

Dempsey v City of New York
2022 NY Slip Op 33943(U)
November 21, 2022
Supreme Court, New York County
Docket Number: Index No. 156967/2020
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 62

Justice

-----X

BOBBY DEMPSEY

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 156967/2020

MOTION DATE 06/21/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

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

In the underlying action, plaintiff alleges that on May 7, 2020, between 3:15 p.m. and 4:15 p.m., he was “caused to fall on the street located at the Columbus Circle,” in the County, City, and State of New York, due to “a traplike, raised, holey, unlevel, mis-leveled, hazardous, broken, depressed, defective, trip hazard, sink hole, pot hole, and/or dangerous condition” at the subject location.

Now pending before the court is a motion filed by defendant THE CITY OF NEW YORK (the “City”) seeking an order, pursuant to Civil Practice Law and Rules (“CPLR”) Section 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.

Oral arguments on the motion were heard before the undersigned on October 13, 2022 and the arguments and findings made on the record are incorporated herein.

Standard for Summary Judgment

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 [Sup. Ct. App. Div. 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 [Sup. Ct. App. Div. 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]).

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]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

City’s prima facie case for summary judgment

In its motion, the City argues that it did not receive prior written notice of the allegedly depressed roadway condition on the eastern side of West 59th Street and Columbus Circle. The City argues that plaintiff has the burden of pleading and proving that the City had prior written notice of the allegedly defective condition, and that plaintiff’s failure to do so requires dismissal of the complaint.

In support of its arguments, the City submits, *inter alia*, three sworn affidavits and an EBT transcript.

The first affidavit was by FULU BHOWMICK, (NYSCEF Document #29), who is employed by the Department of Transportation of the City of New York (“DOT”), and who is assigned to search for records maintained by DOT. Ms. Bhowmick stated that she personally conducted a search in the pertinent electronic databases and identified and requested a search for corresponding paper records of permits, applications for permits, OCMC files, CARs, NOVs, NICAs, inspections, contracts, maintenance and repair orders, complaints, gangsheets for roadway work, milling and resurfacing records, and Big Apple Maps for the roadway located at West 59th Street between Columbus Circle and 7th Avenue in the County, City, and State of New York. This

search encompassed the two-year period prior to and including May 7, 2020, the date upon which plaintiff claims to have been injured. She also conducted the same search for the intersection of Columbus Circle and West 59th Street in the County, City, and State of New York. The results of the search included, *inter alia*, the work orders discussed *infra*.

The second affidavit was by NICHOLAS IANNUZZELLI, (NYSCEF Document #31), who is also employed at the DOT, in the Division of Roadway Repair and Maintenance, as a Supervisor Highway Repairer of the Jolt Elimination Team Emergency Response Unit. Mr. Iannuzzelli stated that he reviewed the maintenance and repair records (also known as "FITS" reports) for repair order DM2018321001 that was generated on November 16, 2018, for the location of West 59th Street and Columbus Circle in the County, City, and State of New York. Mr. Iannuzzelli stated that a maintenance crew, supervised by Highway Repairer Harris, responded to the location. The Action-ID is listed as "defect not found," the Repair Status as "DNF," and the Defect Status as "CLS - closed work order." Mr. Iannuzzelli stated that all of this information indicates that the condition described in repair order DM2018321001 was "not found" by the DOT crew when they inspected the location, and that the work order was closed.

The third affidavit was by JOYCE EDGEHILL, (NYSCEF Document #32), who is also employed by the DOT and who works in the Manhattan Street Maintenance Division of Roadway Repair and Maintenance ("RRM") as an Administrative Manager. Ms. Edgehill stated that she reviewed the FITS reports for work orders DM2018296013, DM2019018025, and DM2020066012. According to Ms. Edgehill, work order DM2018296013 was for the location of West 59th Street and Columbus Circle in the County, City, and State of New York. A pothole crew, supervised by Highway Repairer Laird, responded to the location and referred the work order to DOT maintenance. Subsequently, the condition was found and repaired. Work order

DM2019018025 was for the location of West 59th Street between Columbus Circle and 7th Avenue, in the County, City and State of New York. A pothole crew, supervised by Highway Repairer Blacknall, responded to the location and referred the work order to DOT maintenance. Subsequently, the condition was found and restored. Work order DM2020066012 was for the location of West 59 Street between Columbus Circle and 7th Avenue in the County, City, and State of New York. A pothole crew, supervised by Highway Repairer Laird, responded to the location and referred the work order to DOT maintenance. Subsequently, the condition was found and repaired.

At his deposition David Dorce, a record searcher employed by the DOT, testified in relevant part that a defect mentioned on Bates pages 807-808 of the City's "Supplemental Response to the Case Scheduling Order" (NYSCEF Document #28 was associated with work order DM2020066012 (transcript at NYSCEF Document #30).

The City argues that the affidavits and Dorce's testimony, when considered in totality, support the City's arguments that the City had no prior written notice of the alleged defect in this case.

In Katz v City of New York, 87 NY2d 241 (1995), the New York Court of Appeals held that:

Administrative Code of the City of New York § 7-201(c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location [...] prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City [...]. The failure to demonstrate prior written notice leaves plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying a defective sidewalk. Because this prior written notice provision is a limited waiver of sovereign immunity, in derogation of common law, it is strictly construed.

Further, “Unless the injured party can demonstrate that a municipality *failed or neglected to remedy a defect* within a reasonable time after receipt of written notice, a municipality is excused from liability absent proof of prior written notice or an exception thereto” [emphasis added] (Poirier v City of Schenectady, 85 NY2d 310 [Ct. of Appeals 1995]).

Here, the City submitted an EBT transcript of a records searcher at the DOT, an affidavit from another records searcher at the DOT, as well as two other affidavits from individuals at the DOT who personally reviewed the work orders. The City also addressed, work orders at or near the accident location, and submitted documentation to show that the work orders were addressed and closed.

Given the above, this court finds that the City has made a *prima facie* showing of entitlement to summary judgment as a matter of law, and the burden now shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

Conclusions of Law

In opposition, plaintiff argues that there are “three separate instances of prior written notice.” Specifically, plaintiff refers to the City’s “Supplemental Response to the Case Scheduling Order” (NYSCEF Document #28) that consists of hundreds of pages of documents produced by the City. Plaintiff alleges that the three defects noted on Bates Page Numbers 13, 814 and 807-808, provide the City with prior written notice, as each of these reported defects were at or near the alleged accident location. Additionally, although not artfully pled in his papers, plaintiff argued, on the record, that prior notice is not required whereas here, the City caused the defective condition or negligently repaired the prior conditions giving rise to plaintiff’s accident.

There are at least four reports of defects at or near the location of plaintiff's accident all of which are within a very short time period.

With regard to the first defect on October 23, 2018, Bates Page Number 13 states that a complaint was called in about a pothole at "CPW – W. 59 St." While the City contends that the defect was found and repaired, such claim is unsupported by the record. On Bates Page Number 15, the City's records show that the defects reported on October 23, 2018 were marked either as "XCL" (which means the subject defect was found and repaired) or "DNF" (which means that no defect was found by the work crew upon their inspection). There is no indication on this record which of the codes correspond to the October 23, 2018 defect and, importantly, unlike the defects reported below on January 18, 2019 and March 6, 2020, the City did not produce any work orders or repair records with regard to this defect. Interestingly, approximately one month later on November 16, 2018, a repair order was generated in or around the subject location which was reported as "not found."

With regard to the second defect on January 18, 2019, Bates Page Number 817 states that a complaint was called in and that the defect was associated with work order DM2019018025. While Ms. Edgehill claims in her affidavit that the defect had been found and restored, it is unclear on this record whether the January 18, 2019 complaint was the result of a new and different defective condition that had been detected or whether it arose from the October 23, 2019 complaint or the November 16, 2018 repair order.

Similarly, with regard to the third defect, Bates Page Numbers 807-808 state that a complaint was called in about a defect on March 6, 2020. According to Bates Page Number 807 this defect was associated with work order DM2020066012. In her affidavit, Ms. Edgehill confirms that a defect had been found and that it had been repaired. Again, it is unclear on this


record whether the March 6, 2020 complaint was the result of a new and different defect that had been detected or whether it arose from the complaint filed earlier on either January 18, 2019 or October 23, 2018.

This court finds that the records in this case raise more questions than they answer regarding the cause of plaintiff’ injuries and whether the City caused or created the defect, thus putting the City on notice. Thus summary judgment is denied.

Conclusion

It is hereby:

ORDERED that the City’s motion is DENIED.

11/21/2022					
DATE			J. MACHELLE SWEETING, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<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