

<b>Samon v Roosevelt Is. Operating Corp.</b>
2021 NY Slip Op 30811(U)
March 16, 2021
Supreme Court, New York County
Docket Number: 157628/2018
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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JENNIFER SAMON

Plaintiff,

- v -

ROOSEVELT ISLAND OPERATING CORPORATION,

Defendant.

-----X

INDEX NO. 157628/2018
MOTION DATE N/A
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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, 31, 32, 33, 34, 35, 36

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

In this personal injury action, Plaintiff Jennifer Samon ("Plaintiff") alleges that she was caused to trip and fall over the base of a pedestrian stop sign owned by Defendant Roosevelt Island Operating Corporation ("Defendant") in the middle of a crosswalk. In motion sequence 002, Defendant moves for summary judgment pursuant to CPLR 3212, arguing that it is not liable for Plaintiff's injuries because deposition testimony establishes that Defendant did not have actual or constructive notice of the missing stop sign. The motion has been fully submitted.

Background

Plaintiff alleges that around 3:00 pm in the afternoon of May 20, 2018, while she was walking on or near the premises located at 560 Main Street, Roosevelt Island, New York, New York, she tripped and fell over the base of a pedestrian stop sign in the middle of a crosswalk, sustaining injuries. Plaintiff alleges that the stop sign itself had been removed, leaving only the metal base in the middle of the crosswalk, which she did not see due to the stop sign's removal. (NYSCEF Doc No. 25.) Plaintiff argues that Defendant was negligent in allowing the stop sign to persist in this condition. A 50-h hearing was held on August 13, 2018. (NYSCEF Doc No. 17.)

Depositions of the Plaintiff and Defendant were held on 4/10/19 (NYSCEF Doc Nos. 22, 23.) Plaintiff filed the note of issue on August 7, 2019, certifying that all discovery had been completed. (NYSCEF Doc No. 24.)

Defendant moves for summary judgment on the grounds that it lacked notice of the condition of the stop sign and thus is not liable for Plaintiff's accident. In support, Defendant submits the deposition testimony of Mr. Nnaedozie Agbasonu, a maintenance supervisor employed by Defendant and testimony of the Plaintiff from the 2018 50-h hearing. Mr. Agbasonu testified that he saw the sign in its proper location on Friday, May 18, 2018 (two days before the alleged accident) and Plaintiff testified that she had seen the sign in its proper location the afternoon before the day of the alleged accident.

In opposition, Plaintiff argues that Defendant has failed to demonstrate its entitlement to summary judgment because the proffered deposition testimony does not eliminate issues of material fact as to Defendant's constructive notice of the stop sign's defective condition. Plaintiff submits an affidavit from Mr. Keith Summers, a 28-year resident of Roosevelt Island, who avers that he noticed that the sign was missing around 8:00 am on the morning of May 20, 2018 while walking to his routine Sunday morning basketball game. (NYSCEF Doc No. 29.) Thus, Plaintiff argues that Defendant had constructive notice of the defective condition of the stop sign because it was visible and apparent, as it was on Main Street, and existed for at least 7 hours.

Defendant contends that the court should not consider Mr. Summers' affidavit, as he was not disclosed as a witness during discovery. Rather, in response to Defendant's discovery demand for names and addresses of witnesses, Plaintiff stated that she was "currently unaware of any witnesses" (NYSCEF Doc No. 35) and in a preliminary conference order, agreed to supplement her bill of particulars as to actual and constructive notice if necessary, within 45 days after the

completion of EBTs. Additionally, Defendant argues that Plaintiff filed the note of issue on August 7, 2019, certifying that discovery was complete, and thus, Plaintiff has improperly produced this witness solely to manufacture an issue of fact to defeat summary judgment.

### Discussion

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) “Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].) Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

“[A] defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it.” (*Dhu v New York City Hous. Auth.*, 119 AD3d 728, 729 [2d Dept 2014].) For there to be constructive notice, “a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it.” (*Gordon v American Mus. of Nat. Hist.*, 67 NY2d 836, 837 [1986]; *Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985].) “The mere happening of the accident does not establish liability on the part of the defendant” (*Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 251 [2d Dept 1984], *aff’d* 64

NY2d 670 [1984]); rather, it must be shown that “the owner ha[d] a sufficient opportunity, within the exercise of reasonable care, to remedy the situation,” and failed to do so. (*See Mercer v City of New York*, 223 A.D.2d 688, 689 [2d Dept 1996], *aff’d* 88 N.Y.2d 955 [1996].) “To meet its burden on the issue of lack of constructive notice, a Defendant must offer some evidence as to when the accident site was last cleaned, inspected prior to the accident.” (*Bacon v Equinox Holdings, Inc.*, 2021 WL 65440 [Sup Ct, NY County 2021].)

Contrary to the Plaintiff’s contention, the Defendant established its prima facie entitlement to judgment as a matter of law, demonstrating through the deposition testimony that it did not create the allegedly hazardous condition and that it lacked actual and constructive notice of the condition. Mr. Agbasonu testified that two days before the accident, the pedestrian stop sign in question was attached to the metal base. (NYSCEF Doc No. 23 at 27, Ins 14-16.) Plaintiff testified that the sign was attached to the metal base on the day before the accident. (NYSCEF Doc No. 17 at 38, Ins 20-22.) This testimony is sufficient to demonstrate that the condition did not exist for a sufficient length of time prior to the accident to permit Defendant’s employees to remedy it.

Plaintiff fails to produce evidence in admissible form sufficient to warrant a trial on the issue of constructive notice. Plaintiff’s witness was not disclosed in discovery and was disclosed only in Plaintiff’s opposition to summary judgment. The court precludes Plaintiff from offering the witness’ affidavit because Plaintiff failed to identify this witness during discovery and failed to supplement the discovery produced after the conclusion of depositions and before filing the note of issue certifying that all discovery had been completed. (*Alamo v NYCHA*, 118 AD3d 484, 485 [1st Dept 2014]; *see also Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 [1st Dept 2009] [“plaintiff is precluded from offering this evidence because the witness was not disclosed until defendants’ motion for summary judgment, made after defendants’ demands for the names and

addresses of such witnesses, a preliminary conference order requiring plaintiff to disclose any notice witnesses and plaintiff's filing of her note of issue".)

Defendant has demonstrated that it did not have actual or constructive notice of the condition of the pedestrian stop sign prior to Plaintiff's accident and Plaintiff has failed to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923 [1986]). Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements 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.

03/16/21  
DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE