

<b>Falkovich v City of New York</b>
2019 NY Slip Op 31873(U)
June 26, 2019
Supreme Court, New York County
Docket Number: 153503/2017
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

-----X

TATYANA FALKOVICH

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

INDEX NO. 153503/2017  
MOTION DATE 05/16/2019  
MOTION SEQ. NO. 001

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff commenced this action seeking to recover damages allegedly sustained in a trip and fall accident on September 11, 2016, in a crosswalk on the roadway at the intersection of Pearl Street and Broad Street, New York, New York. Defendant City of New York ("City") now moves for summary judgment, and plaintiff opposes the motion.

In support of its motion, defendant City submits copies of the notice of claim, pleadings, bill of particulars, plaintiff's 50-h hearing transcript, a photograph from plaintiff's 50-h hearing, supplemental case scheduling order response, an affidavit from a paralegal and records searcher for the City Department of Transportation ("DOT"), and an affidavit from an administrative manager of the Manhattan Street Maintenance Division of Roadway Repair and Maintenance for the City DOT. Defendant City argues that it is entitled to summary judgment because 1) its records reflect that defendant City did not have prior written notice of the defect alleged to have cause plaintiff's accident, and 2) there is no evidence that Defendant City caused or created the subject condition.

In opposition, plaintiff submits a copy of a so-ordered compliance conference stipulation dated January 10, 2019, which states "plaintiff to serve post-EBT demands by 03/10/19, City to respond within 60 days after". Defendant City's motion was filed on February 4, 2019. Plaintiff contends that the motion should be denied because 1) defendant City has not made a *prima facie* showing of entitlement to judgment, 2) defendant City has not shown that the pothole reported on September 21, 2015, was ever repaired prior to plaintiff's accident, and 3) the motion is premature because there is outstanding discovery and defendant City has not yet returned defendant's deposition transcript (*see* CPLR 3116 [a]).

In reply, defendant City reiterates its main contentions and argues that 1) the Big Apple Maps at issue do not show a pothole at the area at issue, 2) the pothole reported September 21,

2015, was found restored upon inspection prior to plaintiff's accident, and 3) incomplete discovery does not require denial of its motion.

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]).

"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 [NYC Admin. Code 7-201], 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]).

In opposition, plaintiff does not contend that defendant City caused or created the pothole at issue nor does plaintiff contend that defendant City made special use of the area. Therefore, the only issue is the sufficiency or insufficiency of defendant City's *prima facie* showing of a lack of prior written notice.

The first issue is the Big Apple Map. In opposition, plaintiff argues that defendant City has failed to make a *prima facie* showing of entitlement to judgment insofar as defendant City did not submit any affidavits addressing the Big Apple Maps and, moreover, neither affiant described their qualifications to interpret such maps.

At her 50-h hearing, Plaintiff identified the pothole condition that allegedly caused her to fall on September 11, 2016, in a photograph (see City aff. in supp., Exhibit F). The photograph shows the location of the pothole in the subject crosswalk (*id.*). Plaintiff marked the photograph at the hearing, circling the pothole (*id.*). The Big Apple Maps submitted by defendant City are found in their supplemental response to the case scheduling order (see City aff. in supp., Exhibit

G, at 59-61, 806-808). Plaintiff, in opposition, does not dispute that the exchanged Big Apple Maps are the maps at issue. Rather, plaintiff argues that defendant City has failed to make a showing that these Big Apple Maps do not show the alleged defect. In reply, defendant City reiterates that interpretation of the Big Apple Maps does not require special training and that the maps at issue plainly do not show a pothole defect.

According to the “Key to Map Symbols” (*id.* at 59, 806), a pothole in a pedestrian crosswalk would be shown on the Big Apple Map as a square. A review of the Big Apple Maps submitted shows no markings in the area—that is, the intersection of Pearl Street and Broad Street—that can rationally be interpreted as a square. The court therefore finds that the Big Apple Maps served upon defendant City on October 23, 2003 (*id.* at 59-61, 806-808) do not depict a pothole at the subject location (*see Vega v 103 Thayer Street, LLC*, 23 NY3d 1027 [2014]; *D’Onofrio v City of New York*, 11 NY3d 581 [2008]). In any event, defendant City provided work records which indicate that the City DOT responded to complaints in that area and repaired defects in the years prior to plaintiff’s accident on September 11, 2016 (*see City aff. in supp.*, Exhibit I at ¶ 3 “[u]pon arrival at a specific location in the complaint, the supervisor inspects the entire street block of the roadway, including the crosswalk on both ends of the block.... Upon completion of such a search, the crew repairs all defective conditions found by the supervisor on the entire block”]; *e.g. id.* at 29-38). As a result, the court finds that the Big Apple Maps do not create a question of fact on the issue of prior written notice as to the defect at issue which allegedly caused plaintiff’s fall on September 11, 2016, and is depicted in the photograph marked at plaintiff’s 50-h hearing (*see City aff. in supp.*, Exhibit F).

The next issue is the pothole reported to defendant City on September 21, 2015, which is described in defendant City’s records as defect number DM2015264046. Plaintiff’s position is that defendant City failed to make its *prima facie* showing as to this reported pothole because it was “found restored” and not “repaired” by DOT. Defendant City’s initial submission, in addressing DM2015264046, includes a sworn affidavit from Shana Salomon, an Administrative Manager with the Manhattan Street Maintenance Division of Roadway Repair and Maintenance with defendant City’s DOT (*see City aff. in supp.*, Exhibit I at ¶ 1). Ms. Salomon is “familiar with the policies, procedures and protocols of DOT, particularly those relating to standard operating procedures related to roadway repair and maintenance” (*id.*). As to DM2015264046, Ms. Salomon refers to copies of the relevant repair order, and computerized and handwritten gang sheets (*id.* at ¶¶ 10-11). The repair order and gang sheets indicate that the pothole reported at “101 Broad Street Pearl to Water”, DM2015264046, was “[f]ound [r]estored” on September 28, 2015 (*id.* at 39-48).

Plaintiff argues that a “found restored” entry may reflect either that the defect was actually found restored or that the defect was not observed or identified. Instead, as explained by Ms. Salomon in her affidavit, “[u]pon arrival at a specific location in the complaint, the supervisor inspects the entire street block of the roadway, including the crosswalk on both ends of the block.... Upon completion of such a search, the crew repairs all defective conditions found by the supervisor on the entire block” (*see City aff. in supp.*, Exhibit I at ¶ 3). This is corroborated by the gang sheet, which shows, for example, that at the location immediately following the crew’s inspection “101 Broad Street Pearl to Water”, that is, at “Bridge St Whitehall St”, the crew closed four “A” potholes and two “B” potholes (*id.* at 43). Moreover,

there is a specific option for “Defect Not Found” (*id.* [“(DNF) Defect Not Found”]), which was *not* entered for the location “101 Broad St Pearl to Water”. Finally, it is apparent that this DOT crew was not hesitant to use the “DNF” entry, as this entry was used for four of that morning’s 14 entries. Not only is plaintiff’s argument speculative,<sup>1</sup> the records reflect that the DOT crew makes a clear distinction between defects found restored and defects not observed. Ultimately, plaintiff’s contention that the “found restored entry” indicates that “the maintenance crew merely *may have* observed evidence of a prior repair” (Plaintiff’s aff. in opp. at ¶ 25) is without merit. A “shadowy semblance of an issue” (*Hooke v Speedy Auto Center*, 4 AD3d 110 [1st Dept 2004]) will not defeat a motion for summary judgment. The court therefore finds that defendant City has carried its *prima facie* burden as to defect number DM2015264046—the pothole reported to defendant City on September 21, 2015—and that plaintiff has failed to create a question of fact.

The third and final issue raised by plaintiff in her opposition to defendant City’s motion for summary judgment is that defendant City’s motion is premature pursuant to CPLR 3212 (f). “A party contending that a motion for summary judgment is premature is required to demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant.” (*Burlington Ins. Co. v Casur Corp.*, 123 AD3d 965, 965-966 [2d Dept 2014]; see *Global Minerals and Metals Corp. v Holme*, 35 AD3d 93 [1st Dept 2006] [“The party invoking the section must provide a proper evidentiary basis supporting its request for further discovery”]). “The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion.” (*Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 [2d Dept 2006]; see *Oates v Marino*, 106 AD2d 289 [1st Dept 1984] [“[T]o speculate that something might be caught on a fishing expedition provides no basis to postpone decision on the summary judgment motions under the authority of CPLR 3212 (f)”] [internal quotation omitted]).

Here, plaintiff argues that defendant City’s motion was premature because, when defendant City filed the instant motion on February 4, 2019, 1) plaintiff had not yet received a returned, sworn copy of defendant’s witness’ deposition transcript and 60 days had not yet elapsed, and 2) plaintiff had until March 10, 2019, to serve post-deposition demands pursuant to a compliance conference stipulation dated January 10, 2019, and said demands were not yet served. As to the second issue, plaintiff’s counsel states, in an affirmation dated March 12, 2019:

“Plaintiff is in the process of drafting post-EBT demands upon Defendant. However, such demands will include, but are likely not limited to, any inspections reports, notices of violations, or corrective action reports related to the following permits, all of which were issued to Galasso Trucking and Rigging, Inc. for work in the area of the subject accident in August and September of 2016, prior to Plaintiff’s accident: M02-2016228-D00, M02-2016228-D01, M02-2016228-D02, M02-2016239-C20, M02-2016228-C98, M02-2016228-D08, M02-20162390C21, M02-2016228-C98, M02-20162390C22” (Plaintiff’s aff. in opp. at ¶ 14).

<sup>1</sup> By the same logic, an entry indicating “close defect” might pertain to a separate defect in the area and not to the reported defect.

In reply, defendant City argues that plaintiff's supposed future discovery demands are for documents and information already produced, as defendant City has exchanged all inspection reports, notices of violation, and corrective action reports for "a period of two years prior to and including September 11, 2016" (City aff. in supp., Exhibit H at ¶ 3). Additionally, defendant City contends that the unsigned transcript is admissible as it was certified.

Here, plaintiff states that it will request a number of documents that have already been exchanged by defendant City (Plaintiff's aff. in opp. at ¶ 14 ["inspections reports, notices of violations, or correction action reports"]). In an affidavit in support of this motion, Ms. Rita Shapsis, a paralegal for DOT, states that she performed "a search of all of the usual and customary locations where records are maintained by DOT in the ordinary course of business" (City aff. in supp., Exhibit H at ¶¶ 3-4), including both DOT's electronic and paper records (*id.*). These records were previously exchanged in defendant City's supplemental response to the case scheduling order (City aff. in supp., Exhibit G, 2-809), and include the documents contemplated by plaintiff's in-process post-deposition demands—"inspections reports, notices of violations, or corrective action reports...in August and September of 2016" (Plaintiff's aff. in opp. at ¶ 14; *see* City aff. in supp., Exhibit H at ¶ 3 ["search for...corrective actions requests (CARs), notices of violations (NOVs), notifications for immediate correction (NICAs), inspections"... "two years prior to and including September 11, 2016"])).

On the issue of whether defendant City's motion was premature, plaintiff was "*required to demonstrate* that additional discovery might lead to relevant evidence" *Burlington Ins. Co. v Casur Corp.*, 123 AD3d 965, 965-966 [2d Dept 2014] [emphasis added] or "provide a proper evidentiary basis supporting its request for further discovery" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006]). Although defendant City's witness' deposition transcript was not yet signed, plaintiff failed to submit a copy of the transcript in opposition or identify any of its contents which would justify opposition to its motion; indeed, it was plaintiff who was in possession of the transcript and served it upon defendant City (Plaintiff's aff. in opp. at ¶ 13 ["Plaintiff served Defendant with Defendant's EBT transcript on or about January 23, 2019."]). Plaintiff failed to make a showing that 1) the contents of the deposition provided a factual basis upon which to deny the instant motion, 2) further discovery is made necessary by the contents of defendant City's witness' testimony or 3) there is otherwise outstanding discovery that may contain facts "essential to justify opposition to a motion for summary judgment" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d at 103).

The court finds that plaintiff has failed to identify particular contents of the deposition transcript or to describe any documents (not previously exchanged) that would be requested in its post-deposition demands which would warrant denial of defendant City's motion as premature (*see* CPLR 3212 [f]; *Burlington Ins. Co.*, 123 AD3d at 965-966; *Global Mins. & Metals Corp.*, 35 AD3d at 103). Accordingly, plaintiff cannot rely on CPLR 3212 (f) to defeat the instant motion. The court therefore finds that defendant City's motion is not premature under CPLR 3212 (f).

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

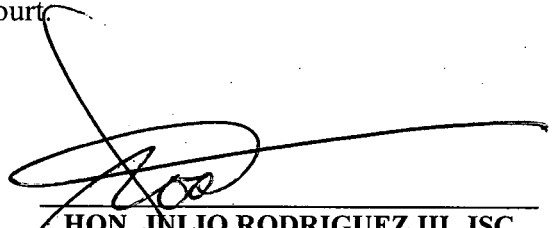
Accordingly, it is ORDERED that defendant City of New York's motion for summary judgment is granted in its entirety, dismissing plaintiff's complaint as against it; and it is further

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 plaintiff and the General Clerk's Office; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

June 26, 2019



HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE