

Carmona v City of New York

2023 NY Slip Op 33588(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 158699/2016

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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CARMEN CARMONA,

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 158699/2016

MOTION DATE 01/13/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, the motion by defendant the City of New York (the "City") to dismiss this action pursuant to CPLR §§3211 and 3212 is denied for the reasons set forth below.

Plaintiff's complaint alleges that on October 28, 2015, she sustained injuries when her foot became caught in an uncovered fire hydrant valve box—a chamber embedded in the street which contains a valve that shuts off water to an adjacent fire hydrant—in front of 2322 Third Avenue, New York, New York (NYSCEF Doc. No. 1 [Compl. at ¶¶6-8]). Plaintiff alleged that the City had actual or constructive notice of the alleged dangerous condition and failed to remedy same and, additionally, caused and created the dangerous condition at issue (Id. at ¶18).

The City now moves, pursuant to CPLR §3211(a)(7), to dismiss plaintiff's complaint on the grounds that plaintiff has not alleged in her notice of claim or complaint that the City had prior written notice of the defect. In the alternative, the City moves, pursuant to CPLR §3212, for summary judgment dismissing the complaint, on the grounds that the City has established that it

has not received prior written notice of the condition as required by Administrative Code §7-201 and did not cause and create the subject condition.

In support of its motion, the City submits: (i) the affidavit of Alison Boles, an employee of the New York City Department of Transportation, detailing the results of her search of DOT records for the roadway of Third Avenue, between East 126th Street and East 127th Street, for the two-year period prior to and including the date of the subject accident, which produced four permits, five inspections and two Big Apple Maps (NYSCEF Doc. No. 48 [Boles Aff. at ¶¶3-4]); (ii) the records produced by Boles' search (NYSCEF Doc. No. 49 [DOT Records]); and (iii) the affidavit of Kisha Miller, a Claims Specialist for the New York City Department of Environmental Protection ("DEP"), attesting to a search of DEP records for the roadway in front of 2322 Third Avenue, which produced no results (NYSCEF Doc. No. 50 [Miller Aff. at ¶¶4-5]).

Plaintiff opposes the motion, arguing, principally, that summary judgment is premature because relevant discovery remains outstanding. Specifically, plaintiff argues that the search of DEP records related to the roadway in which the hydrant valve box was placed will not produce all records related to that hydrant valve box because it does not include records of the City's mandatory biannual inspection of fire hydrants, which inspection would necessarily include examination of the hydrant valve box at issue. Plaintiff contends that these inspection and maintenance records are relevant to resolving whether the City removed the hydrant valve box's cover during an inspection and neglected to put it back in place, thereby creating the hazardous condition that led to plaintiff's injury.

DISCUSSION

The City's motion to dismiss plaintiff's complaint pursuant to CPLR §3211(a)(7) is denied. While plaintiff's failure to plead prior written notice in her notice of claim or subsequent pleading precludes her from seeking liability as to the City on that basis (See Kales v City of New York, 169 AD3d 585, 585 [1st Dept 2019]), plaintiff has consistently pled that the City caused or created the defective condition, an exception to the prior written notice requirement, making dismissal of the complaint inappropriate (See e.g., Salazar v City of New York, 2022 NY Slip Op 33130[U], *3 [Sup Ct, NY County 2022] citing Perez v City of New York, 193 AD3d 432, 433 [1st Dept 2021]; see also Elstein v City of New York, 209 AD2d 186, 186-187 [1st Dept 1994] ["[i]t is well established that Administrative Code §7-201(c)(2) requires a plaintiff to plead and prove the City had prior notice of a sidewalk defect, unless it is claimed that the City was affirmatively negligent in causing or creating the defective condition, in which case a plaintiff has no burden to either plead or prove notice"]).

The City's motion for summary judgment is also denied, as plaintiff has established that facts essential to oppose this branch of the motion may exist but are not currently known by plaintiff insofar as the City has yet to produce DEP records detailing its statutorily-mandated maintenance of the fire hydrant and hydrant valve box (See CPLR §3212[f]; Lyons v New York City Economic Dev. Corp., 182 AD3d 499 [1st Dept 2020]). The Court agrees with plaintiff that these records are highly relevant inasmuch as they will reveal when the most recent inspection was conducted and what was involved in that inspection, including whether the cover of the hydrant valve box was removed (See Marabyan v 511 W. 179 Realty Corp., 165 AD3d 581, 581-582 [1st Dept 2018] [summary judgment premature as "installation, repair, and/or maintenance records may also shed light on what work, if any, defendants undertook at the accident location, and

when”]; see also Lyons v New York City Economic Dev. Corp., 182 AD3d 499, 499 [1st Dept 2020] [summary judgment premature where the “record does not show that the parties have exchanged any paper discovery, such as records concerning the installation, maintenance, or repair of the mesh walkway” where plaintiff fell]).

Accordingly, it is

ORDERED that the branch of the motion by defendant the City of New York to dismiss plaintiff’s complaint is denied; and it is further

ORDERED that the branch of the motion by defendant the City of New York for summary judgment is denied, as premature, without prejudice to its refileing at the conclusion of discovery; and it is further

ORDERED that within thirty days from entry of this order, counsel for plaintiff shall serve a copy of this order, with notice of entry, on defendant 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); 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 “Efiling” 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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10/12/2023
DATE

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

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