

Almonte v City of New York

2022 NY Slip Op 30951(U)

March 24, 2022

Supreme Court, New York County

Docket Number: Index No. 156813/2013

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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MARIA E. ALMONTE, OSCAR ALMONTE,
Plaintiffs,

INDEX NO. 156813/2013

MOTION DATE 01/25/2022

MOTION SEQ. NO. 006

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
NEW YORK CITY DEPARTMENT OF TRANSPORTATION,
CARLO LIZZA & SONS PAVING, INC.,NEXTG NETWORKS
OF NY, INC.,CROWN CASTLE NG EAST INC.,S & N
BUILDERS, INC.,SIDERA NETWORKS, LLC,LIGHTOWER
FIBER NETWORKS II, LLC,CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.,CONSOLIDATED
EDISON, INC.,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 137, 138, 139, 140,
141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161,
162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175

were read on this motion for JUDGMENT - SUMMARY.

Plaintiffs commenced this action for personal injuries Maria E. Almonte allegedly
sustained on November 19, 2012, in a trip and fall over a defective, broken, and uneven manhole
cover in the crosswalk at the intersection of West 131st Street and Amsterdam Avenue (NYSCEF
Doc. No. 12 [Amended Complaint at ¶12]) and her husband Oscar Almonte’s resulting loss of
companionship and services (Id.).

Defendants NextG Networks of NY, Inc. and Crown Castle Ng East Inc. moved for
summary judgment dismissing this action as against them, which motion was granted by this Court
(Hon. W. Franc Perry, J.S.C.) in a decision and order dated February 28, 2017 (NYSCEF Doc. No.
66). Defendants Carlo Lizza & Sons Paving, Inc. also moved for summary judgment dismissing
the complaint as against it, which motion was granted by this court (Hon. Dakota D. Ramseur,

J.S.C.) in a decision and order dated April 20, 2021 (NYSCEF Doc. No 130). Defendant S&N Builders' motion for summary judgment dismissing the complaint as against it was granted by this court (Hon. Dakota D. Ramseur, J.S.C.) in a decision and order dated May 28, 2021 (NYSCEF Doc. No 134). This action was also discontinued pursuant to stipulation against defendants Lighttower Fiber Networks II, LLC f/k/a Sidera Networks, LLC, Consolidated Edison Company of New York, Inc., and Consolidated Edison, Inc. (NYSCEF Doc. Nos. 74, 109).

The remaining defendants the New York City Department of Environmental Protection ("DEP"), the New York City Department of Transportation ("DOT"), and the City of New York (collectively, the "City") now move, pursuant to CPLR §3212, for an order granting them summary judgment dismissing this action on the grounds that the City did not receive prior written notice of the defective, broken and uneven manhole cover at issue as required by Administrative Code §7-201. In support of its motion the City submits, as relevant here: (1) an affidavit by Talia Stover, a paralegal at DOT, attesting to her review of DOT records for a period of two years prior to and including November 19, 2012 for the roadway located at West 131st Street between Convent Avenue and Amsterdam Avenue and for the roadway located at the intersection of West 131st Street and Amsterdam Avenue and (2) the affidavit of Moira Fable (née Tittle), a claims specialist at DEP, attesting to her review of DEP records relating to the intersection of Amsterdam Avenue and West 131st Street for the two years prior to and including November 19, 2012 (NYSCEF Doc. Nos. 152-156).

DISCUSSION

Section 7-201 of the Administrative Code of the City of New York provides, in pertinent part, that:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf,

culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger, or obstruction complained of, or the place otherwise made reasonably safe.

(Administrative Code 7-201[c][2]).

The City has met its prima facie burden by submitting the affidavits of Fable and Stover detailing their search of DOT and DEP records and the affirmation of its counsel (Igoe Affirm. in Supp. at ¶¶24-36, 39-42) establishing that none of the records produced by these searches could constitute written notice of the allegedly defective manhole cover (See Gray v City of New York, 195 AD3d 538 [1st Dept 2021]). Accordingly, the burden shifts to plaintiffs to submit evidence in admissible form that raises a question of fact as to whether the City had notice or caused or created the subject condition (See Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Plaintiffs have failed to meet their burden.

In opposition, plaintiffs do not dispute that the City did not receive written notice but instead note that

the DEP, as the owner of the subject manhole cover, was vested with the responsibilities of monitoring, inspecting, maintaining and repairing the manhole, cover and surrounding ground to keep it flush with the hardware in accordance with the Rules of City of New York Department of Transportation (34 RCNY) § 2-07(b) [but] ... has failed to produce a witness with personal knowledge and information from the sewer department to speak on these matters, despite the request for production of such a witness

(Edelman Affirm. in Opp. at ¶14) and argue that this outstanding discovery renders the City's motion premature. This argument is unavailing. 34 RCNY §2-07(b) does not obviate the written

notice requirement in Administrative Code §7-201. Nor do the cases relied on by plaintiffs even suggest such. Instead, they stand for the proposition that although property owners are generally responsible for the maintenance of the sidewalk abutting their property (See Administrative Code §7-210) 34 RCNY §2-07(b) creates an exception to this rule for sidewalk covers or gratings and the area extending 12 inches outward from the perimeter of same, the maintenance of which is the responsibility of the owner of that hardware (See e.g., Flynn v City of New York, 84 AD 3d 1018 [2d Dept 2011]; Storper v Kobe Club, et. al., 76 AD3d 426 [1st Dept 2010]).

In light of the foregoing, it is

ORDERED that the motion for summary judgment by the only remaining defendants in this action, i.e., the City of New York, the New York City Department of Environmental Protection, and New York City Department of Transportation seeking dismissal of all claims and cross claims asserted against it is granted in its entirety; and it is further

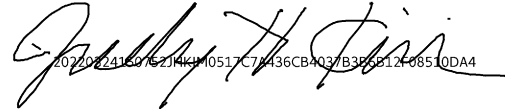
ORDERED that the complaint is dismissed with prejudice in its entirety without costs and disbursements; and it is further

ORDERED that within thirty days from entry of this order, counsel for the City of New York shall serve a copy of this order, with notice of entry, on plaintiff, the Clerk of the Court (60 Centre St., Room 141B) and the Trial Support Office (60 Centre St., Rm. 158M); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "Efiling" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the complaint in its entirety without costs and disbursements.

This constitutes the decision and order of the Court.



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3/24/2022

DATE

JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE