Silverman v City of New York

2020 NY Slip Op 31660(U)

May 28, 2020

Supreme Court, New York County

Docket Number: 157140/2014

Judge: Laurence L. Love

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

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KENNETH SILVERMAN, ESQ., CHAPTER 7 TRUSTEE AS SUCCESSOR IN INTEREST TO NATALIA SANTANA

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

--X

INDEX NO. 157140/2014

MOTION DATE 03/16/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 54, 56, 57, 64, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

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

Upon the foregoing documents, the motion is decided as follows:

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff on January 29, 2014, at approximately 7:35 a.m., when she was caused to trip and fall in the northern crosswalk of Delancey Street and Clinton Street in New York County. Specifically, Plaintiff alleges that she was caused to trip and fall due to a broken and defective condition in the crosswalk located at said location. As a result of the foregoing, on or about April 7, 2014, Plaintiff served a Notice of Claim upon the City of New York. On or about July 22, 2014, Plaintiff commenced this action by the purchase of an index number and filing a Summons and Verified Complaint. The City joined issue by serving an Answer, as well as an Amended Answer, on or about August 15, 2014 and October 17, 2014, respectively. In an Order, dated April 1, 2019, Kenneth Silverman, Esq. was substituted for plaintiff as bankruptcy trustee. Defendants now move for summary judgment, dismissing the instant action.

The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). 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 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). 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 and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion, defendant submits plaintiff's 50-h hearing transcript, a 2 year Department of Transportation roadway search, the affidavit of Larisa Dubina, a paralegal at the Department of Transportation of the City of New York, who conducted said search, and the EBT transcripts of Danny Garcia and Dmitriy Surkov's, record searchers at DOT, arguing that the City did not have prior written notice of the claimed condition nor did it cause and create the condition, and thus summary judgment is warranted.

Section 7-201(c)(2) of the Administrative Code of the City of New York governs the City's liability in this instance. Said code section is a prior written notice statute enacted to constrain the common-law duty of care in order to solve "the vexing problem of municipal street and sidewalk liability." *Barry v. Niagara Frontier Transit Sys.. Inc.*, 35 N.Y.2d 629, 633 (1974). The purpose

of the prior written notice law "is to prevent any possibility of liability for nonfeasance, except where the [municipality] fails or refuses to remedy the condition within a reasonable time after receipt of notice." *Barry*, 35 N.Y.2d at 633-34. As noted by the Court of Appeals in *Poirer v. City of Schenectady*, 85 N.Y.2d 310, 313 (1995), the purpose of the prior written notice requirement is to limit liability to cases where the municipality has been given actual notice and an opportunity to correct the hazardous condition. The Court continued:

> Unless the injured party can demonstrate that a municipality failed or neglected to remedy a defect within a reasonable time after receipt of written notice, a municipality is excused from liability absent proof or prior written notice or an exception thereto…Practically, prior written notice provisions result in limiting a locality's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have actually been notified exist at a specific location…This comports with the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways, yet imposes responsibility for repair once the municipality has been served within written notice of an obstruction or other defect, or liability for the consequences of its nonfeasance, as the case may be.

Poirer, 85 N.Y.2d at 313-314 (citations omitted). See also *Katz v. City of New York*, 87 N.Y.2d 241, 243 (1995). As such, the City's duty of care over municipal streets and sidewalks is limited to those defects or hazardous conditions which its officials have been actually notified exist at a specified location. Prior written notice of a defect is a condition precedent that Plaintiff is required to plead and prove in order to maintain an action against the City. Because this prior written notice provision is a limited waiver of sovereign immunity, in derogation of common law, it is strictly construed. In the present matter, the City must have had notice of the specific defect involved, and not merely a similar condition. See *D'Onofrio v. City of New York*, 11 N.Y.3d 581 (2008); *Belmonte v. Metro Life Ins. Co.*, 759 N.Y.S.2d 38 (1st Dep't 2003).

Defendant's DOT intersection search and related documents: four (4) permits, three (3) hardcopy permits, three (3) applications, four (4) inspections, two (2) maintenance and repair records/orders, three (3) complaints, two (2) gangsheets for roadway defects, two (2) handwritten gangsheets, and one (1) Big Apple Map labeled as Volume 1N, Page 80. A review of all of said documents establishes that the City did not have prior written notice of the specific defect which plaintiff is alleging. Further, based on the results of the DOT searches, there is no evidence that the City caused or created the purported crack in the crosswalk at the subject location. As such, the City has established a *prima facie* entitlement to summary judgment. The burden now shifts to plaintiff to establish an issue of fact.

In opposition, plaintiff argues that the City's documents indicate that the DOT's maintenance and repair reports assigned a "pothole crew" to the subject location to correct a reported pothole. Plaintiff submits the EBT transcript of the City's record searcher, Danny Garcia, who testified that the report shows that a Mr. Scott supervised work on potholes at the aforesaid location during the night shift of January 2, 2013. Plaintiff argues that the assignment of a maintenance and repair crew to the subject location on January 2, 2013 is clearly written acknowledgment that a defective condition or "pothole" existed at the subject location and that the City failed to remove that defect prior to Plaintiff's fall on January 29, 2014. Specifically, the Defect Details report for defect number DM 2013003009 consists of two pages and identifies a defect type as a pothole. This report identifies the location of the pothole to be on Delancey Street at its intersection with Clinton Street and was reported at 2:56 AM on January 1, 2013. The second page of this report shows a history of defect number DM 2013003009 and indicates the defect was referred to maintenance on January 1, 2013 at 10:00 AM. The only other reported history for this defect number is on January 2, 2013 at 11:19 PM which indicates an action as "CLOSE DEFECT"

and "SCOTT/POT/01-02-2013/SHIFT: N/ GRP:1." Contrary to plaintiff's argument, on January 2, 2013 the City dispatched a repair crew to the subject location and closed the alleged pothole, meaning that the pothole referenced in DM2013003009 was repaired. It is undisputed that if a condition is repaired it extinguishes any notice prior to the repair. See *Lopez v. Gonzalez*, 44 A.D. 3d 1012 (2d Dep't 2007); see also *Jones y. City of New York*, 159 A.D.3d 571 (1st Dep't 2018). Plaintiff further argues that the maintenance and repair record for DM2014024008, dated January 24, 2014, which relates to a pothole in the roadway at Delancey Street and Clinton Street establish prior written notice upon the City. However, as attested to by Eric Brown and indicated by the corresponding gangsheets, DOT inspected the location as a result of this complaint and reported that the defect was not found.

Plaintiff further argues that the City caused and created the subject defect based upon maintenance and repair records for DM 2013003009, dated January 2, 2013 and DM2014024008, dated January 24, 2014. Contrary to plaintiff's argument, said repair records establish that all the potholes in the subject area were filled on January 2, 2013 and that no pothole was found on January 24, 2014. Plaintiff has the burden to prove that the City immediately caused and created the alleged condition. See *Bielecki v. City of New York*, 14 A.D.3d 301, 302 (1st Dep't 2004). The Court of Appeals has held that when Plaintiff fails to submit evidence that the repair immediately created the hazardous condition that caused the Plaintiff's accident, the eventual emergence of a dangerous condition after a repair is not an affirmative act of negligence. *Yarborough v. City of New York*, 10 N.Y.3d 726, 728 (2008). As plaintiff has failed to submit evidence that the City had prior written notice of the complained of condition nor submitted evidence that the City immediately caused the condition, plaintiff has failed to establish an issue of fact precluding summary judgment.

ORDERED that defendant'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.

5/28/2020						
DATE				**LAURENCE L. LOVE, J.S.C.**		
CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**	
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**	**REFERENCE**