

Alicea v City of New York
2023 NY Slip Op 35147(U)
July 5, 2023
Supreme Court, Bronx County
Docket Number: Index No. 25539/2018E
Judge: Mitchell J. Danziger
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 3/33**

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JAYSON ALICEA

Index №. 25539/2018E

-against-

Hon. Mitchell J. Danziger

THE CITY OF NEW YORK

Justice Supreme Court

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The following papers were read on this motion for dismissal and summary judgment noticed for January 27, 2023 and submitted on March 20, 2023

Notice of Motion – Affirmation and Exhibits, Memorandum of Law	NYSCEF Doc. # 48-78
Affirmation in Opposition and Exhibits, Memorandum of Law	NYSCEF Doc. # 81-90
Reply Affirmation and Exhibits	NYSCEF Doc. # 92-94

Motion by defendant The City of New York (“City”) for an order pursuant to CPLR §3211(a)(7) dismissing plaintiff’s complaint for failure to state a cause of action or pursuant to CPLR §3212 granting summary judgment, is decided as follows:

This action stems from an incident that occurred on June 16, 2017, on Bouck Avenue between Given Avenue and Boston Road. Plaintiff alleges to have been injured by being thrown from the back of a sanitation truck due to an unmarked speed bump in the road. Plaintiff alleges the City was careless, reckless, and negligent in its maintenance of the roadway and failure to warn of the alleged danger on the roadway.

The City moves on the grounds that they are entitled to dismissal of plaintiff’s complaint for failure to state a cause of action because plaintiff failed to plead and prove in his Notice of Claim, Amended Notice of Claim, or Complaint, prior written notice and affirmative negligence, as required by GML §§50-e and 50-i and NYC Admin. Code §7-201(c)(2). Moreover, the record does not support a finding that the defendant had prior written notice of the allegedly defective condition. The City had no notice that the roadway and/or speed table at or near 3349 Bouck Avenue presented a dangerous condition, as there were no prior accidents at the location involving motor vehicles and the speed table (hereinafter “speed bump”) or a roadway condition at the subject location in the ten years prior to the incident. Lastly, the City’s design of the roadway and/or speed bump accorded with applicable roadway standards and guidelines and as long as a municipality acts with reasonable diligence in designing and implementing roadways and speed tables, they are entitled to immunity. Defendant states they complied with relevant standards as there were two “SPEED BUMP” warning signs with “20 M.P.H.” advisory speed plates at the site of the alleged bump in the road installed on October 10, 2013, and in place on the day of plaintiff’s accident.

In support of their motion, the City submits the affidavit of professional engineer, Paul Summerfield, P.E.. Mr. Summerfield attests, in sum and substance, based on this review of the records in this matter and his

training and experience, that on the date of the subject accident, the incident site was reasonably safe and designed with the proper use of engineering discretion. In addition, on the date of the accident, a "SPEED BUMP" warning sign with a "20 M.P.H." advisory speed plaque was in place and visible at the subject speed bump in accordance with applicable standards and guidelines. The lack of markings on the subject speed bump were not in violation of roadway guidelines including the national standard for all traffic control devices, because no markings were required to be on the speed bump pursuant to said guidelines. Further, markings are redundant since there was appropriate signage.

The City also submits that affidavit of Gary Washinsky, administrative city planner in the Bronx Borough Engineering Division of the New York City Department of Transportation. Mr. Washinsky attests that in January of 2003, two "BUMP" signs and two "BUMP AHEAD" signs were installed at the location. Thereafter, all four of those signs were removed and on October 10, 2013, the "BUMP" signs were replaced with two "SPEED BUMP" signs which contained a 20 M.P.H. advisory speed plate. The "SPEED BUMP" signs complied with the federal standards required. The "SPEED BUMP" signs with the "20 M.P.H." advisory plates were replacements for the other 4 signs as party of the DOT's sign clutter reduction program.

Plaintiff contends that defendant did not properly maintain the speed bump in the roadway because it was unmarked and because the warning sign was "obstructed by trees." Plaintiff asserts that defendant had prior written notice of the unmarked bump because of a 311 complaint almost two years prior to this incident notifying the City of faded markings at the spot of the bump. According to plaintiff, the 311 complaint was then reduced to writing in the form of a "Buck Slip." Plaintiff submits that the defendant inspected the location of the speed bump and found it "necessary for re-painting." Plaintiff further argues that the City actively and affirmatively created and installed the subject speed bump and that a negligent condition was created by the City in causing and allowing the markings to fade.

Plaintiff submits the expert affidavit of Nicholas Bellizzi, Professional Engineer in opposition to the City's motion. Mr. Bellizzi conducted an inspection of the subject location on July 1, 2018, as well as reviewed the motion papers, and the evidence exchanged between the parties and opines that at the time of the accident, the speed bump had no pavement markings present; that the New York City Department of Transportation ("DOT") had prior written notice of the missing speed bump pavement markings per the "Buck Slip." DOT never followed up on the Buck Slip and a work order was never issued for the re-painting. Due to the lack of pavement markings, the sanitation truck driver did not slow down which caused and allowed the truck to jump and plaintiff to be thrown from the back of the truck. Speed bumps require both pavement markings and warning signs. The unmarked speed bump is an unsafe, dangerous, and hazardous condition and was not visible or discernible to approaching motorists. Due to DOT's sign declutter program, the advance "Bump Ahead" sign was removed at the subject location. DOT's acts and omissions was a substantial factor in the cause of plaintiff's accident and his resulting injuries.

The Court on a dismissal motion pursuant to CPLR §3211(a)(7) "must take the allegations asserted within a plaintiffs complaint as true and accord plaintiff the benefit of every possible inference, determining only whether the facts as alleged fit within any cognizable legal theory." (*Samiento v. World Yacht Inc.*, 10 NY3d 70, 79, 883 N.E.2d 990, 854 N.Y.S.2d 83 [2008]; *see also* CPLR §3026 ["(p)leadings shall be liberally construed"]). Furthermore, a court may freely consider affidavits submitted by plaintiff to remedy any defects in the complaint. (*Leon v. Martinez*, 84 NY2d 83, 88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]; and must determine "whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977])). However, "while factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth." (*Symbol Tech., Inc. v. Deloitte & Touche, LLP*, 69 AD3d 191, 194, 888 N.Y.S.2d 538, [2009]).

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 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [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 non-moving party. (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [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 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment. (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]). However, to defeat a motion for summary judgment, the non-moving party must establish the existence of triable issues of fact that are, "real, not feigned since a sham or frivolous issue will not preclude summary relief. (*Kornfeld v. NRX Technologies, Inc.* 93 A.D.2d 772 [1st Dept. 1983]). "It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owed a duty to the plaintiff." (*Pulka v. Edelman*, 40 N.Y.2d 781, 781 [1976]). "In the absence of a duty, there is no breach and without a breach there is no liability. (*Id.*, *see also*, *Daubert v. Flyte Time Regency Limousine*, 1 A.D. 3d 396, 396 [2d Dept. 2003]).

In a case wherein a municipality is alleged to have failed to maintain a roadway, such as this, plaintiff has the burden of pleading and proving that the City had prior written notice of the allegedly defective condition. Failure to plead and prove such prior written notice requires dismissal of the complaint. (*Katz v. City*

of New York, 87 NY2d 241 [1995]). Similarly, a plaintiff must include the theory of affirmative negligence or cause and create in his Notice of Claim or complaint, or he will be precluded from doing so after the statute of limitations has expired. (*Kales v. City of New York*, 169 A.D.3d 585 [1st Dept. 2019]). The City submits that plaintiff has failed to allege prior written notice or cause and create in his Amended Notice of Claim and cannot now be permitted to amend the same to add a new theory of liability pursuant to GML §50-e after the statute of limitations has expired. (*Semprini v. Vil. Of Southampton*, 48 A.D.3d 543 [2nd Dept. 2008]). A review of plaintiff's Amended Notice of Claim indicates that plaintiff did not allege that the City had prior written notice of the defect nor did plaintiff allege affirmative negligence. Plaintiff alleges both prior written notice and that the City "affirmatively caused and created the condition" in his complaint. The Appellate Division, First Department in *Kales*, noted that the plaintiff in that action failed to allege that the defendant had prior written notice or caused or created the dangerous condition in plaintiff's Notice of Claim **or** Complaint (emphasis added). As a result, the First Department affirmed the dismissal of plaintiff's complaint. Here, in affording plaintiff's pleadings the benefit of every possible inference, plaintiff pleaded both prior written notice and cause and create in his complaint. In light of the foregoing, the portion of the City's motion seeking to dismiss plaintiff's complaint pursuant to CPLR §3211(a)(7) is denied.

The City has met its prima facie burden with regard to prior written notice. Pursuant to New York City Admin. Code §7-201(c), no civil action may be maintained against the City for any street defect unless prior written notice was given to a City agency authorized to accept such notice, or there was written acknowledgment 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. To hold the City liable for an alleged failure to paint or repaint marking in the roadway or on a speed bump, plaintiff must establish that the City received prior written notice. (*Benjamin v. City of New York*, 178 A.D.3d 557 [1st Dept. 2019]). Plaintiff must establish notice of the specific defect. (*D'Onofrio v. City of New York*, 11 N.Y.3d 581 [2008]).

In opposition, plaintiff has failed to raise a triable issue of fact with regard to prior written notice and has failed to show that an exception to prior written notice exists. Plaintiff submits that the 311 call that was reduced to writing in the form of a "Buck Slip" provided the City with prior written notice. Moreover, plaintiff claims that an inspection was conducted by the City and that the defective condition was deemed "in need of being re-painted." 311 calls are insufficient to satisfy the statutory requirement of prior written notice, even if the calls are reduced to writing. (*Haulsey v. City of New York*, 123 A.D.3d 606 [1st Dept. 2014]). As such, a Buck Slip alone does not constitute prior written notice. The Buck Slip does not indicate that an inspection was held. Per the testimony of the City witnesses, a Buck Slip is a request that someone go to a location and see if remarking or repainting was necessary. If there was a need for remarking or repainting, a work order would be generated. The New York City Department of Transportation documents do not reveal that an inspection of this

speed bump was conducted, nor was a work order generated. Further, the Buck Slip makes no mention at all of a speed bump. It is not clear what “pavement markings/faded” means and if it pertained to the speed bump or some other area of pavement markings. Plaintiff has also not shown that the City caused or created the subject defect. In order for the City to have caused or created the subject defect, the claimed dangerous condition must have been immediately apparent from the City’s affirmative acts. (*Yarborough v. City of New York*, 10 N.Y.3d 726 [2008]; *Martin v. City of New York*, 191 A.D.3d 152 [1st Dept. 2020]). Here, plaintiff does not submit any evidence that the City did any affirmative act that resulted in a dangerous condition that was immediately apparent. As a result of the foregoing, plaintiff’s roadway defect claims are dismissed.

With respect to plaintiff’s roadway design claims, the City submits that the roadway and speed bump, together with the accompanying signage and markings were reasonably safe and designed, and provided sufficient warning for motorists who were alert, observing what there was to be seen, and obeying the rules of the road. The Court of Appeals in *Tomassi v. Town of Union*, 46 N.Y.2d 91 [1978] found that: “A municipality, of course is not the insurer of the safety of its roadways. The design, construction, and maintenance of public highways is entrusted to the sound discretion of municipal authorities and so long as a highway may be said to be reasonably safe for people who obey the rules of the road, the duty imposed upon the municipality is satisfied...The liability of a municipality begins and ends with the fulfillment of its duty to construct and maintain its highways in a reasonably safe condition, taking into account such factors as the traffic conditions apprehended, the terrain encountered, fiscal practicality and a host of other criteria.” According to Mr. Summerfield, the City’s expert, on the date of the incident, the roadway and speed bump were reasonably safe and designed with the proper use of engineering discretion. Further, the “SPEED BUMP” warning sign with a “20 M.P.H.” advisory speed plaque was in place and visible at the subject speed bump in accordance with applicable standards and guidelines and was sufficient to warn motorists. As a result, the roadway, speed bump, and optional accompanying markings and signage all complied with relevant standards.

Plaintiff’s expert, Mr. Bellizzi opines that speed bumps require both pavement markings and warning signs. Here, the unmarked speed bump is an unsafe, dangerous, and hazardous condition and was not visible or discernible to approaching motorists. The removal of the two advance warning signs in 2013 made the speed bump markings critical. Mr. Bellizzi went to the accident location and conducted an investigation. Plaintiff contends that the City’s expert should not be considered because he did not visit the site of the accident. Moreover, since plaintiff’s expert and the City’s expert offer different opinions on the sufficiency of the roadway markings, signs and the application of the roadway standards and as such, these are issues for a jury. In reply, the City submits the reply affidavit of Mr. Summerfield which explains that when he attested “my personal knowledge of the road” was partly informed by his visit to the accident location on November 4, 2022. In addition, his opinions were supplemented by photographs and Google Map images. As such, the Court finds Mr. Summerfield’s affidavit to be sufficient.

The City avers that the law does not require any roadway markings for speed bumps. Mr. Bellizzi does not set forth any nationally relied upon roadway design standards or guidelines that were violated. Instead, Mr. Bellizzi submits that the federal standard requires engineering judgment. DOT engineers determined that markings and signage would be used in NYC for speed bumps. Mr. Bellizzi found that the City violated the internal DOT guidelines which were adopted and implemented to go above and beyond what was required by law. A review of Mr. Bellizzi's expert report indicates that Mr. Bellizzi found that the City violated their internal Speed Hump Policy. Mr. Bellizzi does not point to any specific federal standard that the City violated. The City cannot be held to a higher standard than what is required by law. (*Williams v. N.Y.C. Trans. Auth.*, 108 A.D.3d 403 [1st Dept. 2013]). As a result of the foregoing, the Court finds that the City met its prima facie burden with regard to plaintiff's design claims. While plaintiff submits that the speed bump was not reasonably safe, he bases that on internal DOT policies that hold the City to a higher standard than what is required by law. As such, plaintiff fails to raise a triable issue of fact in opposition.

Accordingly, the City's motion is denied in part and granted in part. The City is directed to serve a copy of this order with Notice of Entry on plaintiff within 30 days.

This constitutes the decision and judgment of the Court.

Dated: 7/13/23

Hon. 

Mitchell J. Danziger, J.S.C.

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| 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 |