

Green v City of New York
2023 NY Slip Op 32737(U)
August 4, 2023
Supreme Court, New York County
Docket Number: Index No. 153261/2021
Judge: Denise M. Dominguez
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

-----X INDEX NO. 153261/2021

D'ANDRE GREEN,

MOTION SEQ. NO. 003

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, the Defendant, NEW YORK CITY TRANSIT AUTHORITY's ("TRANSIT") motion for summary judgment pursuant to CPLR §3212, dismissing the Plaintiff's complaint and all cross-claims is granted.

This personal injury matter arises out of January 22, 2020, incident wherein the Plaintiff claims to have been caused to trip and fall over a mound or lump of asphalt that existed in the roadway and partially covered the abutting sidewalk curb in front of 369 West 34th Street in Manhattan (NYSCEF Doc. 1).

TRANSIT moves pre-note of issue arguing that it is entitled to summary judgment as it cannot be found negligent for Plaintiff's accident as it did not owe Plaintiff a legal duty of care. In support TRANSIT submits Plaintiff's statutory hearing and deposition transcripts and an affidavit from its Assistant Project Manager 2, Heribreto Hernandez. Plaintiff opposes.

Background

Plaintiff asserts a single cause of action against TRANSIT, sounding in negligence based upon the allegation that TRANSIT owned, managed, operated, maintained, constructed roadway and curb in front of 369 West 34th Street.

At Plaintiff's August 6, 2021 statutory hearing, Plaintiff testified at the time of his accident, he was walking along the curb of the sidewalk on 34th Street, near a bus stop. Plaintiff was waiting

for a bus to arrive when he fell due to a condition, which he described, as asphalt overlapping the curb. The Plaintiff was not boarding or exiting a bus at the time of his accident.

At Plaintiff's January 13, 2022 examination before trial, Plaintiff testified that he was walking near the bus stop on 34th Street, and had been checking to see if a bus was coming when he fell on a lump that was overlapping the sidewalk. The lump was a faded red color and black. Further during the deposition Plaintiff was able to review photographs and identify the lump that caused him to trip.

As per TRANSIT's affidavit by Heribreto Hernandez, TRANSIT's Assistant Project Manager 2, ("Hernandez"), the Plaintiff's photographs of the subject condition, the Plaintiff's amended notice of claim and an Oasis map were reviewed and it was determined that TRANSIT did not own or maintain any property at or in the vicinity of 369 West 34th Street, nor did TRANSIT own or maintain the curb or roadway in that location.

Discussion

It has long been held that "[t]he duty to maintain public sidewalks and roadways—including those adjacent to bus stops—in a reasonably safe condition and good repair, free from any defect, falls upon the City." (*Cabrera v. City of New York*, 45 A.D.3d 455, 456, 846 N.Y.S.2d 152 [1st Dept 2007] relying upon *Tanzer v. City of New York*, 41 A.D.3d 582, 837 N.Y.S.2d 336 [2d Dept 2007] and *Shaller v. City of New York*, 41 A.D.3d 697, 839 N.Y.S.2d 766 [2d Dept 2007]). In *Cabrera*, a similar action, the plaintiff therein was caused to slip and fall over a mound of asphalt that was covered in ice as she was crossing the roadway to reach a bus stop. It was specifically held that as the duty to keep roadways and sidewalks in good repair falls to the City of New York, entities such as the Transit Authority cannot be held liable, even where the allegation is that the defect is due to wear and tear of the roadway near their bus stops is caused by their buses. (*Cabrera* 45 A.D.3d at 456–57; *see also Weiters v. City of New York*, 103 A.D.3d 509, 959 N.Y.S.2d 429 [1st Dept 2013] where the plaintiff fell due to a roadway defect in the vicinity of a bus stop and it was held that the MTA was entitled to summary judgment because it was not responsible for maintaining public roadways; *see also Gonzalez v. City of New York*, 136 A.D.3d 418, 24 N.Y.S.3d 280 [1st Dept 2016]).

Here, it is uncontroverted that Plaintiff fell on a lump or mound of asphalt that overlapped the sidewalk curb near 369 West 34th Street. It is also uncontroverted that Plaintiff was not in the process of boarding or exiting a bus or subway station. TRANSIT has also established that it did

not own or maintain any property near 369 West 34th Street and that it did not own or maintain the curb or roadway in that location.

In addition, the City of New York is charged with the responsibility to maintain the subject roadway. (New York City Charter §383). This responsibility has been held to include areas adjacent to bus stops, as "...bus lanes, like other elements of the City's infrastructure, are the responsibility of the City and do not constitute a 'special use' by the transit defendants." (*Towbin v. City of New York*, 309 A.D.2d 505, 505, 765 N.Y.S.2d 242 [1st Dept 2003]). Accordingly, TRANSIT has met its *prima facie* burden as a matter of law.

In opposition, Plaintiff does not raise a material question of fact. Plaintiff does argue that TRANSIT owned, maintained or otherwise control the roadway and sidewalk curb near 369 West 34th Street. Rather, Plaintiff argues that TRANSIT owed the Plaintiff a legal duty of care because TRANSIT was obligated to provide Plaintiff with a safe place to board the bus and relies upon *Brown v. City of New York*, 56 A.D.3d 304, 867 N.Y.S.2d 408 (1st Dept 2008). However, the plaintiff in *Brown*, unlike here, was actually in the process of boarding a bus and was on a direct path from the bus stop to the front door of the bus.

Plaintiff also argues that the motion is premature. Yet Plaintiff has not shown that further discovery might lead to **relevant evidence** supporting the claim that TRANSIT owned or was responsible for the accident location (*Cruz v. City of New York*, 135 A.D.3d 644, 24 N.Y.S.3d 67 [1st Dept 2016]; see *Bailey v. Benta's Funeral Home, Inc.*, 82 A.D.3d 672, 673, 922 N.Y.S.2d 274 [1st Dept 2011]; *Dritsas v. Amchem Prod., Inc.*, 169 A.D.3d 526, 94 N.Y.S.3d 264 [1st Dept 2019]).

Accordingly, it is hereby

ORDERED that Defendant NEW YORK CITY TRANSIT AUTHORITY's motion for summary judgment is granted and the complaint and all cross-claims are dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor Defendant NEW YORK CITY TRANSIT AUTHORITY, dismissing the claims and cross-claims made against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued against the remaining Defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal against Defendant NEW YORK CITY TRANSIT and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that as the NEW YORK CITY TRANSIT AUTHORITY is no longer a party in this action, this action, including Motion Sequence No. 4, and any other pending motions, is transferred to an City/ IAS part.

8/4/2023

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

☒

GRANTED

☐

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

HON. DENISE M. DOMINGUEZ

J.S.C.