

Ratel v City of New York
2022 NY Slip Op 35147(U)
April 7, 2022
Supreme Court, Richmond County
Docket Number: Index No. 151439/2019
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2-----X
LONI RATEL,

HON. THOMAS P. ALIOTTA

*Plaintiff,***DECISION AND ORDER***-against-*

Index No.: 151439/2019

Motion No.: 001

CITY OF NEW YORK and LARRY WILLIAMS,

Defendants.
-----X

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" and "4" were fully submitted on the 23rd day of February 2022:

**Papers
Numbered**

Defendant, CITY OF NEW YORK's, Notice of Motion, Affirmation, Statement of Material Facts and Exhibits	1, 2
Plaintiff's Affirmation in Opposition with Exhibits	3
Reply Affirmation with Exhibits	4

Upon the foregoing papers, defendant, CITY OF NEW YORK's, motion for summary judgment is decided as follows:

PROCEDURAL HISTORY

Plaintiff commenced this action on June 17, 2019, and issue was joined on July 9, 2019. Plaintiff served co-defendant, Larry Williams, on June 28, 2019 pursuant to CPLR § 308 (4). To date, the co-defendant has neither appeared nor answered, and plaintiff has not moved for a default judgment pursuant to CPLR § 3215. The City moved for summary judgment on November 30, 2021. Upon the filing of the Request for Judicial Intervention with this motion, the Court issued a Case Scheduling Order setting forth a discovery schedule.

FACTS

This is an action for personal injuries arising out of trip and fall on an alleged raised sidewalk flag in front of 273 Targee Street, Staten Island, New York. Plaintiff testified at her pre-action statutory hearing that the sidewalk had a “high pitch” differential of approximately 2.5 inches.

The basis of the motion for summary judgment is that plaintiff cannot establish that the City received prior written notice of the defect and none of the recognized exceptions to this condition precedent apply (Administrative Code § 7-201). Therefore, the action must be dismissed.

In support of the motion, the City submits a Statement of Material Facts and an affidavit from Gabriel Herman, a paralegal from the Department of Transportation who personally performed a records search and attested to the parameters and content of the search. The affiant searched the Department’s records for the dates of June 23, 2016, through the date of the accident, June 23, 2018. The search included Targee Street on the side of 273 Targee Street, running from Young Street to Laurel Avenue, which includes the intersection of Chestnut Street.¹ It is argued that the records reveal that defendant neither performed work in the area nor had prior written notice of the defect in the form of a written complaint or on a Big Apple Map. The Big Apple Map revealed notice of a broken uneven sidewalk which is not notice of the specific defect upon which plaintiff alleges to have fallen, i.e., a raised sidewalk.

In opposition, plaintiff argues that the motion is premature and made prior to the completion of discovery. Plaintiff did not submit a counter-statement of material facts.

¹ The Court takes judicial notice of the fact that Chestnut Street forms a “T” intersection at or near 273 Targee Street. See Google Maps.

DISCUSSION

It is well established that the proponent of a summary judgment motion must, as a matter of law, tender sufficient evidence to demonstrate the absence of any material issues of fact to warrant the granting of summary judgment (see *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Thus, the Court's sole function is to identify the existence of material issues of fact [or point to the lack thereof] rather than making determinations regarding the credibility of the physical evidence (*Vega v. Restani Construction Corp.*, 18 NY3d 499, 505 [2012]) or the movant's version of events (see *Xiang Fu He v. Troon Management, Inc.*, 34 NY3d 167, 175 [2019] [internal citations omitted]). If the movant fails to meet this burden, the burden of proof does not shift to the opposing party and the motion must be denied regardless of the sufficiency of the opposing papers (see *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, once the movant produces such evidence, the burden of proof then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action (*Xiang Fu He v. Troon Management, Inc.*, 34 NY3d 175). The non-movant must also do so by evidentiary proof in admissible form (*Ayers v. City of Mount Vernon*, 176 AD3d 766 [2d Dept. 2019]). Since summary judgment is the equivalent of trial, any significant doubt as to the existence of a material fact mandates a denial of the motion (*Matter of New York City Asbestos Litigation*, 33 NY3d 20, 26 [2019] and *Phillips v. Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). However, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment" (*Gilson v. Metropolitan Opera*, 5 NY3d 574, 578 [2005]).

The Administrative Code of the City of New York § 7-210 places tort liability for injuries arising on a defective sidewalk abutting one, two and three family residential properties on the

City of New York (see *Meyer v. City of New York*, 114 AD3d 734 [2nd Dept. 2014]). However, where a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective street or sidewalk condition absent proof of prior written notice or an exception thereto” (*Methal v City of New York*, 116 AD3d 743, 743 [2d Dept 2014]; see Administrative Code of City of New York § 7-201[c][2]; *Poirer v City of Schenectady*, 85 NY2d 130 [1995]). Although the maps prepared by the Big Apple Pothole and Sidewalk Protection Committee, Inc. and filed with the Department of Transportation serve as prior written notice of defective conditions, the symbols depicted thereon must be of the type of defect alleged in the notice of claim and complaint (*Abdullah v. City of New York*, 192 AD3d 735, 735 [2d Dept 2021], citing *Katz v. City of New York*, 87 NY2d 241, 243 [1995], see *Arutyunov v. City of New York*, 175 AD3d 1368, 1369 [2d Dept 2019]).

“The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence (*Yarborough v. City of New York*, 10 NY3d 726, 728 [2008]), or where a special use confers a benefit upon the municipality” (*Conner v City of New York*, 104 AD3d 637, 638 [2d Dept 2013]). The affirmative negligence exception is defined as “work by the City that immediately results in the existence of a dangerous condition” and not the “mere eventual emergence as the result of wear and tear” (see *Yarborough v. City of New York*, 10 NY3d 728 and *Wald v. City of New York*, 115 AD3d 939, 940 [2d Dept. 2014]). However, where a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective tree well condition on the sidewalk absent proof of prior written notice (*Fisch v. City of New York*, 194 AD3d 788) or that an exception to Administrative

Code § 7-201[c][2] exists (*see, Methal v City of New York*, 116 AD3d 743, 743 [2d Dept 2014] and *Poirer v City of Schenectady*, 85 NY2d 130 [1995]).

Here, absent proof of prior written notice (Administrative Code § 7-201[c][2]) or records demonstrating that the City caused and created the alleged defect, it is pure speculation as to when the condition arose (*see, Wald v. City of New York*, 115 AD3d 941). Finally, the map produced does not depict a symbol representing the raised sidewalk upon which it is alleged plaintiff fell (*Abdullah v. City of New York, supra*).

The motion is also granted as plaintiff failed to comply with the Uniform Civil Rules for the Supreme Court, Section 202.8-g (b), effective February 1, 2021, which requires, in pertinent part that, "...the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." Further, Uniform Rule 202.8-g[d] requires that "[e]ach statement of material fact by the movant *or opponent*...must be followed by a citation to evidence submitted in support of *or in opposition to* the motion."

Plaintiff failed to comply with the foregoing requirements of the Uniform Rules without offering an explanation or requesting additional time to submit a Counter Statement of Material Facts. Under the circumstances, the motion must be granted on this ground since all of the City's respective material statement of facts are "deemed admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party" (22 NYCRR 202.8-g[c]) (*Abreu-Velasquez v. Camba Housing Ventures, Inc.*, 150476/2017, Unreported Decision, Aliotta, J., 2022 and *Rodriguez v. City*, 101963/2013,

Unreported Decision, Aliotta, J., 2022). It is noted that plaintiff also failed to comply with Rule 202.8-b (Length of Papers). Based upon the foregoing, the remaining arguments of counsel are rendered academic.

Pursuant to CPLR § 3215 (c), the Court on its own initiative is dismissing the complaint as against defendant, Williams, based upon plaintiff's failure to enter a default judgment within one of year of service. This dismissal is without prejudice as the statute of limitations has not expired.

Accordingly, it is hereby,

ORDERED, that the motion by defendant, CITY OF NEW YORK, for an order granting summary judgment and dismissing this action together with all cross-claims is granted; and it is further

ORDERED, that this action is dismissed as against defendant, LARRY WILLIAMS, pursuant to CPLR § 3215 (c); and it is further

ORDERED, that this action is dismissed in its entirety; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April 7, 2022.

ENTER:



HON. THOMAS P. ALIOTTA, J.S.C.