

Safier v City of New York
2022 NY Slip Op 32410(U)
July 22, 2022
Supreme Court, New York County
Docket Number: Index No. 158953/2015
Judge: Judy H. Kim
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

Justice

-----X

INDEX NO. 158953/2015

SCOTT A. SAFIER,

MOTION DATE 03/08/2022

Plaintiff,

MOTION SEQ. NO. 006

- v -

CITY OF NEW YORK, FIRST FOOD SERVICE LLC D/B/A NO.1 CHINESE RESTAURANT, YU SUSHI INC., SAGGIO RESTAURANT INC., PINE 181, INC., TRI-STATE BIODIESEL, LLC, UNITY FUELS, LLC D/B/A GREASE LIGHTNING, MID-BRONX HAULAGE CORP., CENTURY WASTE SERVICES, L.L.C., MOSBACHER PROPERTIES GROUP, LLC, KALKIN E. NARVILAS,

DECISION + ORDER ON MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document num KI (Motion 006) 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 233, 330, 389, 397, 429, 430, 431; 432, 433, 434, 435, 471, 472, 500, 501

were read on this motion for

SUMMARY JUDGMENT

Plaintiff's complaint alleges that on May 31, 2014 he was injured in a bicycle accident caused by oil spilled on the street adjacent to 825-829 West 181st Street (NYSCEF Doc. No. 1 [Compl. at ¶¶10, 27]). Defendant the City of New York (the "City") now moves, pursuant to CPLR §3212, for an order granting it summary judgment dismissing the complaint as against it, on the grounds that the City did not receive prior written notice of the oil spill.

In support of its motion, the City submits the affidavit of Talia Stover, a New York City Department of Transportation ("DOT") paralegal, attesting to her search of DOT records for West 181st Street between Pinehurst Avenue and Cabrini Boulevard for the two years prior to and including the date of plaintiff's accident (NYSCEF Doc. Nos. 196 [Stover Aff.]). This search produced six permits, five hardcopy permits, five applications, three inspections, three

maintenance and repair records, three complaints, three gangsheets for roadway defects, and two Big Apple Maps (NYSCEF Doc. Nos. 196 [Stover Aff.] and 195 [DOT Records]).

In addition, the City submits what it asserts is a record with results from a search performed by the New York City Department of Sanitation (“DOS”) for complaints relating to location West 181st Street between Pinehurst Avenue and Cabrini Boulevard from May 15, 2014 to March 9, 2016 (NYSCEF Doc. No. 197). However, the City has failed to lay a foundation for this document’s admissibility as a business record, as it relies solely on its counsel’s statement as to the document’s source and authenticity (See Buffington v Catholic School Region of Northwest and Southwest Bronx, 198 AD3d 410, 411 [1st Dept 2021]). As a result, the Court will not consider it in connection with this motion.

Plaintiff opposes the motion as do co-defendants Pine 181, Inc. and Mosbacher Properties Group, LLC.

DISCUSSION

As a threshold matter, the Court is not persuaded by the argument raised in opposition by plaintiff and co-defendants Pine 181, Inc. and Mosbacher Properties Group, LLC that the City’s failure to submit a statement of material facts as required by Uniform Rule 202.8-g mandates the denial of the motion; there is no evidence that the City’s non-compliance has prejudiced plaintiff (See Meserole Hub LLC v Rosenzweig, 71 Misc 3d 1222(A) [Sup Ct, Kings County 2021]; but see Amos Financial LLC v Crapanzano, 145 NYS 3d 366 [Sup Ct, Rockland County 2021]). Accordingly, the Court will address the City’s motion on its merits.

“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]). Here, the City argues that this action must be dismissed as against it because the City did not have prior written notice of the oil spill as required by Administrative Code §7-201. The parties do not dispute that Administrative Code §7-201 applies to the oil spill at issue here (See Baez v City of New York, 236 AD2d 305, 305 [1st Dept 1997]; see also Estrada v City of New York, 273 AD2d 194, 194 [2d Dept 2000]) but instead dispute whether the City has established a lack of written notice under the statute.

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...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] [emphasis added]).

The City has established prima facie that it lacked prior written notice of the oil slick through the DOT records and affidavits by Stover (See e.g., Harvey v Henry 85 LLC, 171 AD3d 531, 531-32 [1st Dept 2019]). Accordingly, the burden shifts to plaintiff 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]). Plaintiff has failed to carry his burden.

In opposition, plaintiff makes three arguments. He first takes issue with the scope of the DOT records produced by the City, asserting that Stover only searched for records related to a

“tree well” in the vicinity of plaintiff’s accident. However, this assertion is belied by Stover’s affidavit, in which she attests that the search encompassed “the roadway located at West 181st Street between Pinehurst Avenue and Cabrini Boulevard” (NYSCEF Doc. No. 196 [Stover Aff. at ¶3]).

Plaintiff similarly takes issue with the scope of the Department of Sanitation records submitted, arguing that this search “was limited to complaints made for a period of two weeks prior to the date of the incident” and therefore “fails to capture the recurring nature of the defective condition” (NYSCEF Doc. No. 429 [Gersowitz Affirm. in Opp. at ¶54]). This argument is moot because, as discussed above, the City has not established the admissibility of this document and, as a result, the Court will not consider it in connection with this motion¹.

Finally, plaintiff argues that the City failed to provide records from the Fire Department of New York (“FDNY”) despite being ordered by the Court to produce such records (NYSCEF Doc. NO. 122 [June 18, 2020 Decision and Order]). However, plaintiff waived his right to further disclosure by filing a note of issue on August 4, 2021 (NYSCEF Doc. No. 131) which failed to reserve his right to further discovery (See Rivera-Irby v City of New York, 71 AD3d 482 [1st Dept 2010]; see also Melcher v City of New York, 38 AD3d 376, 377 [1st Dept 2007]). The fact that this note of issue was subsequently vacated based upon plaintiff’s dilatory responses to certain defendant’s demands (See NYSCEF Doc. No. 507 [February 2, 2022 Decision and Order]) does not vitiate this principle.

¹ “Even if the court accepted the one (1) page search result at face value because plaintiff has not contested the validity of the results” (Pyne v City of New York, 2017 WL 836866 [Sup Ct, Queens County 2017]), the Court notes that the complaints mentioned therein range from March 15, 2014 to January 13, 2016 (NYSCEF Doc. No. 197).

In short, “a municipality which has enacted a prior written notice statute may not be subject to liability for personal injuries unless it either received actual written notice of the dangerous condition, its affirmative act of negligence proximately caused the accident, or where a special use confers a special benefit on the municipality [and] [t]he instant case, involving an oil spill of unknown origin on a City thoroughfare, does not fit within these exceptions” (Estrada v City of New York, 273 AD2d 194, 195 [2d Dept 2000] [internal citations omitted]). Accordingly, the City’s motion for summary judgment is granted

In light of the foregoing, it is

ORDERED that the motion by defendant the City of New York for summary judgment is granted and this action is hereby dismissed as against it; and it is further

ORDERED that the caption is to be amended to reflect this dismissal and that all future papers filed with the court are to bear the amended caption; and it is further

ORDERED that since the City of New York is no longer a party to this action, the Trial Support Office shall reassign this action to the inventory of a non-City Part; and it is further

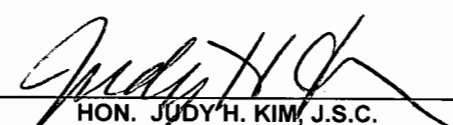
ORDERED that within thirty days from entry of this order, counsel for the City of New York shall serve a copy of this order with notice of entry on all parties as well as on the Clerk of the Court (60 Centre St., Room 141B) and the New York County Supreme Court’s General Clerk’s Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly and mark their records to reflect the change in the caption herein; 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 “E-Filing” page on this court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

7/22/2022
DATE


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

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