Flemming-Hamm v Manhattan & Bronx Surface Tr. Operating Auth.
2020 NY Slip Op 30612(U)
February 18, 2020
Supreme Court, New York County
Docket Number: 155744/2015
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE **PART** IAS MOTION 62

Justice

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SHANNON FLEMMING-HAMM, MATTHEW HAMM,

Plaintiff,

- v -

MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE CITY OF NEW YORK

Defendant.

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INDEX NO. 155744/2015

MOTION DATE 10/08/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 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, 69, 70, 71, 72, 73, 74, 75

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

Upon the foregoing documents,

The following read on The City of New York's motion for summary judgment, per CPLR 3212. The City of New York states it did not receive prior written notice of the subject condition pursuant to New York City Administrative Code § 7-201.

This personal injury action occurred on January 14, 2015, at approximately 7:00 p.m., when plaintiff Shannon Flemming-Hamm allegedly disembarked from a bus and stepped into a "defective condition" located in the 14th Street roadway near the intersection of eighth avenue, New York, New York.

Plaintiff served upon the City a notice of claim on February 17, 2015, and a summons and complaint on June 16, 2015. The City joined issue by service of its answer on June 30, 2015. A General Municipal Law § 50-h hearing revealed that plaintiff stepped off a bus into a crack in the roadway on 14th Street between eighth avenue and ninth avenue, closer to eighth

avenue. Plaintiff further testified that the alleged crack was in the roadway parallel to the curb near a parking garage entrance.

"The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact." *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986). On summary judgment, "facts must be viewed in the light most favorable to the non-moving party." *Vega v Restani Constr Corp*, 18 NY3d 499, 503 (2012). "Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 (2004).

Section 7-201(c)(2) of the Administrative Code of the City of New York reads in pertinent part, "[n]o civil action shall be maintained against the city … unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition was actually given … within fifteen days after receipt of such notice to repair or remove the defect, danger, or obstruction complained of."

The City performed a two-year Department of Transportation ("DOT") roadway search for the location of 14th Street between Eighth Avenue and Ninth Avenue, New York, New York for two years prior to and including plaintiff's date of incident, January 14, 2015. An affidavit from Henry Williams, paralegal working at DOT of the City of New York, affirms the search of the DOT databases and a Big Apple Map that was served upon DOT on October 23, 2003.

Defendant City exhibits a DOT memorandum dated June 14, 2019. This memorandum states a search was done for permits and work records issued to Citywide Concrete relating to the roadway for West 14th Street between 8th Avenue and 9th Avenue from January 14, 2013 through

January 14, 2015. The memorandum states, "no permits found, no records found of In-house work by Citywide Concrete."

City exhibits the affidavit of Leslie Villar, principal administrative associate in the division of Sidewalks and Inspection Management at DOT. Leslie Villar testifies that, "Citywide Concrete would not have done work to fix this alleged defect as this is not the type of work that Citywide Concrete performs."

"Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact" (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiff argues that the City is subject to a preclusion Order issued by this Court on June 6, 2019, based on City's failure to comply with multiple prior Orders. Plaintiff continues with, "[b]ecause City cannot rely on the precluded and struck evidence, it cannot sustain its initial burden of establishing a *prima facie* case. Further, because City failed to raise the issue of its preclusion in its motion papers, because new argument may not be raised in Reply, it cannot now raise it in Reply."

A review of the June 6, 2019 Order states, "defendant shall provide the required records within 45 days or shall be precluded from offering those records to the court at trial or in support of summary judgment and shall receive a missing document charge at trial." This Court has not precluded defendant from offering all evidence in support of their summary judgment motion, solely the records related to City Wide Concrete's search if same were offered.

Plaintiff states the City had prior written notice of the defective condition by virtue of the Big Apple Map. ¶ 56 of plaintiff's affirmation in opposition states, "[t]he Big Apple Map provided by City in its Response to the Case Scheduling Order shows the defect that caused

plaintiff's injuries. The Key to Map Symbols was identified as page 401; and the Big Apple Map was identified as page 402 in City's response." Plaintiff does not describe the symbol which provides notice in this case. Precise notice of the map is required to satisfy the prior written notice requirement (see *D'Onofrio v City of New York*, 11 NY3d 581 [2008]). A nearby defect is insufficient to constitute prior written notice of another defect (see *Leary v City of Rochester*, 67 NY2d 866 [1986]).

CPLR § 3212 (b) states that, "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented." *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968).

ORDERED that defendant, The City of New York's, motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

2/18/2020
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE