Suarez v City of New York

2024 NY Slip Op 34963(U)

October 7, 2024

Supreme Court, Bronx County

Docket Number: Index No. 26291/2020E

Judge: Mitchell J. Danziger

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 3
---X

IRMA SUAREZ

-against-

THE CITY OF NEW YORK, JASMINE FIELDS, MEDINA BYARS, TARODD FIELDS, NANCY PEREZ, and the NANCY PEREZ TRUST AGREEMENT DATED JULY 27, 2015
---X

Index №. 26291/2020E

Hon. Mitchell J. Danziger
Justice Supreme Court

#005

The following papers were read on this motion (Seq. No. 5) for **summary judgment** noticed for and submitted on May 30, 2024

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 135-161
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 171-173
Reply Affirmation	NYSCEF Doc. # 179

Motion by the defendant, the City of New York ("the City"), for an order, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's complaint and all cross claims asserted against the City, is decided as follows:

This action stems from a trip and fall accident which occurred on December 4, 2019, while plaintiff was walking along the sidewalk located at 158 Newman Avenue and 170 Newman Avenue, in the Bronx (NOC; Pl. 50-h at 11; Pl. EBT at 12). At this location, "the sidewalk and driveway of 170 Newman Avenue, and the grass strip/path in front of 158 Newman Avenue meet (there being no cement sidewalk in front of 158 Newman Avenue)" (NOC; *see also* Pl. EBT at 16). Initially, plaintiff was "walking on the sidewalk, which is like a grass area," and then plaintiff fell because she "tripped on a cement… the cement was higher, like two inches higher than the grass" (Pl. EBT at 16). When asked if her feet "hit that cement," plaintiff responded, "[y]es," with her "[r]ight foot" (*id.*). Plaintiff further clarified she tripped when she "came upon a cement area and there was like a hole, and the cement area was higher than the grass" (*id.*). At her deposition, plaintiff marked a photograph depicting the location of her fall (*id.* at 39-40). The City submitted the marked photograph with this motion (NYSCEF Doc No. 161). In sum, plaintiff claims she fell as a result of both a defect in the cement and a hole in the ground.

The City now moves for summary judgment arguing that it cannot be held liable for plaintiff's alleged injuries because it had no prior written notice of the alleged defect, that none of the exceptions to the prior written notice rule apply, and that it did not affirmatively cause or create the alleged defect. In addition, the City argues that the owner of the subject property made a "special use" of the portion of driveway where plaintiff fell, and as a result, the City had no duty to maintain that certain portion of sidewalk.

"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 eliminate any material issues of fact from the case" (*Winegrad v N.Y Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985] [citations omitted]). "Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact" (*Melendez v Parkchester Med. Set-vs., P.C.*, 76 A.D.3d 927 [1st Dept 2010], citing *Zuckerman v New York*, 49 N.Y.2d 557, 562 [1980]). "[T]he opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist" and "the issue must be shown to be 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], *affd* 62 N.Y.2d 686 [1984]). The evidence submitted on a motion for summary judgment is construed in the light most favorable to the opponent of the motion (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 [2007]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503, 505 [2012], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]).

"Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective street or sidewalk condition absent proof of prior written notice or an exception thereto" (*Martin v City of New York*, 191 A.D.3d 152, 153 [1st Dept 2020]). 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]). "The Court of Appeals has recognized two exceptions to this rule, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality" (*Martin v City of New York*, 191 A.D.3d 152, 153 [1st Dept 2020] [internal quotation marks and brackets omitted]). In an action such as this, where the City moved for summary judgment dismissing the complaint alleging personal injury due to a sidewalk defect, "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]).

As an initial matter, and contrary to the City's contention, the "grassy area between a curb and a paved sidewalk is part of the sidewalk" (*LoCurto v City of New York*, 2 A.D.3d 277 [1st Dept 2003]). Thus, NYC Administrative Code 7-201 (c) (2) applies to the alleged hole located in the grass, adjacent to the portion of sidewalk, where plaintiff fell, and "require[es] a showing that the City had prior written notice of the alleged hole in the ground or created the hole through an affirmative act of negligence or made a special use of the grassy area that conferred a benefit" (*id.*).

Beginning with the issue of prior written notice, the Court reviews the 2003 Big Apple Map ("BAM"). Here, the parties agree that the BAM is marked "NS" for "no sidewalk," at the location of the subject accident. Nevertheless, "[t]here is no mention of a hole. The awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident" (*Roldan v City of New York*, 36 A.D.3d 484 [1st Dept 2007]). In other words, the BAM does not contain a circle symbol at or near the location of the subject accident, which, according to the BAM symbols page, means "hole or hazardous depression." Thus, the Court finds that the BAM did not provide the City with prior written notice of the defective condition in this matter.

Moreover, the City sufficiently argues that "plaintiff has failed to cite to any binding law that requires the City to have a sidewalk at the location in question or that the lack of sidewalk qualifies as a defect" (NYSCEF Doc No. 136, at ¶47). Contrary to Plaintiff's contention, the Administrative Code of the City of New York § 19-152 (a), "imposes no affirmative sidewalk maintenance duty on [] defendant City… and, accordingly, proof of its violation would not have been probative of plaintiff's claim of negligence against" the City (*Herrera v City of New York*, 8 A.D.3d 139 [1st Dept 2004]; *see also Missirlakis v McCarthy*, 145 A.D.3d 772, 773 [2d Dept 2016] ["neither Administrative Code of the City of New York § 19-152 nor 34 RCNY 2-09 (f) expressly imposes liability for injuries resulting from a breach of the duty to maintain the public sidewalk"]).

As to the New York City Department of Parks and Recreation ("Parks") records, and contrary to plaintiff's contention, "prepar[ing] written reports and work orders" (NYSCEF Doc No. 171, ¶19) does not satisfy the prior written notice rule (*see e.g.*, *Harvey v Henry 85 LLC*, 171 A.D.3d 531, 532 [1st Dept 2019] ["service report that was the result of a verbal or telephonic communication received through the City's 311 system, [] is insufficient to raise an issue of fact as to prior written notice"]). Plaintiff's reliance upon *Bochner v Town of Monroe* (169 A.D.3d 631 [2d Dept 2019]), and *Prucha v Town of Babylon* (138 A.D.3d 1083 [2d Dept 2016]) are misplaced, since in both of those cases the municipalities received prior written notice through "an officer designated by the Village Code as a recipient of written notice" (*Bochner*, 169 A.D.3d at 632) and "an entity designated by the Town's prior written notice code" (*Prucha*, 138 A.D.3d at 1084). Plaintiff fails to provide a sufficient explanation, or case law or authority, as to how the Parks records satisfy the notice requirements of NYC Administrative Code 7-201 (c) (2).

As to the New York City Department of Transportation ("DOT") records, plaintiff's opposition papers do not meaningfully address those records to explain how it provides sufficient notice of the defective condition in this matter.

Accordingly, the City has established its prima facie entailment to summary judgment due to have received no prior written notice of the defective condition in this matter. The burden therefore shifts "'to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality'"

(*Flynn v City of New York*, 154 A.D.3d 488 [1st Dept 2017], quoting *Yarborough v City of New York*, 10 N.Y.3d 726, 728 [2008]).

In opposition to the motion, plaintiff argues that the City affirmatively created the defective condition – the hole in the ground. Plaintiff does not assert a "special use" exception on the part of the City. Plaintiff rests the affirmative creation argument based upon a tree removal conducted by the City during March of 2017, at the subject accident location, approximately two-and-a-half-years prior to Plaintiff's incident on December 4, 2019. "[T]he affirmative negligence exception 'is limited to work by the City that immediately results in the existence of a dangerous condition'" (*Yarborough*, 10 N.Y.3d at 728, quoting *Oboler v City of New York*, 8 N.Y.3d 888, 889 [2007]). The two-and-a-half-year span between the City's tree removal and Plaintiff's date of injury does not constitute work by the City that immediately results in the existence of a dangerous condition (*see e.g.*, *Thompson v City of New York*, 172 A.D.3d 485 [1st Dept 2019] [finding the City did not affirmatively create the defect, even assuming "inadequate repairs," "six months prior to plaintiff's accident"]; *Civic v City of New York*, 215 A.D.3d 445, 446 [1st Dept 2023] ["Plaintiff's claim that the City's alleged negligent repair of a defect at the location several months before the incident resulted in an immediate hazardous condition was speculative"]; *Flynn v City of New York*, 154 A.D.3d 488, 488-489 [1st Dept 2017] ["Plaintiff's speculation that the City's repaving work in the area, three and a half years earlier, immediately caused the alleged depressed and dangerous condition, is insufficient to create a triable issue of fact"]; *Brown v City of New York*, 150 A.D.3d 615, 616 [1st Dept 2017] [finding the City did not affirmatively create the defect because the "City's record search demonstrated that the sign was last repaired two years before plaintiff's accident, and plaintiff failed to present any evidence to the contrary"]; *compare Bania v City of New York*, 157 A.D.3d 612, 614 [1st Dept 2018] [issue of fact whether the City affirmatively created the defect since "the City has conceded… it worked to fill the sinkhole… eleven days prior to the accident"]). Accordingly, the Court finds that no triable issue of fact is raised as to whether the City affirmatively the defective condition – the hole in the ground.

On this motion, "[t]he City is entitled to summary judgment, because it established that it did not have prior written notice of the alleged defective sidewalk and that none of the exceptions to the statutory rule requiring such notice applied." (*Spencer v City of New York*, 149 A.D.3d 557 [1st Dept 2017]).

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Accordingly, the City's motion for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it, is granted. The Clerk of the Court shall transfer this matter to a non-City part. The City shall serve a copy of this Order with Notice of Entry upon all parties within thirty days of the upload of this Order in NYSCEF.

This constitutes the decision and order of this Court.

Dated: 10/7/24

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

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