

Culbertson v Triumph Constr. Corp.

2023 NY Slip Op 33028(U)

August 31, 2023

Supreme Court, New York County

Docket Number: Index No. 159608/2019

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 05RCP

Justice

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JAMES CULBERTSON,

Plaintiff,

- v -

TRIUMPH CONSTRUCTION CORP., CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,
CONSOLIDATED EDISON, INC., THE CITY OF NEW
YORK, NEW YORK CITY DEPARTMENT OF
TRANSPORTATION,

Defendants.

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INDEX NO. 159608/2019

MOTION DATE 11/15/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by defendants the City of New York and New York City Department of Transportation ("DOT" and, collectively, the "City") for summary judgment dismissing this action is granted for the reasons set forth below.

On October 3, 2019, plaintiff commenced this action alleging that on April 19, 2019, he sustained injuries "when a metal plate (that was being used in connection with certain roadway work) popped-up/lifted and then crashed down onto [p]laintiff" while he was traversing the crosswalk in the intersection of West 39th Street and Tenth Avenue, New York, New York (NYSCEF Doc. No. 67 [Compl. at ¶15]). At his examination before trial ("EBT"), plaintiff testified that

A. ... Once I had the light, I crossed from the north side of [West] 39th to cross [West] 39th Street in the crosswalk. Then I was going to step over the metal plate. I heard a really loud metallic rumble and boom. And the plate had popped up. And

at that point my right foot slid underneath the plate. And the plate crushed it causing excruciating pain ... Then I heard another rumble. The same kind of metallic rumble. The plate popped out and my foot slipped out.

Q. Now, you said the plate popped up. Do you know how the plate popped up?

A. The plate extended into traffic. And the traffic drove over it causing the plate to move.

(NYSCEF Doc. No. 75 [Culbertson EBT at pp. 13-14]). Plaintiff's complaint asserts that the City, Triumph Construction Corp., and Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc. were negligent in maintaining the metal plate that caused plaintiff's injuries (NYSCEF Doc. No. 67 [Compl. at ¶81]).

The City now moves, pursuant to CPLR §3212, for summary judgment dismissing the complaint and all crossclaims against it on the grounds that it did not receive prior written notice of the defective condition as required by Administrative Code §7-201. In support of its motion, the City submits the affidavit of Henry Williams, a DOT employee, detailing the results of record searches he performed for: (i) roadway of West 39th Street, between Tenth Avenue and Ninth Avenue, including the Lincoln Tunnel Entrance, Lincoln Bus Exit, and Dyer Avenue; and (ii) the intersection of West 39th Street and Tenth Avenue, including the Lincoln Tunnel Entrance, for the two-year period prior to and including the date of the subject accident (NYSCEF Doc. No. 80 [Williams Aff. at ¶¶3-5]).

The City attaches the records produced by Williams search, which include, collectively: seventy permits, one Office of Construction Mitigation and Coordination file, one corrective action request, five notices of violation, twenty-seven inspections, twelve maintenance and repair orders, sixteen complaints—including 311 complaints—eight gangsheets, and three Big Apple Maps (NYSCEF Doc. No. 79 [DOT Records]). The City argues that none of these records provided the

City with prior written notice of the alleged defect (NYSCEF Doc. No. 62 [Lynch Affirm. at ¶¶23-25]).

In opposition, plaintiff responds that a 311 complaint, SR number 1-1-1701863156, produced by the City—which recorded a “Customer Comment” that “there is a rectangular black piece of metal that everytime passed over by the cars makes a very very loud noise I’m on a high floor and I could hear it very loud please help and inspect the area”—creates an issue of fact as to whether the City received prior written notice.

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]).

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]).

The City has satisfied its prima facie burden, through the Williams affidavit and the DOT records attached thereto, which establish 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]).

Accordingly, the burden shifts to plaintiff to submit evidence in admissible form that raises a question of fact as to whether the City had prior written notice or, failing that, “demonstrate[s] the applicability of one of two recognized exceptions to the rule—that the [City] 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]). Plaintiff has failed to carry his burden. The 311 complaint he points to, concerning a “loud” metal plate in the vicinity of the events at issue, is insufficient to raise an issue of fact, as “a verbal or telephonic communication to a municipal body that is reduced to writing cannot satisfy the prior written notice requirement” (Kapilevich v City of New York, 103 AD3d 548 [1st Dept 2013] [internal citations omitted]).

Accordingly, it is

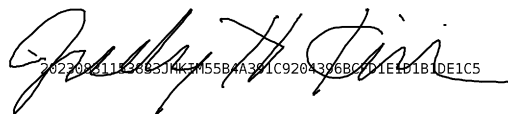
ORDERED that the City of New York and the New York City Department of Transportation’s motion for summary judgment is granted and this action and all crossclaims against it are dismissed; and it is further

ORDERED that, as the City of New York is no longer a party to this action, the Clerk of the Court shall reassign this action to the inventory of a non-City Part; and it is further

ORDERED that within twenty days from the date of this decision and order, counsel for the City of New York shall serve a copy of this order with notice of entry on plaintiff as well as 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/supctmanh).

This constitutes the decision and order of the Court.



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8/31/2023

DATE

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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE