

Schwab v City of New York

2019 NY Slip Op 33577(U)

November 19, 2019

Supreme Court, New York County

Docket Number: 154248/2017

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 62

Justice

-----X

INDEX NO. 154248/2017

DAVID SCHWAB,

MOTION DATE 08/29/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, THE NYC DEPARTMENT OF TRANSPORTATION

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36

were read on this motion to/for

JUDGMENT - SUMMARY

Plaintiff commenced this action seeking damages for personal injuries sustained on February 12, 2016, when he tripped and fell as a result of an alleged dangerous condition at 4 Whitehall Street, New York, New York. Defendants City of New York ("City") and NYC Department of Transportation ("DOT") (collectively "City defendants") move for summary judgment because, they contend, City defendants did not cause or create or have prior written notice of the subject condition. Plaintiff opposes the motion.

Parties' Positions

In support of their motion, City defendants submit as exhibits copies of the notice of claim, the pleadings, plaintiff's bill of particulars, the transcript of plaintiff's deposition, photographs marked at plaintiff's deposition, the transcript of City defendants' witness Danny Garcia's deposition, an affidavit by DOT paralegal George Gudushauri, DOT permits, and a map of the East River waterfront related to City contract number 17060017. City defendants argue that a review of their records reveals that they did not have any prior written notice of the alleged dangerous condition. Additionally, City defendants argue that they are entitled to summary judgment because the records do not provide a basis upon which to find that they caused or created the condition at issue.

Opposing City defendants' motion, plaintiff refers to City defendants' exhibits and also attaches seven photographs plaintiff marked at his deposition, indicating the location of his accident and the alleged dangerous condition at issue. Plaintiff argues that City defendants' motion should be denied because Administrative Code § 7-201 (c) (2) does not apply to plaintiff's claims herein or, at least, there is a question of fact as to the section's applicability. Additionally, plaintiff argues that the testimony of City defendants' witness demonstrates that City defendants' failed to meet their prima facie burden.

In reply, City defendants contend that Administrative Code § 7-201 (c) (2) indeed applies to the condition at issue. Moreover, City defendants argue that plaintiff in opposition improperly raises new theories of liability—negligent lighting, maintenance of streetlights, and failure to warn—and that plaintiff may not pursue theories of liability not asserted in his notice of claim. City defendants also stress that plaintiff did not cite any evidence showing that City defendants caused or created the condition at issue.

Summary Judgment Standard and Applicable Law

The proponent of a motion for summary judgment must tender sufficient evidence to show its 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]).

Analysis

Plaintiff’s opposition appears to argue the following: 1) Administrative Code § 7-201 (c) (2) does not apply to plaintiff’s claims herein and 2) assuming that the section does apply, City defendants have failed to carry their burden.

Plaintiff argues that the accident at issue does not pertain to a “sidewalk” defect and therefore the prior written notice requirement is not implicated. However, an examination of Administrative Code § 7-201 (c) (2) indicates that the section does not create a prior written notice

requirement for sidewalks exclusively. In fact, the section casts a wide net. Administrative Code § 7-201 (c) (2) states that

“[n]o 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 [there has been the required prior written notice]” (emphasis added).

In addition, Administrative Code § 7-201 (c) (1) (a) provides that “[t]he term ‘street’ shall include the curbstone, an avenue, underpass, road, alley, lane, boulevard, concourse, parkway, road or path within a park, park approach, driveway, thoroughfare, public way, public square, public place, and public parking area.” As described in plaintiff’s opposition papers, “[p]laintiff’s accident took place in the plaza in front of the Staten Island Ferry in Manhattan” (Karmazin aff at ¶ 8 [a]), “somewhere in the plaza area” (*id.* at ¶ 7 [d]). “Plaza” is defined *inter alia* as “a public square in a city or town” (Merriam-Webster Online Dictionary, plaza). Consequently, notwithstanding plaintiff’s choice of the word “plaza” to describe the area in which he fell, the area at issue falls squarely within the broad domain of Administrative Code § 7-201, which includes “a public square” (Administrative Code § 7-201 [c] [1] [a]). Additionally, and notwithstanding plaintiff’s description of the condition at issue as a “brick divider”, the alleged dangerous condition at issue falls under “any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto” (Administrative Code § 7-201 [c] [2]). Finally, at plaintiff’s deposition, he testified that he tripped and fell on a pathway made of paving stones (Montaque aff, Ex F, at 23-24; *see id.* at 20)).

Plaintiff’s relied-upon cases, *Glickman v City of New York*, 297 AD2d 220 (1st Dept 2002) (where First Department reversed Supreme Court’s finding that alleged defect was trivial), *Provenzano v City of New York*, 79 AD3d 541 (1st Dept 2012) (where First Department found sufficient evidence for a question of fact as to City’s special use as landlord of a private parking lot), *Balbes v City of New York*, 96 AD3d 478 (1st Dept 2012) (where First Department found sufficient evidence in form of milling records for question of fact as to immediate cause and create exception to prior written notice), and *Abreu v New York City Hous. Auth.*, 61 AD3d 420 (1st Dept 2009) (where First Department found evidence did not establish defect as “trivial” as a matter of law), are inapposite to the instant set of facts.

Accordingly, plaintiff’s argument that the condition at issue falls without Administrative Code § 7-201 is misplaced, and the court finds that the alleged dangerous condition is one for which prior written notice is required pursuant to Administrative Code § 7-201.

City defendants submitted an affidavit from DOT records searcher and paralegal George Gudushauri as well as the exchanged DOT records, which did not indicate any notice of the alleged dangerous condition at issue. The court therefore finds that City defendants met their initial burden by making a prima facie showing of entitlement to summary judgment through evidence in admissible form that it did not have prior written notice of the alleged dangerous condition (*see Yarborough*, 10 NY3d 726).

In opposition, then, plaintiff's burden was to create a question of fact either on the issue of prior written notice or otherwise as to the applicability of the two recognized exceptions—affirmative creation of the defect or special use. Plaintiff's opposition papers, however, do not identify any evidence in the record pertinent to special use, cause and create, or the issue of prior written notice. Plaintiff does cite to certain portions of City defendants' witness Danny Garcia's testimony regarding streetlight-related documents and data, but plaintiff does not allege that the dangerous condition upon which he fell was a streetlight.

To the extent that plaintiff relies on a theory of negligence through insufficient lighting, plaintiff appears to rely upon *Miller v Village of East Hampton*, 98 AD3d 1007 (2d Dept 2012). In *Miller*, the Second Department affirmed Supreme Court's denial of defendant's motion for summary judgment, holding that because

“plaintiff alleged in her notice of claim, complaint, and bill of particulars that the defendant affirmatively created the dangerous condition which caused the accident through various specified acts of negligence in the design and construction of the sidewalk, the lighting, and the landscaping” (*Miller* at 1009), “the defendant was required to eliminate all triable issues of fact as to whether it affirmatively created the alleged dangerous condition through negligent design and construction to sustain its prima facie burden” (*id.*).

Miller has since been cited favorably by the First Department. In *Chapman v City of New York*, 139 AD3d 507 (1st Dept 2016), the First Department reversed Supreme Court's order granting defendant City of New York's motion for summary judgment, denying the motion, because defendant “addressed the [liquid condition on the stairs] but not the [allegedly defective, worn, uneven and slippery condition of the stairs themselves], thereby failing to demonstrate its entitlement to judgment as a matter of law” (*Chapman* at 507 citing *Miller*). Additionally, the First Department in *Chapman* noted that “[p]laintiff's notice of claim and complaint, as amplified by her bill of particulars, made clear that she was alleging that there were at least two separate dangerous conditions that caused or contributed to her fall” (at 507).

Here, plaintiff refers the court to his notice of claim, complaint, and bill of particulars. Plaintiff's notice of claim states *inter alia* that the accident occurred “by reason of the negligence, carelessness and recklessness of [City defendants] in the ownership, management, maintenance, construction, repair, inspection, operation, use and control at and about the area where the accident occurred” (Montaque aff, Ex A, at ¶ 2). Additionally, plaintiff's notice of claim states that plaintiff “tripped and fell over a curb area which was under construction between a fence and structure where the claimant was walking.... [City defendants were] further negligent in failing to adequately protect the location where the obstruction was protruding and/or to adequately warn the claimant of the differences in elevation thereat” (*id.*).

In his complaint, plaintiff alleges that City defendants

“negligently, recklessly and carelessly owned, operated, managed, maintained, constructed, repaired, inspected and controlled the aforesaid premises in that it permitted the aforesaid curb area to be, become and remain in a dangerous and

defective condition in that it was raised, depressed, uneven and not properly lit; in that there existed at the place of the occurrence, among other things, a tripping hazard at the location of the accident; in that the defendant failed to place signs, signals, barriers or other warnings around this dangerous and defective condition, thereby creating an extremely dangerous and hazardous trap for persons lawfully traversing over said area, and more particularly for the plaintiff, DAVID SCHWAB, who was caused to trip and fall at the point where the aforesaid curb area was negligently, recklessly and carelessly owned, operated, managed maintained, constructed, repaired, inspected and controlled as described above, thereby causing [injury]" (Montaque aff, Ex B, at ¶ 10).

In his bill of particulars, plaintiff makes substantively identical allegations (*see* Montaque aff, Ex D, at ¶ 19) and also notes that plaintiff "was caused to trip and fall over a defective and dangerous curb area which was under construction and dimly lit" (*id.* at ¶ 22).

In contrast to the plaintiff in *Chapman* (139 AD3d 507), plaintiff Schwab fails altogether to assert a theory of negligent failure to adequately light the area in his notice of claim. The "separate theor[y]" upon which plaintiff now attempts to ground his claim was accordingly not "made clear" (*id.*).

Consequently, to the extent that plaintiff argues that his theory of negligence is the failure to adequately light the area at issue, the absence of this theory from his notice of claim requires its dismissal (*see Barksdale v New York City Tr. Auth.*, 294 AD2d 210 [1st Dept 2002] [plaintiff precluded from offering evidence at trial in support of theory alleged in bill of particulars but not in notice of claim]; *see also* GML 50-e [2] ["notice...shall set forth...the time when, the place where and the manner in which the claim arose"]; *Mendoza-Jimenez v New York City Transit Authority*, 140 AD3d 522 [1st Dept 2016]; *Lewis v New York City Housing Authority*, 135 AD3d 444 [1st Dept 2016]).

Here, plaintiff's notice of claim fails to include any allegation that negligent failure to adequately light the area caused his accident. Accordingly, plaintiff's argument that a question of fact exists due to City defendants' witness Danny Garcia's testimony regarding streetlight-related documents must fail. The court therefore finds that plaintiff's reliance on the theory of negligent failure to adequately light the area at issue fails to raise a question of fact or otherwise demonstrate a deficiency with City defendants' prima facie showing of entitlement to judgment.

Plaintiff also argues that City defendants' witness Danny Garcia's testimony that a search of streetlight records would not have been performed in the course of an ordinary DOT search like the one performed by Mr. Gudushauri (Karmazin aff at ¶¶ 37, 39; *see* Montaque aff, Ex H, at 16-17, 24) as well as Mr. Garcia's testimony about "some permits that did reference some kind of plaza, but [he did not] know if that was referring to the plaza in front of the ferry" (*id.* at 27) create a questions of fact on the issue of prior written notice. In light of the court's determination that plaintiff cannot rely upon a theory of negligence related to lighting as a result of its omission from the notice of claim, the court finds that Mr. Garcia's testimony regarding streetlight records is irrelevant. Moreover, Mr. Garcia's testimony regarding permits does not create a question of fact (*see Gabriele v Edgewater Park Owners Co-op. Corp., Inc.*, 67 AD3d 484 [1st Dept 2009];

DeSilva v City of New York, 15 AD3d 252 [1st Dept 2005]). City defendants' motion addressed all permits issued to a city permittee (Montaque aff ¶¶ 21-26), and plaintiff does not dispute the sufficiency of this showing.

The court finds plaintiff's additional arguments, including that argument based upon a theory of failure to warn, unavailing (*see* Administrative Code § 7-201).

Accordingly, and upon the foregoing, including all papers and exhibits submitted by the parties, it is

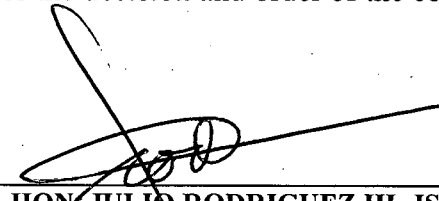
ORDERED that defendants City of New York and NYC Department of Transportation's motion for summary judgment dismissing plaintiff's complaint as against them is granted in its entirety; and it is further

ORDERED that defendants City of New York and NYC Department of Transportation shall serve a copy of this order with notice of entry upon plaintiff, the Clerk of the Court (60 Centre Street, Room 141B), and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), within 20 days; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and that the case be marked disposed.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

November 19, 2019



HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE