Rodriguez v City of New York

2023 NY Slip Op 33645(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 153208/2017

Judge: J. Machelle Sweeting

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART 62**

Justice

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AURORA RODRIGUEZ,

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

---X

INDEX NO. 153208/2017

MOTION DATE 04/28/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88

were read on this motion to/for JUDGMENT - SUMMARY.

In an earlier decision in this action (NYSCEF Doc. No. 50) with respect to Motion Sequence #002, the court (Hon. Laurence Love) summarized some of the relevant facts as follows:

> Plaintiff commenced the instant action by filing a summons and complaint on or about April 5, 2017, alleging that she sustained injuries as a result of a trip and fall accident that occurred within a New York City tree well on the sidewalk abutting the premises located at 19 West 103rd Street, New York, New York on April 28, 2016. […] Plaintiff appeared for a 50-H hearing on July 12, 2016 and appeared for an examination before trial on August 2, 2019. The transcripts of same establish as follows: On April 28, 2016 at approximately 8:00 am, plaintiff was walking on the west side of 103rd Street. While walking, plaintiff tripped in a hole that was contained entirely within a tree well. Plaintiff made no complaints regarding the condition of the sidewalk surrounding the tree well […]

Now pending before the court is Motion Sequence #003 filed by defendant The City of New York (the "City") seeking an order: (i) pursuant to Civil Practice Law and Rules ("CPLR") 3211, dismissing the complaint and all cross-claims for failing to state a meritorious cause of action; or in the alternative, (ii) pursuant to CPLR 3212, granting the motion for summary judgment on the grounds that, pursuant to 7- 201 of the Administrative Code of the City of New

York, the City did not have prior written notice of the defect that allegedly caused plaintiff's accident.

Standards for Summary Judgment and for Dismissal

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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, and 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 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Per the New York Court of Appeals, "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction […] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

Arguments Made by the Parties

With respect to relief under CPLR 3211, the City argues that plaintiff failed to state a cause of action, because she failed to assert in the Notice of Claim that the City had prior written notice of the subject defect, and failed to plead that the City caused and created the alleged defect. The City further argues that because plaintiff failed to comply with the statutory pre-requisite of 7-201 of the New York City Administrative Code, plaintiff is now barred from making such a claim against the City and her Complaint must be dismissed as a matter of law. Further, plaintiff cannot now move for leave to serve a late or amended Notice of Claim or Complaint, or assert any new theories of liability against the City, because the statute of limitations has expired.

With respect to relief under CPLR 3212, the City argues that it did not have prior written notice of the subject defect as required under Administrative Code 7-201, nor did the City cause or create an immediately dangerous condition for which it may be held liable. Therefore, the City argues that as a matter of law, summary judgment should be granted in favor of the City.

In support of these arguments, the City submitted, *inter alia*, three sworn affidavits. The first affidavit was from Henry Williams (NYSCEF Doc. No. 69), who is a paralegal working at the Department of Transportation of the City of New York ("DOT"), and who personally conducted: (i) a search in the pertinent electronic databases, and identified and requested a search for corresponding paper records of permits, applications for permits, corrective action requests (CARs), notices of violation (NOVs), Notification for Immediate Corrective Action (NICAs), inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, and Big Apple Maps for the sidewalk at West 103rd Street between Central Park West and Manhattan Avenue, County of New York, City and State of New York, for a period of two years prior to and including April 28, 2016, the date that plaintiff claims to have been injured; and also (ii) a search for Big Apple Maps for an area that included the location referenced above.

The second affidavit was from Sharon Lai (NYSCEF Doc. No. 70), an Assistant Records Officer by the Department of Parks & Recreation of the City of New York ("Parks") in the Office of the General Counsel, who personally conducted a search for complaints. service requests. inspections, work orders, images, Commissioner and Borough Commissioner Correspondence, permits and permit applications, Daily Crew Work Reports and Borough Forestry contract records for the location at 19 West 103 Street, County, City and State of New York for two years prior to and including April 28, 2016.

The third affidavit was from Yelena Bogdanova (NYSCEF Doc. No. 70), who personally conducted a search for installation records, which include complaints, Commissioner Correspondence, service requests, inspections, work orders, permits and permit applications, for the location at 19 West 103 Street, County of New York, City and State of New York, for 2 years prior to and including April 28, 2016. The City argues that the results of these searches show that the City did not have prior written notice of the subject defect.

In opposition, plaintiff does not dispute the City's central argument that it had not received prior written notice of the subject defect. However, plaintiff argues, first, that the records upon which the City relies have not been properly authenticated because the affiants do not address if the records were made in the ordinary course of business or whether the records were made at or about the time of the event being recorded. Plaintiff argues, second, that the testimony of City witness John Muller, a forester from the New York City Department of Parks and Recreation, (transcript at NYSCEF Doc. No. 84) shows that the City sometimes receives complaints from community boards and city councilmen. Plaintiff argues that the City must address "every avenue" in which a prior written notice/compliant could be received by the City, and because the City did not address whether or not there were any complaints from community boards or city councilmen, the City did not meet its burden. Plaintiff argues, third, that the City only submitted Big Apple Map search results for two years prior to the subject accident, which is not sufficient. Plaintiff argues, fourth, that the NOC and Complaint need only include the word "notice" and not the phrase "prior written notice" to be sufficiently pled.

Conclusions of Law

The court finds the arguments made by plaintiff to be unavailing.

Regarding whether the records were properly authenticated, the affidavits of both Ms. Lai and Ms. Boddanova state, "My employment responsibilities include searching for records maintained in the ordinary course of business at Manhattan Forestry." The affidavit of Mr. Williams states that he searched for "records maintained by DOT;" that "DOT records are preserved and maintained in accordance with the guidelines for records retention and disposition;" and that "In the regular course of DOT's records management program the above records are kept for a minimum of ten years." The court finds this to be sufficient authentication of the subject records. Furthermore, all affidavits included the timeframes for which the searches were conducted.

Regarding the testimony of City witness John Muller, a review of the transcript submitted by plaintiff shows that Mr. Muller testified that complaints about defects could come in through community boards (transcript p. 6) and that complaints that come in are then transferred into databases and given service request numbers. His testimony includes:

> I'm not sure exactly how the transfer works, but it gets transferred into our database, the forester management system. It's given a service request number. Here in Manhattan there are four of us so we divide Manhattan up. There are 12 community boards, so everyone gets three. We go out and inspect the tree and if there's a problem, we can make a work order for it and then work is assigned to the planters and pruners and they go out and deal with it (transcript p. 9).

Mr. Muller's testimony makes clear that there would be a written record made of any complaint, but there is no indication that any such complaints were received here.

Regarding the Big Apple Maps, the First Department has consistently held that a search for two years prior to and including the date of accident is sufficient to establish a *prima facie* case. *See, e.g.* Elstein v City of New York, 209 AD2d 186 (1st Dept 1994) ("Here, the City came forward

with proof that it had not been given any prior written notice of the alleged defective condition and that no work construction or repair had been performed in the nearly *two-year period* preceding the date of the incident [...] Under these circumstances, the IAS Court properly granted the City's cross-motion for summary judgment dismissing the complaint"); Hued v City of New York, 170 AD3d 571 (1st Dept 2019) ("The City established that it lacked prior written notice of the subject condition by submitting affidavits by record searchers employed by the Department of Transportation and nonparty Department of Environmental Protection (DEP) concerning the searches they conducted of the records in their respective agencies' possession, which showed that the City received no written complaints about the subject sunken catch basin in the *two years* preceding the day of plaintiff's accident"); Rizzo v City of New York, 178 AD3d 503 (1st Dept 2019) ("Defendants also made a *prima facie* showing that they did not cause or create the alleged defect by submitting their deposition testimony denying that they attempted to repair the area before the accident and the deposition testimony of codefendant City of New York's witness that the applicable records for two years prior to and including the accident date for the property were searched and no permits for sidewalk repairs were found"); Kovel v Glenwood Mgt. Corp., 200 AD3d 460 (1st Dept 2021) ("In its motion for summary judgment, defendant relied on the following evidence: plaintiff's description of the border as green, smooth and approximately three inches high, plaintiff's deposition testimony [...] and a record search by the New York City Department of Transportation finding no violations concerning the tree well or its border in the *two years* preceding the accident. This evidence was sufficient to *prima facie* establish that the tree well border did not constitute an inherently dangerous condition") [emphasis added].

With respect to the central issue of prior written notice, Section 7-201 [c][2] of the Administrative Code of the City of New York (also known as the "Pothole Law") provides, in relevant part:

> 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.

Further, pursuant to the New York Court of Appeals in Katz v City of New York, 87 NY2d 241 (N.Y. Ct. of Appeals 1995:

> As recognized by plaintiff, prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City [emphasis added] […]. The failure to demonstrate prior written notice leaves plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying a defective sidewalk. Because this prior written notice provision is a limited waiver of sovereign immunity, in derogation of common law, it is strictly construed.

Here, as noted above, plaintiff does not dispute the City's central argument that it did not receive prior written notice of the subject defect, and the court is unpersuaded by plaintiff's arguments to the contrary.

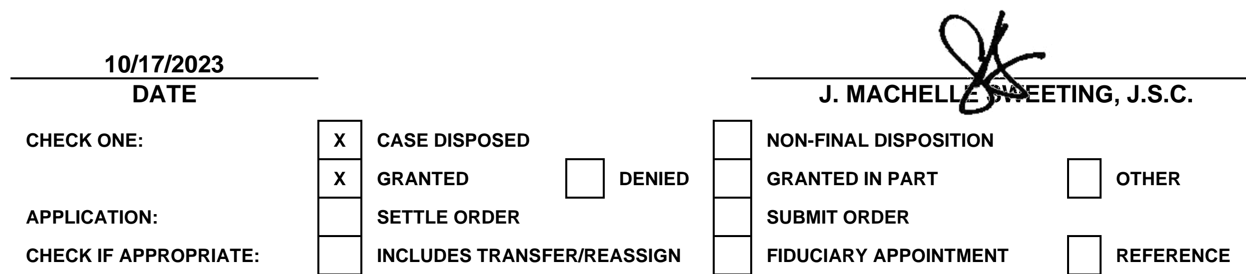
Conclusion

Given the record in this case, and for the reasons stated above, it is hereby:

ORDERED that the City's motion is **GRANTED**; and it is further

ORDERED that the Complaint and any cross-claims are dismissed as against the City, with prejudice, and it is further

ORDERED that this action is closed.



10/17/2023
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE