

**Tomashevskaya v City of New York**

2017 NY Slip Op 32146(U)

October 12, 2017

Supreme Court, New York County

Docket Number: 153705/2013

Judge: William Franc Perry

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY, J.S.C.PART 5

LYUDMILLA TOMASHEVSKAYA,  
Plaintiff

INDEX NO. 153705/2013

MOT. DATE August 15, 2017

- v -

MOT. SEQ. NO.003

THE CITY OF NEW YORK AND NEW YORK CITY  
DEPARTMENT OF PARKS AND RECREATION,  
Defendants

The following papers were read on this motion for Summary Judgment  
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A through J  
Answering Affidavits — Exhibits I through 3  
Replying Affidavits

ECFS DOC No(s). 1-15ECFS DOC No(s). 1-13ECFS DOC No(s). 1-8

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Lyudmilla Tomashevskaya (hereinafter “plaintiff”) on March 5, 2013, when she tripped and fell on the cobblestoned area abutting the Charging Bull statue located at 1 Bowling Green, in New York city. Defendants, The City of New York and New York City Department of Parks and Recreation, (hereinafter “City” and/or “defendants”) seek an order pursuant to CPLR §3212, for summary judgment dismissing the complaint because it did not receive prior written notice of the subject condition pursuant to New York City Administrative Code, §7-201 and because it did not cause or create the condition alleged to have caused plaintiff’s injuries. Plaintiff opposes the City’s motion arguing that §7-201 does not apply and there are issues of fact that require the matter to proceed to a jury trial. For the reasons that follow, the City’s motion is granted.

**PROCEDURAL HISTORY/CONTENTIONS**

Plaintiff commenced this action by service of a Summons and Complaint against the City on or about April 24, 2013. (Papandrew Aff., Ex. B). The City joined issue by serving a Verified Answer on or about May 30, 2013. (Papandrew Aff., Ex. C). On or about July 1, 2015, plaintiff filed leave to amend her Notice of Claim and Summons and Complaint. On or about January 11, 2016, plaintiff’s request was granted *nunc pro tunc* by the court. (Papandrew Aff., Ex. D and Ex. A). On or about August 13, 2013, September 30, 2013 and March 10, 2016, plaintiff filed, respectively, a Verified Bill of Particulars, Supplemental Verified Bill of Particulars and Third Supplemental Verified Bill of Particulars. (Papandrew Aff., Ex. E). On or about October 1, 2016, plaintiff filed her Note of Issue. (Papandrew Aff., Ex. F).

Plaintiff testified at a hearing pursuant to General Municipal Law §50-h, on July 24, 2013 and described the location of her accident as the cobblestone area in Bowling Green Park abutting the statue of the Charging Bull. Plaintiff testified that she was at the back of the bull, she “tried to approach the bull and there was a protruding stone, and I tripped over it”. (Papandrew Aff., Ex. G, p. 21-22).

Following the 50-h hearing, the City directed the Department of Parks and Recreation (“DPR”) to conduct a search for relevant records for the location for two years prior to and including the date of plaintiff’s accident. The City has submitted the DPR records and the affidavit of Yolanda Cleveland in support of its motion. (Papandrew Aff., Ex. I). On April 28, 2014, Juan Torres, a DPR su-

pervisor testified at a deposition wherein he was asked questions about the records located by DPR. The City contends that Mr. Torres' testimony demonstrates that plaintiff's accident occurred on a cobblestone sidewalk and that during the course of Mr. Torres' various inspections of the area, he never saw the particular cobblestone protruding from the rest of the surface. (Papandrew Aff., Ex. J, pp. 33-34, 39).

The City argues that plaintiff's alleged injuries resulted from a raised cobblestone brick in the pathway/walkway abutting the statue and as such, §7-201(c) requires plaintiff to prove compliance with the prior written notice law in order to defeat the City's motion.

Plaintiff argues that Mr. Torres' testimony was contradictory in his description of the situs of plaintiff's accident. Plaintiff claims that while Mr. Torres considered the cobblestone area to be a sidewalk, he also testified that the area is an island in the middle of the street. (Papandrew Aff., Ex. J, p. 16). Plaintiff contends that Mr. Torres' testimony is insufficient to establish that plaintiff's accident occurred on a "sidewalk" as the City maintains. Plaintiff argues that the photographs submitted in opposition to the City's motion clearly delineate between the pedestrian sidewalk and the triangular cobblestone island, claiming that the cobblestone island is neither a sidewalk nor a roadway as contemplated by §7-201. Finally, plaintiff contends that the affidavit of her investigator and engineer raise issues of fact as to whether the City created the alleged defective condition due to the negligent placement of the cobblestone.

#### STANDARD OF REVIEW/ANALYSIS

When deciding a summary judgement motion, the Court's role is solely to determine if there are any triable issues of fact, not to determine the merits of any such issues. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 NYS2d 316 (1985). The Court must view the evidence in the light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Sosa v. 46<sup>th</sup> St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 (1<sup>st</sup> Dept. 2012). If there is any doubt as to the existence of a triable fact, the motion for summary judgement must be denied. CPLR §3212[b]; *Grossman v. Amalgamated Housing Corp.*, 298 AD2d 224, 226, 750 NYS2d 1 (1<sup>st</sup> Dept. 2002).

Summary judgement is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgement as a matter of law. See, e.g., *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 NYS2d 923 (1986); *Andre v. Pomeroy*, 35 NY2d 361, 364, 320 N.E.2d 853, 362 NYS2d 131 (1974). The party moving for summary judgement must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact. *Santiago v. Filstein*, 35 AD3d 184, 185-186, 826 NYS2d 216 (1<sup>st</sup> Dept. 2006), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 NYS2d 316 (1985). A failure to make such a showing, requires denial of the motion. See, *Smalls v. AII Indus., Inc.*, 10 NY3d 733, 735, 883 N.E.2d 350, 853 NYS2d 526 (2008).

Contrary to plaintiff's assertion that the situs of her accident did not occur on a sidewalk/pathway, it is clear from the pleadings that she alleges injuries resulting from a "raised brick in the pathway/walkway", specifically a "cobblestoned pathway/walkway abutting the Charging Bull statue. (Papandrew Aff., Ex. A, paragraph 3). As such, plaintiff must plead and prove compliance with Administrative Code §7-201 (hereinafter §7-201) and demonstrate that the City had prior written notice of the allegedly defective condition and plaintiff's failure to do so requires dismissal of the complaint. *Elstein v. City of New York*, 209 AD2d 186 (1<sup>st</sup> Dept. 1994).

In support of her contention that §7-201 is inapplicable to the instant matter, plaintiff relies on case law where the accident occurred on a defective paddleball court, and a tree well. See, *Walker v Town of*

*Hempstead*, 84 NY2d 360 (1994); *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 (2008). In *Walker*, the Court of Appeals held that prior written notice was not a condition precedent to municipal liability and in *Vucetovic*, the Court held that a tree well did not constitute a part of the sidewalk for purposes of §7-210. These cases offer no support to plaintiff's position here as it is clear that plaintiff's accident occurred on a sidewalk as that term is defined in §701-c (2) (b).

As the Court of Appeals has recognized, prior written notice statutes are always strictly construed, and unless a party can demonstrate that a municipality failed to remedy a defect within a reasonable time of receiving written notice, the "municipality is excused from liability absent proof of prior written notice or an exception thereto [citations omitted]." *Poirier v. City of Schenectady*, 85 NY2d 310, 313 (1995). The Court in *Poirier* observed the practical reality of limiting municipal liability in this way, noting that municipal officials are not aware of every dangerous condition that may exist on a public street or walkway and thus liability to repair the defect can only be imposed after receipt of written notice of the defect. *Id.*, 85 NY2d at 314.

Once the City meets its burden demonstrating that there was no prior written notice of the alleged defect, the burden then shifts to the party opposing the motion to demonstrate "the applicability of one of two recognized exceptions to the [prior written notice requirement] – 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." *Ortiz v. City of New York*, 67 AD3d 21, 27 (1<sup>st</sup> Dept. 2009), *rev'd* 14 NY3d 779 (2010) (reversing the First Department, finding no triable issue of fact exists "as to whether the City created a dangerous condition that caused plaintiff's injuries.").

Plaintiff appears to conflate §7-201 and §7-210. However, §7-210 shifts liability for defective sidewalk conditions from the City to abutting property owners. In contrast, §7-201 is a prior written notice statute. §7-201-c (2) (b) defines the term "sidewalk" to include a "boardwalk, underpass, pedestrian walk or path, step and stairway." The City's motion for summary judgment is based on the prior written notice provision of § 7-201, not the liability shifting provision of § 7-210. As such, plaintiff's argument that §7-210 does not apply is misplaced.

Additionally, the photographs submitted in support of plaintiff's contention that her accident did not occur on a sidewalk, in the court's opinion, prove quite to the contrary and depict a "pedestrian walk or path", both of which fall within the definition of "sidewalk under §7201-c (2) (b). The Field Inspections Forms for the two-year period prior to plaintiff's accident did not reveal any "unacceptable sidewalk condition" at the location of the accident. Likewise, the Park Inspections Reports reveal no unacceptable conditions for the cobblestone area immediately abutting the Charging Bull statue; in fact, the records submitted in support of the City's motion demonstrate that the only complaint received for the subject location did not involve the cobblestones around the statue. (Papandrew Aff., Ex. I).

Here, the City has met its burden establishing that it did not receive prior written notice of the alleged defect through its search of Parks Department records. (Papandrew Aff., Ex. I). The affidavit of the records clerk and the testimony of Mr. Torres, establish that the City did not have prior written notice of the alleged defect. See, *Campisi v. Bronx Water & Sewer Serv., Inc.*, 1 AD3d 166, 167 (1<sup>st</sup> Dept. 2003); *Cruz v. City of New York*, 218 AD2d 546, 547 (1<sup>st</sup> Dept. 1995).

As there was no prior written notice of the defect, the City can only be held liable for affirmative negligence if plaintiff demonstrates that the City caused or created the allegedly dangerous condition or a special use confers a special benefit upon the City.<sup>1</sup> *Yarborough v. City of New York*, 10 NY3d 726

<sup>1</sup> The "special use" exception is not implicated here as plaintiff has not alleged that the City maintained a "special use" of the sidewalk where plaintiff tripped and fell.

(2008). As noted, the records submitted in support of the City's motion clearly establish that the City did not cause or create the condition that is alleged to have caused plaintiff to trip and fall. Similarly, there is no evidence that the condition which plaintiff claims to have been injured on was the subject of any prior repair by the City. (Papandrew Aff., Ex. 1).

Plaintiff argues the City created the alleged defective condition by negligently placing the subject cobblestone at some point in the distant past. In support of this contention, plaintiff relies on the affidavit of her investigator, Valentin Slivka, and the report of engineering expert, Eugene R. Camerota, PE. (Prakhin Aff. in Opp., Ex. 1). This argument must fail as the First Department has held that the affirmative negligence exception to §7-201 is limited to "work done by the City that immediately results in the existence of a dangerous condition." See *Bielecki v City of New York*, 14 AD3d 301 (1st Dept. 2005); *Oboler v City of New York*, 8 NY3d 888 (2007).

Here, plaintiff has simply not met her burden of proof to oppose the City's motion. Moreover, even though the City did not need to prove that it did not cause or create the allegedly defective condition, the record before the court clearly establishes that the City did not perform any work at the subject location that caused or created an allegedly defective condition.

**CONCLUSION**

ORDERED, that Defendants' the City of New York and New York City Department of Parks and Recreation, motion for summary judgment seeking dismissal of the complaint is granted in its entirety without costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: October 12, 2017

  
HON. W. FRANC PERRY, J.S.C.

1. Check one:

CASE DISPOSED     NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED     DENIED     GRANTED IN PART     OTHER

3. Check if appropriate:

SETTLE ORDER     SUBMIT ORDER     DO NOT POST

FIDUCIARY APPOINTMENT     REFERENCE