Stevenson v City of New York
2016 NY Slip Op 30674(U)
March 8, 2016
Supreme Court, Bronx County
Docket Number: 306959/2010
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

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LISA STEVENSON,

Plaintiff,

-against-

DECISION / ORDER
Index No. 306959/2010

THE CITY OF NEW YORK,

Defendant

---X

The following papers numbered 1 to 6 read on the below motion noticed on July 10, 2015 and duly submitted on the Part IA15 Motion calendar of **December 4, 2015**:

Papers Submitted	Numbered
Def.'s Notice of Motion, Exhibits	1,2
Pl.'s Aff. In Opp., Exhibits	3,4
Def.'s Reply Aff., Exhibits	5,6

Upon the foregoing papers, the defendant the City of New York ("Defendant") moves for summary judgment, dismissing the complaint of the plaintiff Lisa Stevenson ("Plaintiff") pursuant to CPLR 3212. Plaintiff opposes the motion.

I. Background

This matter arises out of an alleged trip and fall accident that occurred on May 25, 2009, on the roadway in front of a bus stop located on Einstein Loop North and Hutchinson River Parkway in the Bronx, New York. Plaintiff alleges that she tripped and fell when she stepped into a pothole-like condition in the street in front of the BX28 Bus Stop. Defendant now moves for summary judgment, contending that it had no prior written notice of this defect more than 15 days prior to the date of the accident, and further, Defendant did not cause or create this allegedly defective condition through an affirmative act of negligence.

In support of the motion, Defendant asserts that the Department of Transportation ("DOT") conducted a search for various records concerning the accident location over a two-year period preceding the accident. The DOT's search for "records of permits, applications for

permits, corrective action requests, notices of violation, inspections, contractors, maintenance repair orders, complaints, gangsheets for roadway work, and milling and resurfacing of this location yielded no results." None of these records revealed any prior written notice of a hole in the roadway in front of the BX28 Bus Stop on Einstein Loop North in the Bronx. Defendant also alleges that a "Big Apple Map" search revealed no symbols for the alleged defect at the accident location. Defendant notes that any repair orders for other conditions near the location are insufficient to establish prior written notice of a defect.

Defendant further contends that there is no evidence that it caused or created this allegedly defective condition. At his examination before trial, DOT record searcher Dimitriy Surkov identified certain DOT documentation, including a March 20, 2008 repair order for a pothole located at the intersection of Einstein Loop and Hutchinson Parkway, and history of a defect at that location, as well as three street opening permits issued to the Department of Environmental Protection ("DEP"), Consolidated Edison, and to Tully Construction Co. for certain specific time periods in 2007, 2008 and 2009. Defendant asserts that the street opening permits were for the purpose of certain water-related repairs that were not located near the accident site. In any event, the permits only evidence that the DEP was granted permission to do work, and is not evidence that any work was actually performed. The repair order identified by Mr. Surkov revealed that a reported pothole in the area was subsequently repaired, and therefore any dangerous condition no longer existed.

Plaintiff opposes the motion. Plaintiff notes that at her statutory hearing, she testified that the accident took place when she "fell into a hole" near the bus stop. She described the hole as "big" and "a little deep" and estimate it was approximately three to four inches deep, and 2-3 feet in diameter. The hole was in the street, and approximately six inches from the curb and sidewalk. Plaintiff argues that Defendant has not satisfied its burden of establishing lack of prior written notice of this defective condition. Plaintiff asserts that Defendant's record search is defective because it only sought records from the two years that pre-dated this accident. Defendant has therefore introduced no evidence to foreclose on the possibility that this deep sunken hole existed for more than two years before the accident took place. Further, the records that were produced contain repair work due to a pothole on the roadway where Plaintiff fell.

These records note that Defendant had written notice of the defect in March 2008, but do not evidence a sufficient repair. Plaintiff argues that Defendant introduced no evidence that the repair work was actually performed on the defect. Plaintiff also contends that the photographs demonstrate that the defect was "structural" and, when coupled with street-opening permits for the location, an inference can be made that the pothole was created by negligent paving work on the part of the Defendant.

II. Standard of Review

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. 46th Street Development LLC.*, 101 A.D.3d 490 [1st 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 [1st Dept. 2006], *Campisi v. Bronx Water & Sewer Serv.*, 1 A.D.3d 166, 167 [1st 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 emergence 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 DOT 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 [1st Dept. 2001]). Moreover, while Defendant has produced DOT records indicating that a pothole had been reported at or near the accident location in March of 2008, the record further notes that this condition was repaired on March 21, 2008. The existence of this report of a defect and subsequent repair, over a year and two months before the accident occurred, is insufficient to constitute prior written notice (*see Khemraj v. City of New York*, 37 A.D.3d 419 [2nd Dept. 2007], citing *Capiobianco v. Mari*, 272 A.D.2d 497 [2nd Dept. 2000][FITS report reflecting only that a pothole repair had been made to the area approximately 1 ½ years prior to the accident was insufficient to constitute written notice to the City]). Further, there is no evidence that the existence of the hole was the "immediate result" of any repair work that had been performed in the area (*see Bielecki v City of New York*, 14 AD3d 301; *Vega v. City of New York*, 88 A.D.3d 497 [1st Dept. 2011]).

In opposition, Plaintiff has failed to raise an issue of fact. Contrary to Plaintiff's contention, Defendant's record search spanning the two years before the accident occurred satisfied its burden of proving the absence of prior written notice (*see, e.g., Elstein v. City of New York*, 209 A.D.2d 186 [1st Dept. 1994]). Next, Defendant's records adequately established that a pothole reported at the intersection was addressed and repaired approximately 1 year and 2 months before the accident. The FITS report provided by Defendant and authenticated by a DOT employee demonstrated that on March 21, 2008, a maintenance crew repaired and closed a pothole located at the intersection that had been reported the day before.

Plaintiff also contends that it is possible that the Defendant "botched the repair job" because, inter alia, photographs of the defect depict one that is not caused by ordinary wear and tear. Plaintiff asserts that it may be inferred that the Defendant caused and created the defect by negligent paving work based on street opening permits for work performed on the street two years before the accident. These arguments are unavailing. Even assuming for purposes of this motion that the pothole repaired in March 2008 was the defect that caused this injury, the Plaintiff has offered no expert testimony to support her allegations that repairs were performed negligently and immediately resulted in a hazardous condition (*Yarborough*; *see also Oboler v.*

City of New York, 8 N.Y.3d 888). Photographs of the defect and street-opening permits do not allow the inference that the Defendant's actions, as opposed to some other instrumentality, immediately resulted in the condition, absent improper speculation (*see Oboler v. City of New York*; *Ghin v. City of New York*, 76 A.D.3d 409 [1st Dept. 2010]). Moreover, Plaintiff's contentions that Defendant could have "botched" the repair work fail to raise an issue of fact, since an "ineffectual pothole repair job which does not make the condition any worse" does not amount to an affirmative act of negligence (*see Arzeno v. City of New York*, 128 A.D.3d 527 [1st Dept. 2015]).

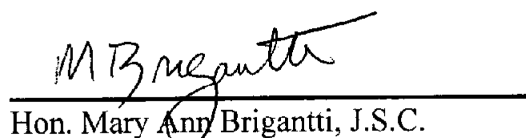
IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendant's motion for summary judgment is granted, and Plaintiff's complaint is dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 3/8, 2016



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