

Figueroa v City of New York

2023 NY Slip Op 32818(U)

August 15, 2023

Supreme Court, New York County

Docket Number: Index No. 156837/2018

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 52

Justice

-----X

ELSA FIGUEROA,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, BO BO REALTY CORP.

Defendant.

-----X

INDEX NO. 156837/2018

MOTION DATE 05/17/2023

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 153, 154, 155, 156, 157, 158, 159, 160, 164

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Statement of Facts

The action arises out of personal injuries sustained on September 28, 2017, when the plaintiff, Elsa Figueroa ("plaintiff"), allegedly tripped and fell over a raised segment of pavement and a protruding piece of metal. The incident occurred near 581 West 207 St., between the curb and the sidewalk along a pedestrian ramp. Plaintiff suffered several injuries, including a left shoulder tear that required surgery.

Defendant, the City of New York ("the City") moves to dismiss the complaint, pursuant to CPLR § 3211, for failure to state a cause of action and/or CPLR § 3212, granting summary judgment on the grounds that the City (1) did not have prior written notice as required by Administrative Code § 7-201 and (2) are not the abutting property owner and, pursuant to Administrative Code § 7-210, cannot be liable.

Discussion

The City, in their motion, alleges that dismissal of the complaint is warranted on three grounds. First, the City moves, pursuant to CPLR § 3211, to dismiss the Complaint for failure to state a meritorious cause of action. Second, the City moves, pursuant to CPLR § 3212, for summary judgment on the grounds they never received prior notice of the defect that allegedly caused the harm, as required by § 7-201 of the New York City Administrative Code. Third, the City moves for summary judgment on the grounds that, under § 7-210 of the New York City Administrative Code, the City is not the abutting property owner of the subject location, and thus bears no liability for the injuries sustained on the sidewalk in question.

The motion is denied as to all three grounds.

First, the City's motion to dismiss is denied as plaintiff has adequately stated a cause of action. On a CPLR § 3211(7)(a) motion to dismiss, the moving party has the burden of showing the "pleading fails to state a cause of action" (CPLR § 3211(7)[a]). In "the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction" (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

It well established that no action may be maintained against the City for injuries arising out of a dangerous, defective, unsafe, or obstructed condition on its' streets or sidewalks unless the City received prior written notice of such condition and failed to repair it within 15 days of such notice (*Kales v City of New York*, 169 AD3d 585 [1st

Dept 2019]; Administrative Code § 7-201). Prior written notice is a condition precedent, which the plaintiff is required to plead and prove to maintain their action (*Katz v City of New York*, 87 NY2d 241, 243 [1995]).

The plaintiff pled prior notice and provided proof. Plaintiff alleged in paragraph 28 of the Complaint, the City of New York received written notice of the defect at least 15 days before the incident (NYSCEF Doc. No. 61). Contrary to defendants' claim, prior written notice does not need to be alleged in both the complaint and the notice of claim (see *Kales v City of New York*, 169 AD3d 585 [1st Dept 2019] ["Plaintiff failed to assert in the notice of claim or plead in the complaint that defendant had prior written notice of the roadway defect that allegedly caused her accident"] [emphasis added]; *Perez v City of New York*, 193 AD3d 432 [1st Dept 2021] ["pleadings are distinct from, and not a substitute for, a valid notice of claim"]). General Municipal Law ("GML") section 50-e(2), which sets forth the required contents of a notice of claim, requires only: "(1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained." Notably, GML § 50-e(2) does not require that prior written notice be alleged in the notice of claim. Therefore, the plaintiff plead prior written notice. Without dismissal on CPLR § 3212 grounds, two First Department cases have proceeded to trial without written notice alleged in both the Notice of claim and Complaint (*Kales v City of New York*, 169 AD3d 585 [1st Dept 2019]; *Perez v City of New York*, 193 AD3d 432 [1st Dept 2021]). This implies alleging written notice in the complaint only is sufficient.

Second, the City moves for summary judgment, alleging that the evidence conclusively establishes they did not have prior written notice of the condition. 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 eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of any material issues of fact or where the issue is arguable (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). “If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion” (CPLR § 3212[b]). “In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]).

The City contends that summary judgment is warranted as it did not have prior written notice of the condition, as required by Administrative Code § 7-201.

“Because the requirement that the City must receive prior written notice before liability may be imposed is a limited waiver of sovereign immunity in derogation of the common law, it is strictly construed” (*Patane v City of New York*, 284 AD2d 513, 514 [2d Dept 2001]). Plaintiff must demonstrate the City was provided notice of the specific curb condition, and not merely a similar condition (*see D’Onofrio v. City of New York*, 11 N.Y.3d 581 [2008]; *Belmonte v. Metro Life Ins. Co.*, 759 N.Y.S.2d38 [1st Dept 2003]).

Moreover, plaintiff must prove that the City had at least 15 days prior written notice of the specific condition that is alleged to have caused the plaintiff's injury.

Plaintiff contends that the Big Apple Map, produced by the defendant as part of its Response to the Preliminary Case Order, provided defendant with prior written notice of the defect. Defendant contends the Big Apple Map is insufficient to demonstrate prior written notice of the specific defect. However, "it is well settled that Big Apple Pothole maps filed with the New York City Department of Transportation serve as prior written notice to the City of the indicated defective conditions" (*Patterson v City of New York*, 1 AD3d 139, 140 [1st Dept 2003]; see also *Katz v City of New York*, 87 NY2d 241, 243 [1995]). The initial burden lies with the plaintiff to plead and prove the City had such prior written notice of the defect (see *Farrell v City of New York*, 49 AD3d 806 [2nd Dept 2008]). To meet the prior written notice requirement, markings for the specific type of defect at the specific location on the map are needed (see *D'Onofrio v City of New York*, 11 N.Y.3d 581 [2008]; *Belmonte v Metro Life Ins. Co.*, 759 N.Y.S.2d38 [1st Dept 2003]). "[W]here there are factual issues as to the precise location of the defect that caused a plaintiff's fall and whether the defect is designated on the map, the question should be resolved by the jury" (*Foley v City of New York*, 151 AD3d 431, 431 [1st Dept 2017] [citation omitted]).

Plaintiff stated she fell over a defect on the sidewalk located at 581 West 207th Street (Complaint, NYSCEF Doc. No. 135). At her GML § 50-h hearing, the plaintiff marked a photo with the approximate location of her fall (NYSCEF Doc. No. 146). The marking on the photo appears to encompass a portion of the curb, curb cut, and sidewalk. The Big Apple Map has several markings at what looks to be the location

plaintiff claims to have fallen. These markings include extended section of broken, misaligned, or uneven curb (X-----X); raised or uneven portion of sidewalk (| and --); and, in the near vicinity, an obstruction protruding from sidewalk (O with an X through it) (see NYSECEF Doc. No. 158). Thus, questions of fact arise as to whether the markings on the Big Apple Map correspond to the exact location the Plaintiff fell and correspond to whatever caused her to fall. These questions require a jury (see *Foley, supra*; *Quinn v City of New York*, 305AD2d 570 [2d Dept 2003]; *Patane v City of New York*, 284 AD2d 513, 514-15 [2d Dept 2001]; see also *David v City of New York*, 267 AD2d 419, 420 [2d Dept 1999]), and render summary judgment inappropriate.

Third, Defendants move for summary judgment on the grounds that the City is not the abutting property owner of the location in question and is thus not subject to liability. The City is not liable for “any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition” (Administrative Code § 7-210). However, “section 7-210 does not define the term ‘sidewalk,’ Administrative Code § 19-101 (d) defines sidewalk as ‘that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians’ ” (*Brown v New York City Dept. of Transportation*, 187 AD3d 535, 536 [1st Dept 2020]).

There is a dispute as to whether the plaintiff tripped on the sidewalk or the curb. The Big Apple Map shows defect symbols for both the sidewalk and the curb at 581 West 207 St., (NYSECEF Doc. No. 158). Thus, as the jury could find that the plaintiff

tripped over a defect in the curb, which the City could be liable for, summary judgment on the basis that the City is not the abutting property owner is inappropriate.

For the reasons stated hereinabove, it is hereby

ORDERED that defendant The City of New York's motion to dismiss and for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.



8/15/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | | |
| | <input type="checkbox"/> | GRANTED | | | | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |