Concepcion v City of New York
2019 NY Slip Op 30964(U)
April 3, 2019
Supreme Court, New York City
Docket Number: 452036/2016
Judge: Julio Rodriguez III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III **PART** IAS MOTION 62EFM

Justice

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INDEX NO. 452036/2016

PEDRO CONCEPCION,

MOTION DATE 02/14/2019

Plaintiff,

MOTION SEQ. NO. 005

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, THE NEW YORK TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY, CONSOLIDATED EDISON OF NEW YORK, INC.,THE NEW YORK AND PRESBYTERIAN HOSPITAL, PRUDENTIAL HUNTOON PAIGE ASSOCIATES, LLC

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 195, 196

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Plaintiff commenced this action seeking damages from an alleged trip and fall on the sidewalk in front of New York Presbyterian Hospital located at 521 East 68th Street, on February 24, 2015. Defendant City of New York ("City") moves this court for summary judgment pursuant to CPLR § 3212, seeking dismissal of all claims and cross-claims asserted against it. Plaintiff opposes the motion.

In support of its motion, defendant City submits copies of the notice of claim, summons and complaint, defendants' answers, a prior order dismissing the matter as against the New York City Transit Authority, a prior order transferring this matter from Supreme Court Bronx County to Supreme Court New York County, defendant City's discovery response, and a prior order denying defendant City's motion for summary judgment for failure to address the issue of grate-ownership (NYSCEF Doc Nos. 152-160). Defendant City also submits an affirmation from City Department of Finance ("DOF") employee David Atik, an attorney (NYSCEF Doc No. 161); two affidavits from City Department of Transportation ("DOT") employees Victor Green, a training coordinator, and Lorenzo Bucca, a paralegal (NYSCEF Doc Nos. 163 and 164); and a set of photographs (NYSCEF Doc No. 162) which are identical to those provided in plaintiff's discovery response and described as "photographs of the scene of the occurrence" (NYSCEF Doc No. 173, at 12, 46-67). In opposition, plaintiff submits copies of the notice of claim, transcript of plaintiff's 50-h, defendants' answers, plaintiff's bill of particulars and discovery response, responses to plaintiff's notices to admit, and the now-amended complaint (NYSCEF Doc Nos. 170-175).

Defendant City argues that it is entitled to summary judgment because it is not responsible for the area around the grate where plaintiff allegedly tripped and fell on February 24, 2015, on the north side of 68th Street. In support of its position, defendant City points to the affirmation of David Atik which states that defendant City was not the owner of the property at issue on February 24, 2015, and that the property was classified as a hospital or health facility (Atik aff, NYSCEF Doc No. 161). Thus, defendant City argues, the property's owners are not exempt from the duties imposed under New York City Administrative Code § 7-210; in other words, the City is not responsible for maintaining the sidewalk at issue. Moreover, Victor Green states in his affidavit that the "grate in question belong to the property owners of record" (Green aff, NYSCEF Doc No. 163, at 4). According to the City, and pursuant to 34 RCNY 2-07, defendant City is not responsible for the grate and "twelve inches outward from the perimeter of the hardware" (34 RCNY 2-07 [b] [1]; *see Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]). Defendant City further argues summary judgment should be granted because there is no evidence to support plaintiff's theory of affirmative negligence (*see Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009] citing *Faulk v City of New York*, 16 Misc3d 1108 [A] [Sup Ct, Kings County 2007]; Bucca aff, NYSCEF Doc No. 164). Defendant City's submission of DOT records contained in its discovery response (NYSCEF Doc No. 159) indicate, according to defendant City's affirmation, that it could not have caused or created the manhole cover condition at issue. Defendant City contends in its affirmation that the attached "Big Apple" maps are "not relevant in determining whether the City is liable for Plaintiff's injuries as such liability shifts to the abutting property owner even if the map indicates notice of the allegedly dangerous condition" (Sutton aff, at 16, NYSCEF Doc No. 151).

In opposition, plaintiff argues that defendant City failed to establish their *prima facie* entitlement to judgment as a matter of law. According to plaintiff, defendant City failed to submit conclusive evidence on the issues of ownership, affirmative negligence, and special use. Plaintiff argues that defendant City did not include supporting documentation for any of the statements made by its affirmants or affiants. Moreover, defendant City's motion is premature under CPLR 3212 § (f).

In reply, defendant City argues that its supporting documentation in fact established (1) that the liability for the sidewalk shifted to the abutting property owner, (2) that defendant City does not own the grate at issue, and (3) that defendant City did not cause or create the alleged defect.

The proponent of a motion for summary judgment must tender sufficient evidence to show the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing, "the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]; *see Prevost v One City Block LLC*, 155 AD3d 531 [1st Dept 2017]).

"Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous roadway[, sidewalk, or encumbrance] condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (*Phillips v. City of New York,* 107 A.D.3d 774 [2d Dept 2013] citing *Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *see* New York City Administrative Code 7-201 and 7-210).

"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 (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). Additionally, the affirmative negligence exception 'is limited to work by the City that immediately results in the existence of a dangerous condition' (*Oboler v City of New York*, 8 NY3d 888, 889 [2007] [emphasis omitted], quoting *Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005])" (*Yarborough v City of New York*, 10 NY3d 726 [2008]; *see Chambers v City of New York*, 147 AD3d 471 [1st Dept 2017]).

Pursuant to New York City Administrative Code § 7-210, "[i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition" and the property owner "shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition". This provision does not apply to owner-occupied one-, two-, or three-family properties "used exclusively for residential purposes" (New York City Administrative Code § 7-210). Moreover, "the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks" unless the sidewalk abuts an exempted property or city-owned property (*id.*). Finally, pursuant to 34 RCNY 2-07, if defendant City does not own a certain hardware, including manhole covers or grates, defendant City is not responsible for the hardware and "twelve inches outward from the perimeter of the hardware" (34 RCNY 2-07 [b] [1]); rather, owners of hardware are exclusively responsible to maintain the hardware and the twelve-inch perimeter (*see Storper v Kobe Club*, 76 AD3d 426 [1st Dept 2010]), unless a non-owner affirmatively created the condition (*see Kearney v Capelli Enterprises*, 151 AD3d 521 [1st Dept 2017]) or derives a special use from the hardware (*see Patterson v City of New York*, 1 AD3d 139 [1st Dept 2003]; *Posner v New York City Transit Authority*, 27 AD3d 542 [2d Dept 2006]; *see generally Kleckner v Meushar 34th Street, LLC*, 80 AD3d 478 [1st Dept 2011]).

In the instant matter, plaintiff alleges that his injury occurred as a result of a trip and fall near a grate on 68th Street adjacent to New York Presbyterian Hospital (NYSCEF Doc No. 173, at 33, plaintiff's 50-h transcript, at 12; NYSCEF Doc No. 173, 46-67, photographs; NYSCEF Doc No. 152, notice of claim).

On this record, it is unclear whether the accident occurred within or without the twelve-inch area of responsibility created by 34 RCNY 2-07 [b] [1] (*see* NYSCEF Doc No. 152, notice of claim ["trip and fall on dangerous conditions on the sidewalk located near a subway grate..."]; NYSCEF Doc No. 173, 46-67, photographs). Accordingly, under *Storper* (*supra*), *Lewis v City*

of New York, 89 AD3d 41 (1st Dept 2011), and *Yarborough* (*supra*), the City cannot be held liable if it had no notice of the alleged defect or if (1) it did not own the sidewalk-abutting property, (2) the sidewalk-abutting property is not an exempted one-, two-, or three-family residential property, and (3) it did not own the subject grate (*see id.*).

In support of its motion, Defendant City submitted *inter alia* an affirmation from David Atik, an attorney and employee of the City DOF (NYSCEF Doc No. 161). Mr. Atik's "duties and responsibilities include responding to Freedom of Information Law requests and complying with and responding to subpoenas and other demands for information concerning [DOF]'s various property records" (*id.*). DOF "maintains and operates the Real Property Assessment Division ('RPAD') database" "[i]n the operation of its statutory mandate", which database "includes property ownership information and building classification information" (*id.*). Mr. Atik performed a search of the RPAD database, and those records indicated 1) "that the property was classified as Building Class I9 (hospitals and health facilities), and not as a one-, two-, or three-family solely residential property" and 2) "that, on February 24, 2015, the City of New York was not the owner of the property". Based on this submission, defendant City established that it was not the owner of the property on the date of the alleged occurrence. However, as discussed *supra*, due plaintiff's accident occurring near a grate, to establish its *prima facie* burden for entitlement to judgment as a matter of law, defendant City must also establish that it was not the owner of the grate at issue on the date of the occurrence.

Defendant City also submitted an affidavit from Victor Green, a training coordinator employed by DOT, who stated that he "personally conducted an on-site inspection to identify the owner of the metal grating on the sidewalk located at East 68th Street between York Avenue and Dead End, County, City and State of New York" and that "[a]s a result of my inspection, and based on my years of training and experience, I confirmed that the grate in question belongs to the property owners of record" (NYSCEF Doc No. 163).

"Mr. Green's affidavit, standing alone, does not establish that the City did not own the grate on the date of plaintiff's accident. Mr. Green's affidavit is conclusory because it does not explain how his training and experience led him to the conclusion that the City does not own the grate nor does Mr. Green opine that the City did not own the grate on the date of plaintiff's accident which is a critical inquiry" (*Vega v City of New York*, 2016 WL 7489220, 2016 NY Slip Op 32580 [U] [Sup Ct, NY County 2016]). Mr. Green's affidavit describes his duties as general supervision of DOT authorized work and enforcement of DOT policy and regulations (Green aff, NYSCEF Doc No. 163). How these duties provide Mr. Green with the ability to determine ownership through visual inspection is unclear; furthermore, and crucially, his affidavit does not speak to the issue of ownership on the date of the alleged occurrence (*id.*).

Moreover, although defendant City argues that its supporting documents show that it did not create the alleged condition, the documents do not meet defendant City's burden on the issue of *notice* (*see Yarborough*, *supra* [where plaintiff conceded lack of notice and defendant's witness testified as to lack of complaint, maintenance, and repair records]).

Upon the foregoing, and all papers and exhibits submitted concerning the relief sought herein, this court finds that defendant City has failed to meet its *prima facie* burden to establish

its entitlement to judgement as a matter of law, and defendant City of New York's motion for summary judgment dismissing plaintiff's Complaint and all cross-claims against it is denied.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected.

Accordingly, it is ORDERED, that this motion for summary judgment is denied, and it is further,

ORDERED, that defendant City of New York is to serve a copy of this Order with Notice of Entry within twenty days of entry upon all parties and the General Clerk's Office.

This constitutes the decision and order of the court.

The parties are directed to appear for the currently scheduled compliance conference on April 25, 2019.

April 3, 2019

HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE