

Perez v City of New York
2022 NY Slip Op 35079(U)
June 13, 2022
Supreme Court, Bronx County
Docket Number: Index No. 24754/2018E
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX-----X
JOSEPH C. PEREZ,

Plaintiff,

Index No.: 24754/2018e

-against-

CITY OF NEW YORK, et. al.,

Defendants.

DECISION/ORDER**Present:****HON. MITCHELL J. DANZIGER**-----X
Recitation as Required by CPLR §2219(a): The following papers
were read on this Motion for Summary Judgment/Dismiss:

Papers Numbered

Notice of Motion, Affirmation in Support with Exhibits,
Statement of Material Facts, and

Memorandum of Law.....

1

Affirmation in Opposition with Exhibits and

Statement of Material Facts.....

2

Affirmation in Reply with Exhibits.....

3

Motion by defendant, City of New York, s/h/a New York City Department of Transportation and New York City Parks Department (hereinafter "City"), for an order pursuant to CPLR §§ 3212 and 3211 and New York City Charter 17, granting summary judgment and dismissal of plaintiff's complaint as against the City is resolved as follows:

According to plaintiff's pleadings, this action arises from an incident that took place on February 13, 2017, at approximately 12:10 A.M. on Orchard Beach Road, wherein plaintiff was heading towards Route 908 A, Exit 5, Southbound Hutchinson River Parkway exit ramp, Bronx, New York. Plaintiff alleges that while he was traveling on Orchard Beach Road he was caused to lose control of his automobile due to an icy condition on the roadway caused by pooling/ponding that the City allowed to accumulate. This caused plaintiff to strike negligently placed boulders used as a roadway divider. Plaintiff does not plead in his notice of claim or in his complaint, that the lack of lighting in the area caused or contributed to his incident. As such, plaintiff seeks to argue a new theory of liability in his opposition papers and as this theory was not previously pleaded, the Court will disregard the same. (*Keilany B. v. City of New York*, 122 A.D.3d 424 [1st Dept. 2014]).

The City moves this Court for summary judgment on the grounds that: 1) the storm in progress rule precludes recovery, as a couple of hours earlier, a sleet storm had ended and the City had no duty to remove black ice; 2) there is no evidence of actual or constructive notice regarding a ponding or pooling condition at the subject location or any prior accidents or injuries relative to the placement of the boulder that plaintiff's car came in contact with; and 3) plaintiff was intoxicated pursuant to a blood serum test taken at the hospital and as such, this constitutes Aggravated Driving While Intoxicated pursuant to Vehicle and Traffic Law (VTL) §1192.2-a, which carries a presumption under Penal Law §120.03, that his intoxication caused his accident.

Plaintiff opposes the City's motion and submits that the defendants' argument regarding black ice and the storm in progress rule and plaintiff's intoxication is just an attempt to detract from the "boulder infested" unlit grass median area. Had the boulders not existed, plaintiff would have been able to safely bring his vehicle to rest after losing control. Moreover, plaintiff avers that if there were guardrails instead of boulders, plaintiff's vehicle would have remained on the roadway and potentially avoided a near fatal crash.

In support of plaintiff's opposition, plaintiff submits an engineer's report dated August 3, 2021. Said report is not notarized. As an engineer is not within the category of people who can submit affirmations, as opposed to affidavits, this report is inadmissible and will not be considered. CPLR §2106(a).

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 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [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 non-moving party. (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [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 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v.*

Da Ecib USA, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]). Moreover, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict.”(*Asabor v Archdiocese of New York*, 102 AD3d 524, 527 [1st Dept. 2013]).

According to plaintiff’s testimony and the climatological records submitted with this motion, there had been sleet or “ice rain” and/ or snow all day prior to plaintiff’s incident. In addition, according to the certified weather records, in the days prior to the incident, there were temperature fluctuations below and above freezing. With regard to the storm, plaintiff testified that the “ice rain” continued during the time that he was having dinner at a restaurant and until 10-10:30 p.m.. Plaintiff surmises that his car began sliding due to black ice, however, he did not see the ice before or after the incident. Plaintiff alleges that the ice was due to a ponding condition on the roadway.

In opposition to the City’s motion, plaintiff contends that the submitted weather records are inadmissible. However, the certified climatological records provided by the City are routinely used and relied upon for motions for summary judgment without the need for an expert. (*Saavedra v. City of New York*, 137 A.D.3d 421 [1st Dept. 2016]). Plaintiff seems to have changed his focus with regard to his theory of liability in his opposition papers. He now indicates that the alleged black ice and plaintiff’s intoxication are of no consequence and an attempt to detract the Court from the material fact that plaintiff’s injuries were caused and aggravated by him hitting the boulder placed in the unlit grassy median. It is unclear if the plaintiff is abandoning his prior theories of liability from his papers, but to the extent he is not, assuming there was black ice or a pooling/ponding condition, the fluctuation of temperatures in the days before the accident and the storm on the day of, prevents a finding of liability on the part of the City, as there was not a reasonable time to remedy the alleged conditions after the cessation of the storm. (*Katz v. City of New York*, 11 A.D.3d 391 [1st Dept. 2004], *Saavedra v. City of New York*, 137 A.D.3d 421 [1st Dept. 2016]).

Whether plaintiff is arguing that the proximate cause of his accident is the black ice, the pooling/ponding condition, or the boulders, the City must have actual or constructive notice of any of those alleged defective conditions. Here, there is nothing in the record that supports a

finding that the City had notice, either actual or constructive of any of the potential causes of plaintiff's accident or injuries. The City conducted searches of the New York City Parks Department, the New York City Department of Environmental Protection, the New York City Department of Transportation, and the New York State Department of Transportation, none of which reveal any prior notice of black ice, a pooling or ponding condition on the roadway, and/or the boulders located at the accident location. This lack of notice is fatal to plaintiff's claims.

While plaintiff alleges that the City caused or created the alleged boulder defect, he does not and cannot argue that the placement of the boulders immediately resulted in the existence of a dangerous condition. The boulders had been present in the location since 2008 and his accident was the first involving the boulders. A nine year delay between the placement of the boulders and an accident is not immediate. (*Fiero v. City of New York*, 190 A.D.3d 822 [1st Dept. 2021]). Moreover, there is no liability for dangers that are open and obvious, are plainly observable, and/or that do not pose a danger to someone using their senses. *Rivera v. City of New York*, 57 A.D.3d 281 [1st Dept. 2008], *Buccino v. City of New York*, 84 A.D. 670 [1st Dept. 2011]). Plaintiff was aware of these boulders well in advance of this accident and it is undisputed that the boulders are located entirely within the median on the grassy area. According to plaintiff's testimony, he drove on this road approximately every day for the last 15 years. (Exhibit L, page 53). Plaintiff himself was unaware of any incidents involving the boulders.

Pursuant to New York City Administrative Code §7-201, a plaintiff must plead and prove that the City had prior written notice of a street defect. Additionally, "to impose liability upon a defendant in a negligence action based upon a defective [design], a plaintiff must establish that the defendant either created the condition or had actual or constructive notice of it." (*Cappolla v. City of New York*, 302 A.D.2d 547 [2nd Dept. 2003].) Here, none of the records submitted show that there was prior written notice and there is no evidence of constructive notice. There is no evidence that the placement of the boulders resulted in an immediately dangerous condition. As such, the City has established prima facie entitlement to judgment as matter of law. The plaintiff fails to raise a triable issue of fact in opposition.

Lastly, the plaintiff was driving while intoxicated, which certainly cannot be overlooked as the cause of plaintiff's accident. Plaintiff admitted to consuming approximately three drinks prior to driving that evening and may have had more. The City's toxicologist places plaintiff's

blood alcohol content at almost three times over the legal limit of alcohol consumption at 0.21 g%, which would have adversely effected plaintiff's ability to safely operate his vehicle.

Plaintiff argues that the expert report of toxicologist Michael Holland, M.D. should not be considered because it was served with the City's motion for summary judgment, it was not properly affirmed, the records relied upon were not certified, and the expert fails to establish the chain of custody for the preservation of the blood sample. First, Dr. Holland's report was affirmed and notarized. Second, all of the records that Dr. Holland relied upon were certified. Given that plaintiff admitted to drinking, the FDNY records indicated that plaintiff had alcohol on his breath, and the blood draw at the hospital confirmed he had consumed alcohol, plaintiff's argument regarding chain of custody is unavailing. Per the certified hospital records, the blood was drawn at Jacobi Hospital, in the emergency room, which has been found to be admissible as prima facie evidence. (*Rodriguez v. Triborough Bridge & Tunnel Auth.*, 276 A.D.2d 769 [2nd Dept. 2000]). Lastly, pursuant to CPLR §3212(b), where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange [pursuant to CPLR §3101] was not furnished prior to the submission of the affidavit. Accordingly, the Court finds Dr. Holland's report admissible. Pursuant thereto, plaintiff's level of intoxication was almost three time over the legal limit and above the "Aggravated DWI" violation level. As such, plaintiff's intoxication is likely the primary cause of his motor vehicle accident.

Accordingly, the City's motion is granted, and plaintiff's complaint is dismissed in its entirety. The City is directed to serve a copy of this order with notice of its entry upon the plaintiff within 30 days of the entry date.

This constitutes the order and judgment of the Court.

Dated:

6/13/22

Bronx, New York



HON. MITCHELL J. DANZIGER, J.S.C.