

Brown v City of New York

2023 NY Slip Op 31276(U)

April 20, 2023

Supreme Court, New York County

Docket Number: Index No. 108570/2010

Judge: Judy H. Kim

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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 5

Justice

-----X

DENNIS BROWN,

Plaintiff,

- v -

CITY OF NEW YORK, DEPARTMENT OF ENVIRONMENTAL PROTECTION, TREVCON CONSTRUCTION CO., INC.,

Defendants.

-----X

INDEX NO. 108570/2010
MOTION DATE 11/05/2021
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by defendants the Department of Environmental Protection ("DEP") and the City of New York (collectively, with DEP, the "City") for summary judgment is granted on default¹ and for the reasons set forth below.

On June 18, 2010, plaintiff commenced this action against the City and Trevcon Construction Co., Inc. ("Trevcon")², alleging that on April 4, 2009, he tripped and fell "due to a large cutout/hole/depression ... approximately 10 feet in length, 10 feet in width, and 2 inches in depth" within the roadway of West 134th Street, located "approximately 85 feet east of 12[th]

¹ Pursuant to a May 12, 2022 decision and order granting plaintiff's counsel's motion to withdraw as counsel, plaintiff's time to oppose the City's motion was extended from February 14, 2022 to August 10, 2022 (See NYSCEF Doc. No. 45). No opposition papers have been filed.

² On January 6, 2012, Trevcon commenced a third-party action against Tully Construction Company Inc. ("Tully") asserting claims for indemnification and contribution (NYSCEF Doc. No. 12 [Third-Party Compl. at ¶¶1-19]). On January 16, 2012, Tully interposed an answer asserting crossclaims against Trevcon and the City for indemnification and contribution (NYSCEF Doc. No. 13 [Tully Answer]). However, pursuant to a stipulation dated October 2, 2012, plaintiff discontinued this action as against Trevcon and Trevcon discontinued its third-party action against Tully.

Avenue, New York, New York,” and sustained injuries as a result (NYSCEF Doc. Nos. 7 [Amended Notice of Claim at ¶¶3-4] and 9 [Compl. at ¶58]).

On December 16, 2016, the City moved for summary judgment dismissing this action as against it on the grounds that it did not receive prior written notice of the alleged condition as required by Administrative Code §7-201 (NYSCEF Doc. No. 14). On March 12, 2018, the Court (Hon. Verna L. Saunders) denied the City’s motion, without prejudice to its renewal after the completion of discovery (the “Prior Decision”). Justice Saunders concluded that summary judgment was premature because a DEP record produced by the City—i.e., customer service report #1910024—referenced a map detailing the location of a removed hydrant grade that could “indicate whether or not there was work done in the area where the plaintiff sustained injuries and whether or not the City had prior written notice of the condition” (NYSCEF Doc. No. 15 [Prior Decision]). As a result, Justice Saunders denied the motion and ordered the City “to produce any and all outstanding discovery including the [DEP] map referenced in [customer service report] #1910024” (Id.).

The City now moves, once again, for summary judgment dismissing plaintiff’s complaint as against it, arguing that it did not receive prior written notice of the defective condition or cause and create this condition. In support of its motion, the City submits: (i) the affidavit of Omar Codling, an employee of the New York City Department of Transportation (“DOT”), attesting to a record search performed for the roadway of West 134th Street and Twelfth Avenue, for the two-year period prior to and including the date of the subject incident (NYSCEF Doc. No. 23 [Codling Aff. at ¶¶1-4]); (ii) the results of Codling’s search, revealing only two Big Apple Maps (NYSCEF Doc. No. 24 [DOT Records]); (iii) the affidavit of Kisha Miller, a DEP employee, detailing the results of a search for water and sewer records for West 134th Street, between Broadway and

Twelfth Avenue, for the two-year period prior to and including the date of the subject incident (NYSCEF Doc. No. 25 [Miller Aff. at ¶¶1-7]); and (iv) the records produced by Miller's search, including one daily log sheet and five customer service reports (NYSCEF Doc. No. 26 [DEP Records]). The City avers that none of the DOT or DEP records produced by these searches provided the City with prior written notice of the alleged defective condition (NYSCEF Doc. No. 5 [Igoe Affirm. at ¶¶24-41]).

The City also submits the affidavit of Dennis Delaney, a DEP employee, stating

At the request of the New York City Law Department, I identified and reviewed [customer service report] #1910024 ... According to [customer service report] 1910024, the New York Fire Department placed a call to DEP indicating that a hydrant was knocked over at "121 e/o 12 ave 100' n/o w 134 st".

According to [customer service report] #1910024, a DEP crew from the Manhattan Water Maintenance Yard went out to the location to investigate and did not find a hydrant at the location indicated above. The crew surveyed the area and found that a hydrant and a hydrant gate on the southeast corner of 12th Avenue, between West 134th Street and 135th Street, had been removed. A patch was found in place of where the hydrant and hydrant gate use[d] to be located.

(NYSCEF Doc. No. 28 [Delaney Aff. at ¶¶3-4]).

The City submits the affidavit of Michael Brady, a captain in the New York City Fire Department, attesting that his search of the Fire Department's Geographical Information Systems' records for any DEP fire hydrants within the area of 12th Avenue and 134th Street produced no results (NYSCEF Doc. No. 16 [Brady Aff. at ¶¶1-6]). It also submits the affidavit of Michael DiBartolo, a DEP employee, explaining that the general sewer or water infrastructure map referenced in customer service report #1910024 was "overwritten" and, in any event, "would only indicate the location of DEP hardware, and would not indicate or depict any defect or work performed by the City" (NYSCEF Doc. No. 29 [DiBartolo Aff. at ¶¶1-6]).

DISCUSSION

“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. 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, 324 [1986] [internal citations omitted]).

The City has satisfied its prima facie burden for summary judgment. 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, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe dangerous or obstructed condition, 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]).

Here, the City has established through the Codling, Miller, Delaney, Brady, and DiBartolo affidavits, and the DOT and DEP records produced, that it did not receive prior written notice of the defective condition as required by Administrative Code §7-201 (See Gray v City of New York,

195 AD3d 538 [1st Dept 2021]). The outstanding issues of fact noted by Justice Saunders in the Prior Decision have been addressed by the Delaney, Brady, and DiBartolo affidavits, which establish that the DEP map no longer exists but would not, in any event, have had any probative value here.

Plaintiff has failed to raise an issue of fact as to whether the City received prior written notice (See Alvarez v Prospect Hosp., 68 NY2d 320 [1986]) or “demonstrate ... that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality” (Yarborough v City of New York, 10 NY3d 726, 728 [2008]) or, indeed, submit any opposition to this motion. Accordingly, the City’s motion is granted.

In light of the foregoing, it is

ORDERED that the City of New York and Department of Environmental Protection’s motion for summary judgment is granted and plaintiff’s complaint is dismissed in its entirety; and it is further

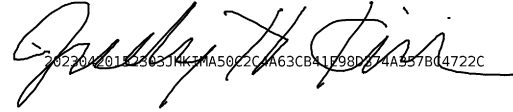
ORDERED that within fifteen days from entry of this order, counsel for the City of New York shall serve a copy of this order with notice of entry on plaintiff; and it is further

ORDERED that within fifteen 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 the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly; 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/suptmanh).

This constitutes the decision and order of the Court.



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4/20/2023

DATE

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

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE