

**Purdie v City of New York**

2021 NY Slip Op 31331(U)

April 20, 2021

Supreme Court, New York County

Docket Number: 100416/2012

Judge: J. Machelie Sweeting

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING PART IAS 62

Justice

-----X

EUGENE PURDIE

Plaintiff,

- v -

CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 100416/2012
MOTION DATE 07/01/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

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

Pending before the court is a motion filed by defendant THE CITY OF NEW YORK (the "City"), seeking an order pursuant to CPLR § 3212 granting summary judgment to the City on the grounds that, pursuant to section 7-201 of the Administrative Code of the City of New York, the City did not receive prior written notice of the defect that allegedly caused plaintiff's accident. Upon the foregoing documents, this motion is GRANTED.

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 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [1st Dept. 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 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 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 Dept. 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 [NY Ct. of Appeals 1957]).

In the underlying action, plaintiff EUGENE PURDIE allegedly tripped and fell on April 2, 2011, at or near the northeast side of West 30th Street near its intersection with 8<sup>th</sup> Avenue, in the County, City and State of New York and more particularly at/or near a sewer drain with designation 05 16 08; Lot 286, 2008 and P3.

The City argues that it engaged in several relevant informational searches with respect to the two years leading up to the accident including: a DOT segment search for the location of 30th Street between 7th Avenue and 8th Avenue, in the County, City, and State of New York; a DOT intersection search for the location of 30th Street and 8th Avenue, in the County, City, and State of New York; a Department of Environmental Protection (“DEP”) search for the location of West 30th Street and 8th Avenue (Northeast corner of 30th Street and 8th Avenue); and had a claims specialist for the New York City DEP search for maintenance/repair records, DEP permits, fire hydrant repair and inspection records, and complaints for the time frame of April 2, 2009 up to and including April 2, 2011 with respect to the location of 8th Avenue and 30th Street in the County, City and State of New York.

The City’s conclusion at the end of these searches was that each and every inspection, NOV, NICA, and CAR, was either issued for an entirely different defect than that alleged by plaintiff, resulted in a passing condition prior to the date of accident, or indicated that work had not started; that each and every complaint related to a different condition and/or different location

than that alleged by plaintiff; that all maintenance and repair records refer to a different condition than that alleged by plaintiff and/or do not reference the specific location where plaintiff's incident occurred; and that each and every service request relates to a wholly different condition in a different location than where plaintiff's accident allegedly occurred.

Further, as detailed in the City's moving papers, the City also researched the possibility that the City had caused or created the defect by having Naqi Syed, a Department of Transportation ("DOT") record searcher, personally conducted a search for the two years prior to and including plaintiff's date of accident for "permits, applications for permits, corrective action requests, notices of violation, inspections, contracts, maintenance and repair orders, complaints, gangsheets for roadway work and milling and resurfacing records," and Big Apple Maps for the roadway located at West 30th Street between 7th Avenue and 8th Avenue and the intersection located at West 30th Street and 8th Avenue. She found no evidence that the City caused or created the alleged sunken roadway condition near a catch basin at the subject location. Specifically, of the thirty-four (34) permits collectively revealed in the DOT searches, only four (4) were issued to a City agency or City-contractors. Of those four, all were issued to City contractor Delaney Associates, LP and the City cannot be held liable for the work performed by its contractors (*see Am. Guar. & Liab. Ins. Co. v Federico's Salon, Inc.*, 66 AD3d 521 [Sup. Ct. App. Div. 1st Dept 2009] ["It is well established that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts"]). The remaining permits revealed in the DOT searches were not issued to the City or its contractors.

Two DEP searches were also conducted for the location of 8th Avenue and 30th Street in the County, City and State of New York for maintenance/repair records, DEP permits, fire hydrant repair and inspection records, complaints, and records relating to catch basins on West 30th Street

and 8th Avenue for the two-year period leading up to the accident. The City's conclusion was that all service requests and corresponding work orders all relate to wholly different conditions in different locations than where plaintiff's accident allegedly occurred; and the DEP search did not show any records of work being performed by DEP at the northeast corner of West 30th Street and 8th Avenue.

Plaintiff does not dispute that the City lacked prior written notice, but instead argues that this situation falls under an exception to the prior written notice requirement in that the City caused or created the defect. Specifically, plaintiff argues that the City's witness, Eduardo Hernandez, who is a district supervisor at DEP, testified at his EBT, with respect to the catch basin at issue, that "it was an old repair, because discoloration of the blacktop, of the asphalt, doesn't show new work [...] it actually looks rougher than the street. The street is smoother." Plaintiff argues that this means that the City had attempted to repair the catch basin, but left the repair in "an unfinished manner," being "rougher" and not as "smooth" as compared to the texture of the other portions of the roadway, and therefore this defect was created through an affirmative act of negligence on the part of the City.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).


Here, the court finds that in the informational searches made by the City, described above, the City made out a prima facie showing that the City had no prior written notice at the subject incident location for two years prior to and including the date of the alleged accident such as to create an immediately dangerous condition. The burden now shifts to plaintiff to show that the defect was created through an affirmative act of negligence on the part of the City.

As the City properly argues, it had performed searches with respect to the possibility that the City caused or created the subject defect, and found no evidence that the City caused or created the alleged sunken roadway condition near a catch basin at the subject location. Furthermore, as Mr. Hernandez confirmed that it was the City's responsibility to maintain all catch basins in New York City, he never actually testified that the City made any repairs to the subject catch basin or surrounding roadway. Rather, in testifying about the photograph depicting the alleged roadway defect, he prefaced his comment about this appearing to be an "old repair" with the phrase, "if it was repaired by us." Additionally, Mr. Hernandez never testified that the repair was "partially completed" or that it "was in an unfinished manner," and plaintiff does not provide an affidavit by an expert who can attest to whether or not the purported old repair was "unfinished" or "partially completed."

Importantly, plaintiff does not rebut the accuracy of the searches performed by the City, as detailed above, and plaintiff has provided no evidence that the City actually performed work at the subject location or that a dangerous condition existed at the time of such alleged repair. Given this, the court finds that plaintiff failed to raise a triable issue of fact. *See also Casellas v Proano*, 190 AD3d 634 (Sup. Ct. App. Div. 1st Dept 2021) ("Finally, the expert affidavits submitted in opposition failed to raise a triable issue of fact [...] Accordingly, plaintiff's arguments as to the origination of the alleged icy condition are speculative and conclusory and insufficient to defeat

the [summary judgment] motion.”); Rivas v New York City Hous. Auth., 140 AD3d 580 (Sup. Ct. Spp. Div. 1st Dept 2016) (“Accordingly, plaintiff’s arguments as to the origination of the allegedly dangerous condition are speculative and conclusory, and insufficient to defeat the [summary judgment] motion”).

In conclusion, this motion is GRANTED. Summary judgment is awarded to defendant City, and this action is DISMISSED WITH PREJUDICE.

<u>4/20/2021</u> DATE		 J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE