

Cedeno v City of New York

2022 NY Slip Op 33483(U)

October 11, 2022

Supreme Court, New York County

Docket Number: Index No. 163142/2015

Judge: Leslie A. Stroth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH

PART 52

Justice

-----X

INDEX NO. 163142/2015

MARIA CEDENO,

MOTION DATE 06/15/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

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

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for

JUDGMENT - SUMMARY

This is an action to recover monetary damages for personal injuries sustained by plaintiff Maria Cedeno (plaintiff) as a result of an alleged trip and fall due on October 11, 2014. Plaintiff alleges that she fell due to a pothole in the vicinity of a pedestrian crosswalk at the intersection of Amsterdam Avenue and West 90th Street, New York, New York. Defendants the City of New York, New York City Department of Transportation and New York City Department of Environmental Protection (collectively, the City) move for summary judgment pursuant to CPLR 3212 (b) for an order dismissing the complaint.

The City maintains that, pursuant to Administrative Code of the City of New York § 7-201, it cannot be held liable for plaintiff's injuries, as the City did not have written notice of the alleged defect nor did the City cause or create the defect. Plaintiff opposes and argues that the City fails demonstrate the absence of any triable issues of fact, because the City's witness could not testify to or explain the documents produced by the City at his deposition.

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." Assaf v Ropog Cab Corp., 153 AD2d 520 (1st Dept 1989), quoting Sillman v Twentieth

Century-Fox Film Corp., 3 NY2d 395, 404 (1957). As such, 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. See *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. See *Sillman*, 3 NY2d 395 at 404. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. See *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf*, 153 AD2d at 520.

For the City to be liable for injuries resulting from an allegedly defective condition, a plaintiff must demonstrate that the City has received prior written notice of the subject condition. See Administrative Code § 7-201; *Amabile v City of Buffalo*, 93 NY2d 471 (1999). The only exceptions to the prior written notice requirement are where the municipality itself created the defect through an affirmative act of negligence or where the defect resulted from a special use by the municipality. See *Yarborough v City of New York*, 10 NY3d 726 (2008); *Amabile*, 93 NY2d 471.

In support of its motion, the City relies on a record search from the New York City Department of Transportation (DOT) (Exhibit G, NYSCEF doc. no. 40) and the affidavit of Henry Williams, the DOT paralegal who conducted the search (Exhibit J, NYSCEF doc. no. 43). The DOT search revealed records regarding the subject location for the two years prior to and including the date of plaintiff's alleged incident. The DOT search records include four maps relating to the subject location from the Big Apple Pothole and Sidewalk Protection Corporation (Big Apple Map), which was received by DOT on October 23, 2003. See Exhibit I, at 102, 104, NYSCEF doc. no. 42. The DOT search also uncovered three maintenance and repair records and corresponding gang sheets for the location at issue. *Id.*

The City avers that no records retrieved from its search impute the City with prior written notice of the specific defect that caused plaintiff's accident. The City asserts that the maintenance and repair records revealed by the DOT search demonstrate that any defects were repaired prior to the date of plaintiff's alleged incident, so the maintenance records could not have provided notice to the City of the condition at issue. Similarly, the City argues that the Big Apple Map does not depict any relevant symbols representing a pothole in the vicinity of the pedestrian crosswalk where plaintiff's accident occurred. As plaintiff alleges that her incident occurred in a pedestrian cross walk due to a pothole, the City maintains that the relevant symbol on the Big Apple Map would be a square symbol ("pothole or other hazard" in a "pedestrian crosswalk"), which does not appear at the intersection of Amsterdam Avenue and West 90th Street. *Id.*, Key to Map Symbols at 104.

In opposition, plaintiff argues that the City fails to tender sufficient evidence to demonstrate the absence of any material issue of fact. Specifically, plaintiff argues that the City's witness, Omar Codling, was unable to substantively testify as to where the alleged accident occurred, provide details as to where the subject repairs were made and by whom, or to address the markings on the Big Apple Map. *See* Exhibit H, NYSCEF doc. no. 41. Plaintiff does not submit any additional evidence to support its position.

Plaintiff's argument that the City's witness, Mr. Codling, was unable to explain the records produced by the City fails. The City submits the affidavit of Henry Williams, the paralegal who conducted the DOT record search, who is familiar with the maintenance of the DOT records. *See* Exhibit J, NYSCEF doc. no. 43. Mr. Williams properly authenticates the maintenance and repair records, which reveal that that the three pothole defects indicated were repaired as of October 6, 2013 and December 9, 2013 – more than 11 months and 10 months prior to the date of incident, respectively. *See* Exhibit I at 86-99. As the reported potholes were repaired at least 10 months prior to the alleged accident, any contention that those

that those repairs caused and/or created an immediately apparent hazardous condition, without additional evidence or specific contention, is speculative.

Additionally, the markings on the Big Apple Maps do not provide prior written notice of the specific condition alleged. See *D'Onofrio v City of New York, et al*, 11 NY3d 581 (2008). Here, the defect alleged (i.e. a pothole in a crosswalk) was not the defect shown on the Big Apple Map. See *Daniels v City of New York*, 91 AD3d 699, 700 (2d Dept 2012) (“None of the defects shown on the Big Apple map was the one on which the plaintiff’s claim was based, and, therefore the map did not give the City written notice of the defect”). The fact that Mr. Codling could not testify as to the markings on the Big Apple Maps does not alter the fact that the maps do not provide written notice of the defect at issue. Therefore, the Big Apple Maps submitted do not provide the City with prior written notice regarding the subject pothole condition. The Court has considered the parties remaining contentions and finds them to be unavailing.

Accordingly, it is

ORDERED that the City’s motion for summary judgment granted, and the complaint is dismissed against it; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants the City of New York, New York City Department of Transportation and New York City Department of Environmental Protection for claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

10/11/2022

DATE


LESLIE A. STRÖTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: