

Gracia-Freire v City of New York
2019 NY Slip Op 31976(U)
July 11, 2019
Supreme Court, New York County
Docket Number: 154464/2016
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

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INDEX NO. 154464/2016

LISSETT GRACIA-FREIRE,

MOTION DATE 07/03/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF
TRANSPORTATION

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff commenced this action seeking to recover monetary damages for alleged injuries sustained on July 17, 2015 when she tripped and fell on the “yellow sidewalk mat” on the handicap ramp located on the sidewalk at the northeast corner of the intersection of Delancey Street and Suffolk Street County, City and State of New York. Specifically, plaintiff alleges that she was injured when she fell on an “uneven, cracked, raised” portion of the mat on the pedestrian ramp. Defendants, the City of New York (“City”), moves for summary judgment seeking an order pursuant to CPLR § 3212 dismissing the complaint. The City maintains that it is entitled to summary judgment as it did not have prior written notice of a defective condition on the pedestrian ramp nor did it cause or create the defective condition.

Plaintiff opposes the instant motion for two reasons: first, that the City has failed to meet its *prima facie* burden based on inspections that were not brought forth throughout the course of discovery; and second, there is a question of fact as to whether the City caused and created the alleged defect because based on the installation/construction of the yellowing warning mat that

Plaintiff fell on. For the reasons set forth below, the City's motion for summary judgment is denied.

Applicable Law

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY 2d 851 (1985). Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

To hold the City liable for injuries resulting from sidewalk defects, a plaintiff must demonstrate that the City has received prior written notice of the subject condition or there is written acknowledgment by the City of the subject condition. *See* Admin Code of the City of New York § 7-201(c)(2); *Amabile v City of Buffalo*, 93 NY2d 471 (1999). The only recognized exceptions to the prior written notice requirement are 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 Yarborough v City of New York*, 10 NY3d 726 (2008); *Amabile v City of Buffalo*, 93 NY2d 471(1999).

Administrative Code of the City of New York § 7- 201(c)(2) reads in part:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any

part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, **or there was written acknowledgement from the city of the defective, unsafe dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger, or obstruction complained of, or the place otherwise made reasonably safe.**

§ 7-201(c)(2)(emphasis added).

Discussion

Here, the City has produced a document prepared by the New York City Department of Transportation (DOT) which is an inspection of the subject location on September 6, 2014, approximately 9 months before plaintiff's alleged accident. On multiple lines of the inspection report items are listed as defective. *See* Plaintiff's Affirmation in Opposition Exhibit 6. It does not appear to be in dispute that this inspection record encompasses the location of plaintiff's accident.


The City produced an employee from the Department of Design and Construction who could not interpret what defects were noted in the report. *See* Pltf.'s Aff. in Opp. Ex. 2, pgs. 49-51. As such the City has failed to establish its *prima facie* entitlement to judgment as a matter of law.

As a result of the above, the Court does not reach arguments with respect to allegations of cause and create and negligent installation. Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

7/11/2019
DATE


LYLE E. FRANK, J.S.C.
**HON. LYLE E. FRANK
J.S.C.**

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