue of fact as to whether the city affirmatively created the condition , as there was no evidence that a dangerous condition existed immediately after the repair was completed or that the repair caused subsequent immediate deterioration .”]; see also, Arzeno v. City of New York, 128 A.D.3d 527,10 NYS3d 198 [1st Dept. 2015]).

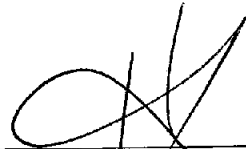
Accordingly, for the reasons above-stated , it is

ORDERED the motion of the defendant City of New York be and hereby is granted, and it is further

ORDERED that summary judgment be and hereby is granted in favor of the City of New York as against plaintiff and co-defendants dismissing as asserted against it the complaint and any and all cross-claims herein.

This shall constitute the decision and order of this court.

Dated: October 14, 2015


Howard H. Sherman