

Vega v City of New York
2019 NY Slip Op 34148(U)
December 27, 2019
Supreme Court, New York County
Docket Number: 114966/2009
Judge: Julio Rodriguez III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

RESENT: HON. JULIO RODRIGUEZ, III PART 62

Justice

X

VEGA, RENEE

Plaintiff,

- v -

CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., and CONSOLIDATED
EDISON COMPANY,

Defendants.

INDEX NO. 114966/2009

MOTION DATE 09/26/2019

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

X

The following papers, numbered 1 to 3, were read on this application to/for DISMISS/SJ

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits

No(s) 1

Answering Affidavits - Exhibits

No(s) 2

Replying

No(s) 3

FILED
JAN 08 2020
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff commenced this action seeking to recover damages allegedly sustained in an accident on April 27, 2009, caused by a defect in the roadway on the west side of Columbia Street between Broome and Delancey Streets, New York, New York. Defendant City of New York ("City") now moves to dismiss pursuant to CPLR 3211 (a) (7) and for summary judgment pursuant to CPLR 3212. Plaintiff opposes the motion.

In support of its motion, defendant City submits copies of the notice of claim, pleadings, bill of particulars, consolidation order dated January 23, 2013, note of issue, plaintiff's deposition transcript, photographs marked at plaintiff's deposition, a map of the area, a Google Street View photograph, Department of Transportation ("DOT") records, an affidavit by DOT employee Naqi Syed, transcripts of Omar Codling and Sanjay Modi's depositions, an affidavit by Department of Design and Construction ("DDC") employee Sanjay Modi, defendant's discovery response dated December 29, 2014, and *Kales v City of New York*, 169 AD3d 585 (1st Dept 2019). Defendant City argues that it is entitled to dismissal because plaintiff failed to plead that defendant City had prior written notice of the alleged defective condition. Additionally, defendant City argues that it is entitled to summary judgment because 1) it did not have prior written notice of the alleged defect and 2) there is no evidence to suggest that it caused or created the alleged defect.

In opposition, in plaintiff's papers and at oral argument, plaintiff does not dispute that defendant City did not have prior written notice of the subject defect. Rather, plaintiff relies upon the affirmative negligence exception to prior written notice (i.e. that defendant City caused or created the defect). In opposition to defendant City's motion, plaintiff attaches as exhibits copies of the notice of claim, an affidavit by plaintiff Vega, transcripts of plaintiff and Omar Codling's

depositions, DOT records, correspondence from DDC dated March 28, 2008, and photographs of the accident location.

In reply, defendant City attaches another Google Street View image, reiterates its main contentions, and further argues that plaintiff's relied-upon documents are insufficient to defeat defendant City's prima facie showing of entitlement to summary judgment. Defendant City contends that the permits and correspondence to which plaintiff cites do not create a question of fact as to whether defendant City affirmatively caused or created the alleged defect.

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, 728 [2008]).

Here, it is undisputed that defendant City did not receive prior written notice of the alleged defect. Consequently, the burden shifted to "plaintiff to demonstrate the applicability of *one of two* recognized exceptions to the rule" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008] [emphasis added]), that is, defect creation or special use (*id.*; see *Chambers v City of New York*, 147 AD3d 471 [1st Dept 2017]). In opposition, plaintiff relies upon the former, arguing that "[t]here is a triable issue of fact as to whether the City's construction efforts created the defect".¹

¹ Plaintiff's reliance on the affirmative negligence exception to prior written notice renders moot defendant City's argument that plaintiff's complaint should be dismissed for failing to plead prior written notice.

As an initial note, there can be little doubt that the defect at issue immediately resulted from a number of cuts to the pavement (*see* Weisberg aff, Ex H, photograph). In opposition to defendant City's motion, plaintiff specifically relies on six street opening work permits for the block of Columbia Street between Broome and Delancey Streets—four of which relate to DDC project number "SECBMTAN3"² and two of which were issued to defendant Consolidated Edison ("Con Ed"). Plaintiff also relies upon correspondence dated March 28, 2008, from DDC to JLJ IV Enterprises ("JLJ"), in which an employee of DDC directs the commencement of work for project number "SECBMTAN3" "as of June 7, 2008" (Lubelsky aff, Ex E).

At his deposition, Omar Codling, a records search for DOT, testified that he performed a "roadway block search for the location of Columbia Street between Broome Street and Delancey Street in the borough of Manhattan" (Lubelsky aff, Ex C, Codling deposition transcript at 8), said search "cover[ing] a time period of April 27th, 2007 up until and including the date of accident, which is April 27th of 2009." (*id.* at 8-9). That search located the six permits (*id.* at 16-17). The four permits issued to JLJ relate to DDC project number "SECBMTAN3" and pertain to a "major reconstruction" project (*id.* at 19-23). The four permits are continuations for the same project, spanning from January 5, 2009, to November 29, 2009 (*id.* at 27-28).

Mr. Modi stated in his affidavit that "neither DDC nor its contractor [JLJ] did any work in the roadway on the west side of Columbia Street, approximately 64 feet south of its intersection with Delancey Street and approximately 4 feet from the curb in front of the Columbia Street entrance to Luther Gulick Playground" (Weisberg aff, Ex N, Modi affidavit at ¶ 2). Assuming *arguendo* that Mr. Modi's sworn statement, upon which defendant City relies, served as defendant City's necessary *prima facie* showing on summary judgment, other evidence in the record creates a question of fact.

It is clear from Mr. Modi's testimony that he has no recollection of actually overseeing any work at this location (Weisberg aff, Ex P, Modi deposition transcript at 28-31). Moreover, although Mr. Modi stated that no work was performed at the precise location of the defect, he also stated that "one catch basin was replaced at the southwest corner of Delancey Street and Columbia Street" (Weisberg aff, Ex N, Modi affidavit at ¶ 3).

Considering the nearby location of catch basin work performed as part of a DDC "major reconstruction" project, the temporal proximity—as indicated by the permit and DDC correspondence dates—of the performance of such work before the date of the accident, as well as the nature of the defect as obvious cuts to asphalt, the court finds that there exists a question of fact as to whether the defect at issue was created by defendant City's contractor during said project.

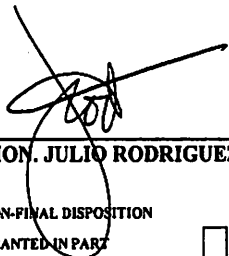
Accordingly, it is ORDERED that defendant City of New York's motion for summary judgment is denied in its entirety; and it is further

² At his deposition, Mr. Codling referred to "SECBMTAN3" as the "contract number" (Lubelsky aff, Ex C, Codling deposition transcript at 21); however, in the DDC letter dated March 28, 2008, "SECBMTAN3" is referred to as the "Lead FMS ID #". In this decision, it is referred to as the project number.

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties, 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 30 days.

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.

December 27, 2019


HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

☒

DENIED

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

☐

REFERENCE

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

FILED

JAN 08 2020

COUNTY CLERK'S OFFICE
NEW YORK