Mazzella v City of New York
2018 NY Slip Op 30138(U)
January 23, 2018
Supreme Court, New York County
Docket Number: 156935/2014
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

ERIC MAZZELLA
Plaintiff

INDEX NO. 156935/2014

MOT. DATE 10/31/17

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, CONSOLIDATED EDISON COMPANY OF NEW YORK and WELSBACH ELECTRIC CORPORTATION
Defendants

MOT. SEQ. NO. 003

The following papers were read on this motion for Summary Judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A through K	ECFS DOC No(s). 1
Answering Affidavits — Exhibits 1-3	ECFS DOC No(s). 2
Replying Affidavits Exhibit A	ECFS DOC No(s). 3

In Motion Sequence No. 003 Defendants City of New York and New York City Department of Transportation (hereinafter "City") seek an order pursuant to CPLR §3212 for summary judgment, dismissing the amended complaint and all cross-claims. Plaintiff opposes the motion.

FACTUAL BACKGROUND and CONTENTIONS

In this personal injury action, plaintiff Eric Mazzella, seeks to recover damages for personal injuries allegedly sustained on November 1, 2013, when he tripped and fell while walking on the roadway located at 301 West 45th Street. In support of its motion for summary judgment, the City submits the pleadings, plaintiff's 50-h testimony and documentary evidence consisting of Department of Transportation ("DOT") records for a period of two years prior to and including November 1,2013, the date of the subject accident. (Gibek Aff., Ex. G, H, I, J, and K).

Based on the pleadings, plaintiff's 50-h testimony and the documentary evidence, the City contends that it is entitled to summary judgment because it did not have prior written notice of the alleged defective condition and it did not cause or create the defective condition. The City argues that the results of the searches of various DOT records reveals *prima facie* evidence that it did not have any prior written notice and is thus entitled to judgment dismissing the amended complaint. Plaintiff argues that issues of fact exist which preclude summary judgment in favor of the City and that inasmuch as this court denied defendant Welsbach Electric Corporation's motion for summary judgment finding issues of fact regarding work Welsbach performed at the accident site, the court should also deny the City's motion upon the same grounds, i.e., that issues of fact preclude summary judgment and that the application is premature as discovery is not complete. For the reasons that follow, the City's motion is granted.

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. 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 (1st Dept. 2012). If there is any doubt as to the existence of a triable fact, the mo-

tion for summary judgement must be denied. CPLR §3212[b]; *Grossman v. Amalgamated Housing Corp.*, 298 AD2d 224, 226, 750 NYS2d 1 (1st Dept. 2002).

A party opposing a motion for summary judgment may not rely upon conclusory allegations, but must present evidentiary facts sufficient to raise a triable issue of fact. *Mallad Construction Corp. v. County Federal Savings & Loan Assoc.*, 32 N.Y.2d 285, 290 (1973); *Tobron Office Furniture Corp. v King World Productions,* 161 A.D.2d 355,356 (lst Dept. 1990) (the opponent of a motion for summary judgment must assemble, lay bare and reveal his proofs; merely setting forth factual or legal conclusions is not sufficient); *Polanco v. City of New* 244 AD2d 322 (2d Dept. 1997) ("a shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment"). The opposing party has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. *Zuckerman* v. *City of New York,* 49 NY2d 557, 562 (1980).

In order to hold the City liable, plaintiff must plead and prove compliance with Administrative Code §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 (1st Dept. 1994). 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 (1st 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.").

In opposition to the City's motion, plaintiff contends that the City caused and created the alleged defective condition by way of its "inspection, supervision or control" of the work authorized to be performed by defendant Welsbach pursuant to a permit issued by the City. According to plaintiff, Welsbach was performing work in the accident location pursuant to a contract it contends the City did not produce, following the search conducted for relevant DOT records. Plaintiff relies on the affidavit of Steve Harrington, a Welsbach project manager, which affidavit was submitted by Welsbach in support of its motion for summary judgment which the court denied. Plaintiff's attempt to conjure up an issue of fact claiming that the City's DOT search was deficient is simply unpersuasive.

Plaintiff s position is not supported by the records produced by the City in discovery and submitted in support of its motion herein, which indicate that a permit was issued to Welsbach Electric Corporation through the Sponsoring Agency of the New York City Department of Transportation under Contract # 10MBTR489, under permit # M01-2012270-155; M0l-201-2258-I18; for the purpose of "install traffic signals and underground conduit"; for the location of 8th avenue from west 45th street and west 46th street. (Gibek Aff., Ex. I). Furthermore, pursuant to the HIQA inspections conducted by the City, Welsbach passed each inspection. (Gibek Aff., Ex. I). Contrary to plaintiff's puzzling contention, the City's search was not deficient, nor did the City deny entering into any contracts; rather, the City provided the

contract number, the permit numbers, the inspections pursuant to the permit, and the results of the inspections, which demonstrate that Welsbach passed each inspection. (Gibek Aff., Ex. I).

