

Campos v City of New York

2024 NY Slip Op 30214(U)

January 9, 2024

Supreme Court, New York County

Docket Number: Index No. 156493/2017

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

-----X INDEX NO. 156493/2017

JOSE CAMPOS,

MOTION SEQ. NO. 001

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, YUK FAN MEDINA

DECISION + ORDER ON MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

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

Upon reading the above listed papers and having heard oral arguments, for the reason that follow, Defendant CITY OF NEW YORK's ("the CITY") motion for summary judgment is denied.

This personal injury matter involves a September 9, 2016 incident where the Plaintiff, JOSE CAMPOS, was caused to twist his ankle on a mound of asphalt in the roadway adjacent to the curb as he was exiting a bus that had stopped at a designated bus stop on 14th Street, between 8th Avenue and 9th Avenue in Manhattan. (NYSCEF Doc. 21)

The CITY moves by notice of motion pursuant to CPLR §3212 for summary judgment, dismissing the complaint and all cross-claims as it did not receive prior written notice of the alleged defective roadway condition. Plaintiff and Defendants NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and YUK FAN MEDINA ("TRANSIT") oppose.

The CITY maintains that it cannot be found liable as the CITY did not receive prior written notice of the specific condition complained of, a hummock in the roadway (a lump of asphalt) adjacent to the curb near a bus stop along 14th Street between 8th Avenue and 9th Avenue.

In support of this position, the CITY submits an affidavit from Gabriela Paiz (“Paiz Affidavit”), a paralegal at the Department of Transportation (“DOT), who conducted a search to locate any records related to complaints or repair work for the sidewalk along West 14th Street between 8th and 9th Avenues for the two-year period prior to the date of the accident. (NYSCEF Doc. 34). Although the Paiz Affidavit identifies the records located in the search, upon review, those records are not annexed to the affidavit itself. It appears that those records, consisting of 1000 pages, are separately submitted. (NYSCEF Doc. 33). The CITY also submits an affidavit from Lorenzo Bucca (“Bucca Affidavit”), a paralegal at the DOT, who conducted a search to locate any records related to complaints or repair work for the roadway along West 14th Street between 8th and 9th Avenues for the two-year period prior to the date of the accident. (NYSCEF Doc. 36). Again, although the Bucca Affidavit identifies the records located in the search, those records are not annexed to the affidavit itself. It appears that those records, consisting of nearly 1200 pages, are separately submitted. (NYSCEF Doc. 35).

The CITY submits an affidavit from Nicholas Iannuzzelli (“Iannuzzelli Affidavit”), a Supervisor Highway Repairer for the Division of Roadway Repair and Maintenance at the DOT. (NYSCEF Doc. 37). As per the Iannuzzelli Affidavit, a complaint was received for a defective condition along 14th Street between 8th and 9th Avenues (defect number DM2015167027) and that on June 16, 2015, the DOT’s maintenance crew made repairs to the defective condition. Upon review, the affidavit does not identify the specific nature or size of the condition complained of, nor is its location along 14th Street identified.

The CITY also submits an affidavit from Yelena Pasyukova (“Pasyukova Affidavit”), a Principal Administrative Associate for the Manhattan Street Maintenance Division of Roadway Repair and Maintenance at the DOT. (NYSCEF Doc. 38). As per the Pasyukova Affidavit, a complaint was received for a pothole on 14th Street between 8th and 9th Avenues (defect number DM2016008017) and that on January 11, 2016, the DOT’s maintenance crew made repairs. Upon review, the affidavit does not identify the location of the pothole nor the subsequent repair work along 14th Street. As per the Pasyukova Affidavit, a complaint was received for another pothole on 14th Street between 8th and 9th Avenues (defect number DM 2016118030) which was repaired on April 27, 2016 by the DOT’s maintenance crew. Upon review, the affidavit does not identify the location of the pothole nor the subsequent repair work along 14th Street.

In opposition, both the Plaintiff TRANSIT argue that that CITY has not met its *prima facie* burden. Specifically, it is argued *in part*, that although the CITY maintains that it did not receive any written notice, the CITY's evidence is insufficient to establish that notice of this condition was not received as the CITY only provides records dating back two years prior to the accident (NYSCEF Doc. 33, 34, 35, 36). It is further argued that it is clear from Google maps images depicting the subject bus stop, the hummock existed at the subject location as far back as 2009 and that the roadway appears to have undergone various repair work from 2009 to 2014 (NYSCEF Doc. 48, 49, 50, 51, 52, 53). Additionally, it is argued in opposition that the CITY's records reflect that pothole repair work was performed on 14th Street between 8th and 9th Avenues (NYSCEF Doc. 37, 38), but that as the records do not show the specific location of the work along the roadway, this raises a question of fact as to whether the CITY in fact performed work at the subject location.

CPLR §3212 provides any party in any action, including in a negligence action, to move for summary judgment. (CPLR §3212 [a], *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853 [1974]). The party seeking summary judgment, even if unopposed, has the high burden of establishing entitlement to judgment as a matter of law with evidence in admissible form (*see* CPLR §3212 [b], *Voss v Netherlands Ins. Co.*, 22 N.Y.3d 728, 734, 8 N.E.3d 823 [2014], *Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81, 790 N.E.2d 772 [2003], *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324–25, 501 N.E.2d 572, 574 [1986], *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]). “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 N.Y.2d 320, 324, 501 N.E.2d 572, 574 [1986]). “[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact.” (*Castore v. Tutto Bene Rest. Inc.*, 77 A.D.3d 599, 909 N.Y.S.2d 452, 453 [1st Dept 2010]).

The Administrative Code of the City of New York § 7-201 (c)(2) provides that no civil action can be maintained against The City of New York due to any claim for damage sustained as a result of any defective roadway condition unless written notice of the condition was given to the commissioner of transportation. (*see Katz v. City of New York*, 87 N.Y.2d 241, 243, 661 N.E.2d 1374 [1995]). “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 [condition]" (*Katz*-87 N.Y.2d at 243).

Upon review, the CITY has not affirmatively established that prior written notice of the subject hummock condition was not received. Notably absent from any of the affidavits submitted by the CITY is any statement by someone with knowledge that the CITY did not receive notice of the specific condition complained of herein. Although it is concluded in the attorney affirmation in support of the motion that the records submitted show that no written notice was submitted, the CITY does not direct this Court to any specific record or combination of records which supports such a conclusion (NYSCEF Doc. 19). Rather, the CITY appears to argue that the Plaintiff cannot make a showing that the CITY had prior written notice of the subject condition. On a motion for summary judgment, it is not enough for a defendant to identify potential problems or issues with a plaintiff's negligence case. Rather, it is the defendant's burden to show that its alleged negligence was not the proximate cause of the plaintiff's accident. (*See Hairston v. Liberty Behav. Mgmt. Corp.*, 157 A.D.3d 404, 405, 68 N.Y.S.3d 439, 440 [1st Dept 2018]; *Artalyan, Inc. v. Kitridge Realty Co.*, 79 A.D.3d 546, 547, 912 N.Y.S.2d 400 [1st Dept 2010]).

However, even if the CITY established that it did not receive prior written notice of the subject hummock, the Plaintiff and TRANSIT have raised a material question of fact in opposition warranting a denial of summary judgment. (*See Martin v. City of New York*, 191 A.D.3d 152, 137 N.Y.S.3d 346 [1st Dept 2020]). The CITY has searched and disclosed records for the two years preceding the date of this accident (from September 9, 2014 to September 9, 2016). However, it is argued in opposition, that based upon the Google map images submitted of the subject accident location, it appears that a hummock existed along the curb near the bus stop on 14th Street as far back as 2009. It also appears from the collective Google images that various roadway work was conducted in the general area of the bus stop between 2009 and 2014. Thus, there is a question of fact as to whether a complaint was received, an inspection was conducted or repair work was performed by the CITY prior to the two year time span the CITY elected to produce. Moreover, it is clear from the CITY's own evidence that the DOT conducted roadway repair work on 14th Street between 8th and 9th Avenues on April 27, 2016 (less than six months prior to the accident) and on January 11, 2016 (less than a year before the accident). However, the affidavits submitted by the CITY do not indicate the extent of the repair work involved, nor is the specific location of the potholes identified. Additionally, the unidentified roadway defect repaired on June 16, 2015 is not

described in any detail, nor is its location identified. Therefore, the CITY has not shown that its prior repair work along 14th Street between 8th and 9th Avenues did not involve the location of the subject accident, or the subject defect itself.

Accordingly, the CITY's motion for summary judgment is denied as the CITY has not met its prima facie burden by establishing that it did not receive prior written notice and as there is a material question of fact as to whether any complaints were received, resulting in any inspections and/or repair work conducted prior to the two-year span of time the CITY has chosen to disclose.

It is hereby,

ORDERED that Defendant THE CITY OF NEW YORK's motion for summary judgment is denied; and it is further

ORDERED that, within 20 days from the entry of this order, Defendant THE CITY OF NEW YORK shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office, who is hereby directed make all required notations thereof in the records of the court; and it is further

ORDERED that such upon 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 the court's website)].

1/9/2024

DATE

CHECK ONE:

- CASE DISPOSED
 - GRANTED
 - SETTLE ORDER
 - INCLUDES TRANSFER/REASSIGN
- DENIED

APPLICATION:

CHECK IF APPROPRIATE:

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

HON. DENISE M. DOMINGUEZ

J.S.C.