

Friedman v City of New York

2023 NY Slip Op 34441(U)

December 18, 2023

Supreme Court, New York County

Docket Number: Index No. 158622/2014

Judge: Judy H. Kim

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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LIBBY FRIEDMAN, ANN FREDLIN,
Plaintiffs,

INDEX NO. 158622/2014

MOTION DATE 12/15/2022

MOTION SEQ. NO. 005

- v -

CITY OF NEW YORK, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, and CONSOLIDATED EDISON COMPANY OF NEW YORK,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 166

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

Upon the foregoing documents, the motion by defendants the City of New York, New York City Department of Environmental Protection ("DEP"), and New York City Department of Transportation ("DOT"), pursuant to CPLR §3212, for summary judgment dismissing this action as against them is denied for the reasons set forth below.

Plaintiffs bring this action to recover for injuries allegedly sustained by plaintiff Libby Friedman on April 1, 2014 after she tripped and fell in the crosswalk extending between the northeast and southeast corners of the intersection of West 17th Street and Tenth Avenue due to a hole containing an uncovered water valve box—a chamber embedded in the street through which one accesses a valve to shut off water (NYSCEF Doc. No. 1 [Compl. at ¶¶29-31]). Plaintiffs assert negligence claims against the City of New York, DEP, and DOT (collectively, the "City") and

Consolidated Edison Company of New York, alleging that these defendants caused and created the defective condition and failed to remedy same.

The City now moves for summary judgment dismissing plaintiff's complaint 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: (i) the affidavit of Fulu Bhowmick, a DOT employee, detailing the results of his searches of DOT records for the roadway of West 17th Street between Ninth and Tenth Avenue and the intersection of West 17th Street and Tenth Avenue, for the two-year period prior to and including the date of the subject incident (NYSCEF Doc. No. 96 [Bhowmick Aff. at ¶¶3-5]); (ii) the DOT records produced by Bhowmick's searches (NYSCEF Doc. No. 95 [DOT Records]); (iii) the affidavits of Kisha Miller, a DEP Claims Specialist, attesting to her searches of DEP records for the roadway of West 17th Street between Ninth and Tenth Avenue and the intersection of West 17th Street and Tenth Avenue, which produced, collectively, three customer service requests and six work orders (NYSCEF Doc. No. 98 [Miller Affs.]); and (iv) the DEP records produced by Miller's searches (NYSCEF Doc. No. 99 [DEP Records]).

In opposition, plaintiffs argue that the Big Apple Map produced by the City raises a question of fact as to whether the City had prior written notice of the subject condition and, further, that a May 1, 2013 customer service request concerning a manhole cover produced by the City constituted a written acknowledgment of the defective condition (See NYSCEF Doc. No. 139). Plaintiffs also argue that City's production of a May 23, 2013 permit that the City issued to the DEP to open the roadway of West 17th Street between Ninth and Tenth Avenue raises an issue of fact as to whether the City removed the valve box's cover during the performance of this work, thereby creating the subject defect.

In reply, the City argues that the Big Apple Map cannot establish prior written notice because all of its markings in the subject intersection relate to sidewalk conditions. The City also argues that the May 1, 2013 customer service request was not a written acknowledgement by the City because it relates to a manhole sewer cover problem rather than the valve box at issue here. Finally, the City argues that the May 23, 2013 permit does not establish an issue of fact as to whether the City could have created the subject defect because this permit relates to work to address the manhole sewer cover problem reported in the prior customer service request¹.

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]).

Administrative Code §7-201 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

¹ Both plaintiffs and the City submit various photos from Google Maps. However, a number of these photos are undated and therefore may not be considered by the Court (See CPLR §4532-b)). Of those images that are dated, i.e., the City’s photos from July 2012 and June 2014 and plaintiff’s photos from September 2013 and October 2014, only one image, from October 2014 (six months after the date of accident), clearly depicts the subject valve, showing that it’s cover is on (NYSCEF Doc. No. 136). As such, none of these photos have been considered and the parties’ arguments based upon them are rejected.

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]).

Here, the City has failed to establish that it bears no liability under Administrative Code §7-201. While the Court agrees with the City that the May 1, 2013 customer service request does not constitute a written acknowledgement of the subject condition, ultimately the Big Apple Map is sufficient to raise an issue of fact as to whether the City had prior written notice of same. Contrary to the City’s characterization, the Big Apple Map includes a symbol in the vicinity of plaintiff’s accident labeled in the map’s key as an “extended section of potholes or other hazards” within a pedestrian crosswalk, which encompasses the alleged condition at issue here (See e.g., Sojo v The City of New York, 2018 WL 3392515, at *2 [Sup Ct, Bronx County 2018]). To the extent that this symbol is not in the exact location of plaintiff’s accident, “[w]hether the defect depicted on the map is the defect of which plaintiff complains ... is a question for the jury” (McDaniel v City of New York, 209 AD3d 409, 410 [1st Dept 2022] citing Foley v City of New York, 151 AD3d 431, 433 [1st Dept 2017]).

Even ignoring the foregoing, summary judgment would still be inappropriate as an issue of fact remains as to whether the City caused or created the subject condition. The City’s assertion that the May 23, 2013 permit was for work correcting the manhole cover reported in the May 1, 2013 customer service request is supported only by the affirmation of counsel for the City, which has no probative value (See Timmons v The City of New York, 2023 NY Slip Op 31138[U], 3-4 [Sup Ct, NY County 2023]; see also Aranovich v The City of New York, 2008 NY Slip Op

33760[U], 3 [Sup Ct, NY County 2008]). Accordingly, the City has failed to establish that any work performed pursuant to that permit could not have created the defective condition at issue (Cf. Ingles v Architron Designers and Builders, Inc., 136 AD3d 605 [1st Dept 2016]; Amini v Arena Const. Co., Inc., 110 AD3d 414 [1st Dept 2013]; Bermudez v City of New York, 21 AD3d 258 [1st Dept 2005]).

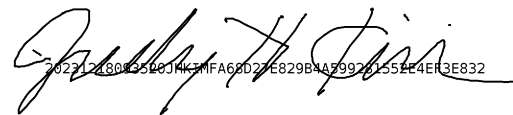
Accordingly, it is

ORDERED that the City of New York, New York City Department of Environmental Protection, and New York City Department of Transportation City of New York’s motion for summary judgment is denied; and it is further

ORDERED that, within fifteen days of the date of this decision and order, counsel for the plaintiff shall serve a copy of this decision and order, with notice of entry, on defendants as well as on the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 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 “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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HON. JUDY H. KIM, J.S.C.

12/18/2023
DATE

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