Additionally, the Dynamic Access System for HIQA performed inspections of Welsbach's work, which all resulted in a "pass" or indicated that "work not started" and the inspection remarks indicated that the type of work being performed by Welsbach was for the purpose of "install traffic signals." Thus, the City contends that notwithstanding whether work was being performed by Welsbach, none of the inspections establish that the City received prior written notice of the subject condition or that the City caused or created the defect. Plaintiff alleges that an "indentation" in the roadway or a "depressed" roadway was the condition that caused his accident. The records which Plaintiff contends support this allegation, however, make no mention nor do they in any way relate to a "indentation" or depression within the roadway. Accordingly, the court finds that plaintiff has failed to sustain his burden of proof as the records relied on by plaintiff to create an issue of fact, are insufficient to defeat the City's motion for summary judgment.

Similarly, plaintiff has not demonstrated that the City may be held liable pursuant to a cause and create exception to the prior written notice requirement. To demonstrate that the City was affirmatively negligent, the Plaintiff must be able to show that the City's construction or repair work actually created the dangerous condition. *De Rosso v. Town of Poughkeepsie*, 51 A.D.3d 966 (2d Dep't 2008); *Daniels v. City of New York*, 29 AD 3d 514 (2d Dept. 2006); *Yarborough v. City of New York*,28 A.D.3d 650 (2d Dept. 2006) aff'd, 10 N.Y.3d 726 (2008); *Lopez v. G & J Rudolph. Inc*., 20 A.D.3d 511 (2d Dept. 2005). As the City correctly points out, plaintiff's claim that the City created the defect that allegedly caused plaintiff's accident is simply not supported by the record.

First, there is no indication that the City performed any of the work in the area that plaintiff s alleged accident occurred. Second, the work that Welsbach was authorized to perform was for the purpose of installation of traffic signals, which is irrelevant to the condition that plaintiff asserts caused his accident. Third, there is no indication through the City's records that the City performed any work in the location where plaintiff's accident allegedly occurred. Lastly, the City conducted inspections of Welsbach's work on March 30, 2015, April 23, 2014, October 11, 2013, January 22, 2013, September 6, 2012, October 2, 2013, April 22, 2013, and March 30, 2015, which all resulted in a "passed" inspections. (Gibek Aff., Ex. l).

Plaintiff's attempt to demonstrate the "special use" exception to the prior written notice law is equally unavailing. In *Poirier,* supra, the Court determined that the "special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use, and is therefore required to maintain a portion of that property." Id. at 315. Accordingly, the Court declined to find a special use in a metal traffic sign post anchored to the sidewalk, finding that these "signs do not confer a special benefit upon the municipality, or the motorists and pedestrians who use the public streets or sidewalks." Id. Moreover, the Court stated that "traffic signs are intended to promote the orderly flow of vehicular and pedestrian traffic, and the posts and the anchors are generally maintained by the municipality in the discharge of its duty to create safe streets." Id. Moreover, in *Hansen v. City of Long Beach*, the Court held that the special use doctrine should not apply to a municipality making use of its own property because such property is for the use of the general public and the municipality does not derive a special benefit from such use. 16 A.D.3d 625 (2d Dep't 2005).

Here, as the City correctly notes, the "special use" exception is unavailing as plaintiff's accident is alleged to have occurred in the roadway and not on the sidewalk as in *Poirier,* supra. Moreover, plaintiff has simply failed to demonstrate that the installation of traffic signals by Welsbach is related to the "indentation" and "depressed" roadway condition alleged to have caused plaintiff to trip and fall. Finally,

as noted, the City does not derive a special use from a traffic sign installed to regulate the flow of vehicular and pedestrian traffic. As such, plaintiff has failed to demonstrate that the prior written notice law does not apply to the facts before the court.

Plaintiff's contention that additional discovery is necessary to resolve the City's motion ignores the plain language of Administrative Code §7-201. Plaintiff has failed to meet his burden of proof to rebut the City's *prima facie* showing that it did not receive prior written notice of the alleged defect. The record before the court establishes that the City did not cause or create the alleged defect and the City did not derive a "special benefit" from the installation of the traffic signals. As such the City's motion is granted and the amended complaint and cross-claims are dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants', City of New York and New York City Department of Transportation, motion sequence 003 for summary judgment is granted and the amended complaint and any cross-claims are hereby severed and dismissed as against said defendants, and the Clerk is directed to enter judgment in favor of said defendants; and it is further,

ORDERED that the caption is amended accordingly; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Counsel for said moving defendant shall serve a copy of this Order on all other parties and on the Trial Support Office, 60 Centre Street.

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.

SO ORDERED:

Dated: January 23, 2018
New York, New York

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**