Cannone v City of New York
2019 NY Slip Op 32538(U)
July 26, 2019
Supreme Court, Richmond County
Docket Number: 151325/2016
Judge: Thomas P. Aliotta

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: Part C-2

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DESIREE CANNONE,

Plaintiff,

- against -

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

Defendants.

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DECISION AND ORDER

Index No. 151325/2016

Motion No: 694-002

The following papers numbered "1" through "3" were fully submitted on the 5th day of June 2019:

	Papers Numbered
Defendants' Notice of Motion for Summary Judgment, Affirmation, Affidavit of Henry Williams, with Supporting Exhibits (Dated: February 8, 2019)	1
Affirmation, Affidavit in Opposition of Plaintiff, with Supporting Exhibits (Dated: April 19, 2019)	2
Reply Affirmation in Further Support of the City's Motion for Summary Judgment (Dated: May 10, 2019)	3

Upon the foregoing papers, the motion for summary judgment of defendants the City of New York and the New York City Department of Transportation (herein collectively, the "City") is granted, and the complaint is hereby dismissed.

This matter arises out of a slip and fall which occurred at approximately 6:30 P.M. on July 28, 2015, on the roadway between 100 and 102 Dutchess Avenue, Staten Island, New York. Plaintiff alleges that she sustained extensive personal injuries, including a fractured right patella,

when she slipped on "loose and broken asphalt/pebbles in the street,"[1] as she exited her parked vehicle after returning home from a birthday celebration for her daughter.

Plaintiff testified at both her statutory hearing on March 29, 2016 (*see* City's Exhibit E) and deposition on January 10, 2019 (*see* City's Exhibit F), that the area where she fell was under construction for the installation of new gas lines during the year preceding her accident.[2] She further testified that on the morning of her accident, she observed an unmarked truck ascend Dutchess Avenue, stop in front of 85 Dutchess Avenue (located diagonally across and several houses up the street from plaintiff's address of 100 Dutchess Avenue (*see, generally*, Ex. "E", 8:2-22), and distribute workmen who placed cones in the vicinity of 85 Dutchess Avenue and who began "working" with "equipment" including a jackhammer (E10:23-25).

Plaintiff left her home for her daughter's birthday celebration (at a nearby restaurant) wearing "flip flops with a flat rubber sole" (E9:16-19). When she returned home that evening she parked her vehicle on Dutchess Avenue in front of her home, "got out of the car, locked the door, turned, and [took one or two steps] before sliding as if…on ice or something" (E16:23-24). She maintains that the debris removed from her knee by emergency room staff matched the debris which caused her to fall (*i.e.,* "many many…black pebbles" [E21:17-19]). Plaintiff speculates that debris rolled from the 85 Dutchess Avenue location and settled in front of her home. According to plaintiff, she slipped on "what turned out to be asphalt" (E18-18) or "loose gravel…more than a foot wide" (E36:10-13), located between 100 and 120 Dutchess Avenue.

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[1] *See* Notice of Claim (City Ex. "A"); Verified Bill of Particulars ¶18, (City Ex. "C").

[2] "…the street was ripped apart. We were in the neighborhood where all the explosions took place, over the summer, with the gas lines…so they were…fixing whatever they needed to fix" (*see* City's Exhibit E, p 22, ll 12-29).

It is undisputed that a search conducted by the City for records relating to the location of "Dutchess Avenue between Chapin Avenue and Dead End" for the two year time period prior to the accident revealed: (1) five permits, all of which were issued to Keyspan; (2) four Notices of Violation, all issued to Keyspan; (3) one Corrective Action Request issued to Keyspan; (4) two Notifications for Immediate Corrective Action issued to Keyspan, and (5) nineteen inspections, the last of which was conducted on July 27, 2015, (*i.e.*, the day before plaintiff's incident) for the condition of the roadway in front of 85 Dutchess Avenue relative to a metal plate in the street, resulting in a "pass" (*see* City's H). In addition, two maps were found to have been served upon DOT by the Big Apple Pothole and Sidewalk Protection Corporation on February 2, 2004.

City moves for judgment dismissing plaintiff's complaint pursuant to CPLR 3212 and CPLR 3211 (a) (7), arguing that plaintiff failed to establish prior written notice on the part of the defendants in compliance with Administrative Code §7-201 and, moreover, that the facts herein do not constitute an exception[3] to the prior written notice requirement, which is a statutory prerequisite to maintaining an action against these defendants.

Plaintiff opposes the motion, arguing that at some point during the month of July, 2015, work was being performed which created the condition which caused plaintiff's fall, and posits that: (1) defendants had prior written notice of the defective condition by way of two inspections, Highway Inspections and Quality Assurance ("HIQA") reports, photographs and issuances of violations for work done without proper permits; (2) defendants may have caused and/or created the subject condition by performing work without a permit (or under an expired permit), which immediately resulted in the existence of the dangerous condition (*see Bielecki v. City of New*

[3] The only exceptions to the rule that the City must have prior written notice of the allegedly defective condition giving rise to plaintiff's alleged injury are: (1) if the City created the defect through an affirmative act of negligence, or (2) if the defect is associated with a condition that conferred a benefit upon the City from a special use.

York, 14 AD3d 301 [1st Dept. 2005]), and (3) depositions of the City beyond the records witness are required to uncover whether the City performed work in the area. Lastly, plaintiff submits google map photographs of the area in question (*see* Plaintiff's Exhibit B) to demonstrate the proximity of 85 Dutchess Avenue to 100-102 Dutchess Avenue.

Pursuant to Administrative Code of the City of New York §7-201 (c) (2), a plaintiff must plead and prove that the City had prior written notice of a roadway defect, or dangerous or obstructed condition before it can be held liable for its alleged negligence related thereto. Transitory conditions present on a roadway or walkway such as debris, oil, ice, or sand have been found to constitute potentially dangerous conditions for which prior written notice must be given before liability may be imposed upon a municipality. Neither repair orders or reports (*see, e.g., Marshall v. City of New York*, 52 AD3d 586 [2d Dept. 2008] nor the issuance of permits (*see Levbarg v. City of New York,* 282 AD2d 239, 241 [1st Dept. 2001]) satisfy the prior written notice requirement promulgated by §7-201 (c) (2) of the Administrative Code. The only two exceptions to compliance are where the municipality affirmatively created the alleged defect or dangerous condition, or where a special use conferred a special benefit upon the municipality. Neither actual nor constructive notice may substitute or override a prior written notice requirement (*see Farrell v. City of New York*, 49 AD3d 806, 807 [2d Dept. 2008; *internal citations omitted*]).

Here, movants have established entitlement to judgment as a matter of law by submitting, *inter alia*, the March 8, 2018 affidavit of paralegal Henry Williams (*see* City's Exhibit I) together with the records relating to his search, showing that the City received no written complaints about the roadway in the two years preceding and including the day of the accident. The City's inspections of defects in the general vicinity of plaintiff's fall (*i.e.*, in front of

85 Dutchess Avenue) do not provide written notice of the specific defect that allegedly caused plaintiff's injury (*see Kalsmith v. City of New York*, 158 AD3d 442 [1st Dept. 2018]; *Stoller v. City of New York*, 126 AD3d 452 [1st Dept. 2015]).

In opposition, plaintiff failed to raise a triable issue of fact. There is no evidence that the municipal defendants created the defective condition, and therefore, that exception to the prior written notice requirement does not apply (*see Yarborough v. City of New York*, 10 NY3d 726, 728 [2008]). Moreover, neither actual nor constructive notice of the defect may substitute for prior written notice (*see Campisi v. Bronx Water & Sewer Serv.*, 1 AD3d 166, 167 [1st Dept. 2003]).

Accordingly, it is

ORDERED, that the motion of defendants City of New York and the New York City Department of Transportation for judgment dismissing the complaint is granted; and it is further

ORDERED, that plaintiff's complaint is hereby dismissed; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

ENTER,

Dated: July 26, 2019

HON. THOMAS P. ALIOTTA, J. S. C.