

<b>Williams v New York City Dept. of Transp.</b>
2022 NY Slip Op 31797(U)
June 8, 2022
Supreme Court, New York County
Docket Number: Index No. 152777/2019
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART

Justice

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RACHAEL DIANE WILLIAMS,
Plaintiff,

- v -

THE NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, THE CITY OF NEW YORK

Defendant.

-----X

INDEX NO. 152777/2019

MOTION DATE 03/08/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion for SUMMARY JUDGMENT.

On March 15, 2019, plaintiff commenced this negligence action for injuries allegedly sustained in a trip and fall caused by a pothole in the roadway located in front of 2641 Adam Clayton Powell Jr. (NYSCEF Doc. No. 38 [Bill of Particulars at ¶¶1-2, 19]). Defendants the City of New York and the New York City Department of Transportation (collectively, the "City") now move, pursuant to CPLR §3212, for an order granting them summary judgment dismissing this action.

In support of its motion the City submits: (1) the affidavit of Anumon George, a paralegal at the New York City Department of Transportation ("DOT"), attesting that a search of DOT records and Big Apple Maps for the two years prior to and including the date of plaintiff's accident for the roadway located at Seventh Avenue between West 152nd Street and West 153rd Street

produced nine permits, nine hardcopy permits, nine applications, eight inspections, and one Big Apple Map (NYSCEF Doc. No. 41); (2) the affidavit of Kemal Babajanov, a claims specialist for the New York City Department of Environmental Protection (“DEP”), attesting that a search of DEP records for 2641 Adam Clayton Powell (7th Avenue), New York, New York for the two year period prior to and including the date of plaintiff’s accident produced five IPS work orders and one hard copy work order; and (3) the affidavit of Jesse Goldin, an Environmental Engineer III for the New York City Department of Environmental Protection attesting that, pursuant to work order number 843767948, a programmatic technical inspection of a catch basin at West 152nd Street and 7th Avenue was performed on April 17, 2018 (NYSCEF Doc. No. 45 [Goldin Aff. at ¶¶3-4]).

In opposition, plaintiff submits the EBT of Kevin Harmon, a claim specialist at DEP. During this EBT Harmon engaged in the following exchange.

Q. [T]he last programmatic inspection was work order 843767948, which took place on April 2, 2018; is that right?

A. That’s the last one on the record search, yes.

Q. So, as a result of the inspection that was done on April 2, 2018, they determined that major work was required and on April 18, 2018, did they begin work that day?

A. It looks like work was started – no.

...

Q. So let’s — according to the prior report, and this might help you, prior report, 843767948, do you see that report?

A. Yes.

Q. And do you see where it says “initiated July 1, 2017”?

A. Yes.

Q. And it says, “schedule for 4/22/2018” [sic].

A. Yes.

Q. 4/2/2018, right, April 2nd. And on April 18th is when they generated the repair report work order; is that correct?

A. Yes.

Q. So is it possible that pursuant to the last order somebody did go on 4/2/2018 as part of the program for the inspection and determined that there needed to be a repair?

A. It's possible.

...

Q. So it would be something internal that according to the last catch basin inspection program when it was scheduled for April 2nd, they found something and then they prepared the repair basin on 4/18; is that correct?

A. That's probably that's what it seems. Again, I'm not working in the yard. So, just from looking at the records, that's probably what occurred.

Q. So on April 2, 2018, when they went, as part of the normal inspection, would they have prepared something in writing or ran a report before generating the April 18th work order to repair it?

A. That I don't know.

...

Q. Okay. So, the notes from the field that presumably were generated on April 2, 2018, when they performed the programmatic technical inspection, where would those notes be?

A. Again, when it comes to programmatic inspection and any notes that I don't know. I'm saying under normal there is a normal complaint generated, the inspector goes out in the field, documents what he sees, those notes get documented into the IPS system. If a work order is generated as a result of those complaints, any notes taken on that work order should be documented within the IPS system. But, honestly, a programmatic inspection, that, I don't really know how that works. That's a separate program. So, I can't really answer that question.

Q. As a result of a programmatic inspection, though, it appears that there was a result of it that led to a work order to perform a repair. Do you agree with that?

A. Yes.

(NYSCEF Doc. No. 58 [Harmon EBT at pp. 35-54]).

During subsequent questioning by counsel for the City, Harmon testified as follows:

Q. With respect to this work order, 843767948, which one of these dates, the schedule date or the completed date indicates the date that the inspection took place?

A. I would say the schedule date is most likely. But, again — and I apologize, programmatic — I'm least knowledgeable about programmatic inspection work orders in terms of when they are actually worked on because they go out as group. So a group of work orders that go out so, each work order, that goes out in a group is worked on different dates. So I would say, it would be the schedule date, April 2, 2018

Q. What does the completed date indicate?

A. I apologize. I think somebody from DW would be better to answer that question. It probably would be the date that it was actually inspected. The inspection was done, it could be the date the inspection was done, but somebody from DW would better answer that question. I wouldn't know.

(Id. at pp. 54-58).

## DISCUSSION

“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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

The City has satisfied its prima facie burden by establishing that did not receive prior written notice of the pothole in question. 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]).

Defendants have established that they did not receive the requisite written notice through the George and Babajanov affidavits and the DOT and DEP records produced by these searches. In opposition, plaintiff argues that these affidavits do not establish that the DEP and DOT records are business records because George and Babajanov did not attest that they performed these searches themselves or detail the procedure underlying the search. This argument is unavailing (See Cruz v City of New York, 218 AD2d 546, 547 [1st Dept 1995] [“the affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by the Department of Transportation is sufficient to establish that no prior written notice was filed. The affidavit need only indicate that the official has caused a search of the department’s records to be made and that no written notice of the defective condition was found”]; see also Campisi v Bronx Water & Sewer Serv., Inc., 1 AD3d 166, 167 [1st Dept 2003]).

As plaintiff notes, neither George and Babajanov asserts that the documents produced by these searches did not provide written notice of the defective condition. This omission is of no

moment in light of the City's submission of the records themselves (NYSCEF Doc. Nos. 42 and 44) and the affirmation of counsel for the City establishing that, as a matter of law, none of these records constituted written notice of the pothole (See Thana v The City of New York, 2014 NY Slip Op 33562[U] [Sup Ct, Bronx County 2014] ["While is it is true that Collins and Robinson's affidavits do not allege or state that defendants had no prior written notice of the missing manhole cover, the documents which they incorporate by reference and provide establish the absence of prior written notice"]; but see Henderson v City of NY, 2014 NY Slip Op 31478[U] [Sup Ct, NY County 2014]).

Accordingly, the burden shifts to plaintiff to submit evidence in admissible form that raises a question of fact as to whether the City had prior written notice (See Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Plaintiff argues that Harmon's EBT testimony that the Scheduled Date of April 2, 2018 listed in work order 843767948 suggests that an inspection of the subject location occurred on that date and, moreover, that this inspection may have resulted in a report of necessary work at that location sufficient to provide prior written notice of the pothole to defendants.

However, a review of Harmon's deposition reveals that his testimony on this point was hedged and speculative; he repeatedly acknowledged that he was uninformed as to how programmatic inspections such as the one at issue in work order 843767948 were conducted and was guessing that the Scheduled Date listed on work order 843767948 indicated the date that the inspection took place. As such, his deposition does not create an issue of fact as to the City's lack of prior written notice (See e.g., Wiener v City of New York, 60 AD3d 598, 598 [1st Dept 2009] ["[f]ollowing defendants' respective documentary showings of prima facie entitlement to summary judgment, plaintiffs' proffer of mere conjecture and speculation ... failed to raise a

triable issue of fact as to whether any of the moving defendants' negligence caused plaintiff's injury").

In any event, plaintiff's argument that an inspection on April 2, 2018 might have resulted in a written record is contradicted by the record. Harmon testified that "[n]otes that are taken in the field ... should be transcribed into the database, the IPS database" (NYSCEF Doc. No. 58 [Harmon EBT at p. 42]) and, per the affidavit of Kemal Babajanov, DEP records stored on the IPS ("Infor Public Sector") database were searched without revealing a written report from an inspection on April 2, 2018 (See NYSCEF Doc. Nos. 43 [Babajanov Aff. at ¶¶2-3] and 44 [DEP Records]). Accordingly, as the City did not have the prior written notice of the pothole required under Administrative Code §7-201, defendants' motion for summary judgment is granted and this action dismissed.

In light of the foregoing, it is

**ORDERED** that the motion for summary judgment by defendants the City of New York and New York City Department of Transportation, is granted; 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

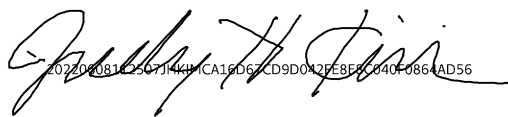
**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the

“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.

6/8/2022  
DATE



HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: