

<b>Lopez v City of New York</b>
2023 NY Slip Op 35046(U)
January 6, 2023
Supreme Court, Bronx County
Docket Number: Index No. 21539/2017E
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, IAS PART 3

*Handwritten signature and number #002*

KARINA LOPEZ

Index №. 21539/2017E

-against-

Hon. Mitchell J. Danziger

Justice Supreme Court

CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION, NEW  
YORK CITY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
MANHATTAN AND BRONX SURFACE  
TRANSIT OPERATING AUTHORITY,  
METROPOLITAN TRANSIT AUTHORITY, MTA  
BUS COMPANY, NEW YORK CITY TRANSIT  
AUTHORITY

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The following papers were read on this motion (Seq. No. 2) for **summary judgment** noticed for August 12, 2022, and submitted on September 13, 2022

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 40-55
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 59-63
Reply Affirmation and Exhibits	NYSCEF Doc. # 64-71

Motion by the City of New York, the New York City Department of Transportation (“DOT”), and the New York City Department of Environmental Protection (“DEP”) (collectively, “the City Defendants”), for an order granting summary judgment pursuant to CPLR 3212, dismissing Plaintiff’s Complaint and all cross claims against the City Defendants, is decided as follows:

This action stems from a trip and fall accident which occurred on October 13, 2016. The parties agree that at the time of this accident Plaintiff was walking on the street around a sewer grate and near the intersection of Amendola Place and Westchester Avenue, and more specifically, in front of 3685 Amendola Place, in the Bronx (NYSCEF Doc Nos. 42 at ¶1, and 60 at ¶1). Plaintiff allegedly fell due to a defect in the street around a sewer grate (Pl. 50-h at 18; Pl. EBT at 20, 24-25; NOC). The City Defendants now move for summary judgment arguing that they had no prior written notice of the alleged defect and that none of the exceptions to the prior written notice rule apply. The City Defendants also submit that they did not cause or create the subject defect. Plaintiff opposes the City Defendants’ motion arguing that the City Defendants’ records search is insufficient.

Where a municipality has enacted a prior written notice law it may not be subjected to liability for “injuries sustained as a result of defects or hazardous conditions on its sidewalks if it has not been notified in writing of the existence of the defect or hazard at a specific location” or an exception to the prior written notice rule applies. (*Amabile v City of Buffalo*, 93 N.Y.2d 471, 473-474 [1999] [citation omitted]). Under NYC Administrative Code

7-201 (c) (2), “[n]o action may be maintained against the City of New York as a result of injury arising from a dangerous, defective, unsafe, or obstructed condition on its, inter alia, 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 A.D.3d 585 [1st Dept 2019]). In an action such as this, where the City Defendants have moved for summary judgment dismissing the Complaint alleging personal injury due to a roadway defect or hazard, “the City has the initial burden of establishing that it lacked prior written notice of the defect or hazard.” (*Bania v City of New York*, 157 A.D.3d 612 [1st Dept 2018]).

In support of the motion, the City Defendants submitted the affidavit of Rita Shapsis (“Shapsis”), a paralegal conducting record searches for the DOT, dated January 8, 2019. Shapsis conducted two record searches “for the roadway located at the intersection of Westchester Avenue and Bruckner Boulevard,” and “for the roadway located at Bruckner Boulevard between Westchester Avenue and Wilkinson Avenue,” for the alleged defect, encompassing a period of two years prior and including up to October 13, 2016, the date of the subject accident, and found no evidence of prior written notice for the alleged defect. The opposition papers argue that Shapsis failed to conduct a records search for the intersection of Amendola Place and Westchester Avenue, the location of Plaintiff’s alleged injury. Plaintiff’s notice of claim and 50-h hearing at page 7, which both pre-date Shapsis’s affidavit, and the agreed upon statement of facts, all indicate that Plaintiff’s alleged injury occurred at the intersection of Amendola Place and Westchester Avenue. However, Shapsis failed to reference Amendola Place in her affidavit as part of the records search.

Similarly, the City Defendants submitted the affidavit of Kisha Miller (“Miller”), a claims specialist for the DEP, dated March 25, 2022. Miller conducted a records search “pertaining to a trip and fall of a sewer grate located at [sic] corner of Westchester Avenue and Bruckner Boulevard, side of Bruckner Boulevard between Westchester Avenue and Wilkinson Avenue.” Miller failed to reference Amendola Place in his affidavit as part of the records search.

The City Defendants also submitted the deposition testimony of Alison Boles (“Boles”), a record searcher with the Department of Transportation’s Office of Litigation Services dated August 27, 2019 (Boles EBT at 8). The City Defendants’ moving papers state the purpose of Boles’s testimony is to show that “the potholes noted in the records were repaired” (Park affirmation, ¶34), and in reply, the City Defendants assert that “Plaintiff’s counsel never questioned [Boles regarding] the accuracy of the search during EBT” (Park reply affirmation, ¶13). A review of Boles’s deposition testimony shows that anytime Amendola Place was referenced, it was only in relation to permits.

Finally, the City Defendants argue in reply that Shapsis’s affidavit contains additional between-the-lines details. For example, the City Defendants claim Shapsis’s use of the word “intersection,” to describe the subject intersection that was searched, actually means that Shapsis searched “all of the areas between Westchester Avenue

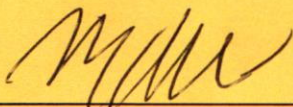
and Bruckner Boulevard” (Park reply affirmation, ¶7). The City Defendants are silent about explaining Miller’s affidavit. Additionally, the City Defendants submitted a Google Map for the proposition “that Amendola Place is also known as Bruckner Blvd” and that the Google Map “indicate[s] that Bruckner Boulevard and Amendola Place in the Bronx, NY refers to the same location” (*id.* at ¶8). Moreover, while the City Defendants appear to rely upon the Big Apple Map in their reply papers, the City Defendants expressly stated in their moving papers that “the map is inapplicable to plaintiff’s subject lawsuit” (Park affirmation, ¶¶44, 46). Even if the Court were to consider the City Defendants’ argument that the Big Apple Map did not provide notice to the City Defendants of the alleged defect, Shapsis’s and Miller’s affidavits, as explained above, do not demonstrate that the City Defendants lacked prior written notice.

Based upon a review of the record, this Court finds that the City Defendants have failed to meet their initial burden of establishing that they lacked prior written notice of the alleged defect. The City Defendants’ record searchers are insufficient because they both failed to conduct searches of records at the subject intersection – *i.e.*, Amendola Place and Westchester Avenue (*see* NYC Administrative Code 7-201 [c] [3]). Instead, Shapsis conducted record searches of “the intersection of Westchester Avenue and Bruckner Boulevard,” and “the roadway located at Bruckner Boulevard between Westchester Avenue and Wilkinson Avenue.” Similarly, Miller conducted record searches of the “corner of Westchester Avenue and Bruckner Boulevard, side of Bruckner Boulevard between Westchester Avenue and Wilkinson Avenue.” Rather than the City Defendants’ counsel elaborating that the word “intersection” means something that it ordinarily would not, and that Amendola Place is the same as Bruckner Blvd, the City Defendants should have had both Shapsis and Miller explain those propositions themselves in their affidavits, or for an additional example, explain that they attempted to search the intersection of Amendola Place and Westchester Avenue but could not do so for some reason. Accordingly, the Court finds that the City Defendants have failed to meet their initial burden of establishing that they lacked prior written notice of the alleged defect. (*compare* *Hued v City of New York*, 170 A.D.3d 571 [1st Dept 2019]; *Harvey v Henry 85 LLC*, 171 A.D.3d 531, 532 [1st Dept 2019]; *Campisi v Bronx Water & Sewer Serv.*, 1 A.D.3d 166, 167 [1st Dept 2003]).

Accordingly, as a result of the foregoing, the City Defendants' motion for summary judgment is denied. Plaintiff shall serve a copy of this order with notice of entry upon all parties within thirty days of the entry date.

This constitutes the Decision and Order of this Court.

Dated: 1/6/23

Hon.   
Mitchell J. Danziger, J.S.C.

- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
- 2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
- 3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT