

Dupree-Harper v City of New York
2025 NY Slip Op 35622(U)
March 4, 2025
Supreme Court, Queens County
Docket Number: Index No. 713647/2019
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

-----X
Denise Dupree-Harper,

Index
Number: 713647/19

Plaintiff,

- against -

Motion
Date: 2/24/25

City of New York, Gertz Plaza Acquisition
2, LLC, Jamaica Center Business Improvement
District, Inc., Unique Thrift LLC, Savers,
Inc., TVI Inc., Apogee NY LLC and Jamaica
Center Improvement Association,

Motion Seq. No.: 10

Defendants.

-----X
Jamaica Center Improvement Association, Inc.
D/b/a Jamaica Center Business Improvement
District i/s/h/a Jamaica Center Business
Improvement District, Inc.,

Third-Party Plaintiff,

- against -

Atlantic Maintenance Corp. D/b/a Streetplus,

Third-Party Defendant.

-----X
Apogee NY LLC,

Second Third-Party Plaintiff,

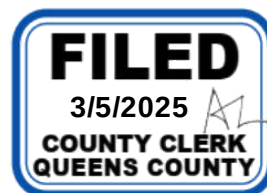
- against -

Consolidated Edison Company of New York, Inc.,

Second Third-Party Defendant.

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The following papers numbered E336-E354 & E411-E414 read on
this motion by Defendant, The City of New York, for summary
judgment.



Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... E336-354
Affirmation in Opposition-Exhibits..... E411-414

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendant, The City of New York, for summary judgment is granted.

Plaintiff testified that she was walking on the sidewalk of Jamaica Avenue near Union Hall Street. The sidewalk there is comprised of cobblestones. However, the area where she fell was comprised of cement. Plaintiff's foot got caught in a crack, causing her to fall near a manhole cover. Marked photographs from the deposition depict a cobblestone sidewalk. There is a manhole situated on the sidewalk close to the roadway with a square-like perimeter comprised of cement. A circle and arrow is marked on Exhibits "B" and "D" indicating specifically where Plaintiff fell. The circle is on the edge of the perimeter near where the cement and cobblestone meet. The cement on the perimeter appears broken and uneven. A catch basin is depicted on the roadway immediately adjacent to the manhole cover. It is undisputed that Gertz Plaza Acquisition 2, LLC owns the abutting premises, and not the City of New York.

The City avers that it is not liable to Plaintiff for her injuries and that it is entitled to summary judgment for the following reasons. First, none of the exceptions to Section 7-210 of the Administrative Code, which shift the burden of liability to the abutting property owner, are applicable. Second, because even if the City were responsible for repairing the relevant portion of the sidewalk, it did not have prior written notice of the alleged defect. Finally, the defect was open and obvious and not inherently dangerous as a matter of law.

Property owners in the City of New York are required to repair and maintain at their own expense the public sidewalks abutting their premises, pursuant to §19-152 of the Administrative Code of the City of New York. However, a violation of that section, prior to September 14, 2003, could not form the basis of liability against them for injuries sustained by pedestrians. In the absence of any statute making property owners liable for injuries to pedestrians, liability remained exclusively upon the City. The Administrative Code was amended in 2003 to add §7-210, which

transferred liability from the City to property owners, except owners of one to three-family homes that are either wholly or partially owner-occupied and used exclusively for residential purposes.

Section 7-210 was enacted to absolve the City of any tort liability for personal injury or property damage and to transfer that liability to the property owner who breaches the duty to repair imposed by §19-152 (see Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193; Xiang Fu He v. Troon Mgt., Inc., 34 N.Y.3d 167 [2019]). Section 7-210 (c) provides, "Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks . . . in a reasonably safe condition." The only exceptions stated in that section are where the adjacent or abutting property is an owner-occupied one to three-family home used exclusively for residential purposes and where the City is the property owner. Neither of these exceptions applies in the instant case. The record on this motion establishes that the area of sidewalk where plaintiff tripped abutted a commercial property, which is not an owner-occupied exclusively residential premises of less than four families. Accordingly, the City is entitled to the protections afforded pursuant to Section 7-210.

Despite the apparent applicability of Section 7-210, the fact that Plaintiff fell in close proximity to a manhole cover adds another layer of analysis on this motion because the City is responsible for making repairs to the 12-inches surrounding manhole covers, gratings, and catch basins pursuant to Section 2-07 of the Rules of the City of New York (see 34 RCNY §2-07[b]). Indeed, there is no indication that the City Council intended §7-210 of the Administrative Code to supercede RCNY §2-07 so as to transfer the statutory responsibility of the owner of a sidewalk hardware to the abutting property owner (see Flynn v City of New York, 84 A.D.3d 1018 [2d Dept. 2011]).

The Highway Rules governing underground street access covers, transformer vault covers and gratings provides "the owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware" (see 34 RCNY §2-07[b][1]). "The owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating" (see 34 RCNY §2-07[b][2]). Notably, and since it may be applicable to this action, 34 RCNY §2-07(b)(1) and (2) provide that the owners

of the covers or gratings on the streets and sidewalks are responsible for the twelve inches extending outward from "the edge of the cover, grating, or concrete pad, if such pad is installed" (see 34 RCNY §2-07(b)(1)(2)). Additionally, a sidewalk is included within the definition of "street" under these sections, pursuant to 34 RCNY §2-01. It undisputed that the subject manhole is owned by the City.

As the Court noted in its decision under motion sequence number 8, there is a question of fact as to whether the surrounding area of the manhole cover where Plaintiff fell qualifies as the "concrete pad" which is contemplated in RCNY §2-07(b). If it does, the City would be responsible for the 12 inches extending outward from not only the manhole itself, but from the concrete pad.

Accordingly, since this Court already determined there is a question of fact with respect to whether the defect was situated within 12 inches of what qualifies as a concrete pad, the motion must be denied on the premise that the City is not responsible for the subject sidewalk pursuant to Section 7-210 of the Administrative Code and Section 2-07 of the Rules of the City of New York. However, despite all of the forgoing, the City may still be entitled to summary judgment if it did not have prior written notice of the alleged defect. Indeed, applicability of the 12-inch rule does not act as a barrier to the City's entitlement to summary judgment because the 12-inch rule does not obviate the requirement for prior written notice (see Civic v. City of New York, 215 A.D.3d 445 [1st Dept. 2023] citing Gori v. City of New York, 171 A.D.3d 1025 [2d Dept. 2019]; Oboler v. City of New York, 8 N.Y.3d 888 [2007]; see also Almonte v. City of New York, 2022 N.Y. Misc. LEXIS 1490 [NY Sup Ct New York County 2022]). Even where a City owned manhole is situated within 12 inches of a defect which causes a plaintiff injury, that plaintiff is still required to establish prior written notice in order for the City to be liable.

Pursuant to Administrative Code §7-201(c)(2), prior written notice is a condition precedent to maintaining an action against the City for damages relating to a street or sidewalk defect (see NYC Admin. Code §7-201; Katz v. City of New York, 87 N.Y.2d 241 [1995]; Abdullah v. City of New York, 192 A.D.3d 735 [2d Dept. 2021]; Harrison v. City of New York, 184 A.D.3d 742 [2d Dept. 2020]; Quinn v. City of New York, 305 A.D.2d 570 [2d Dept. 2003]). Plaintiff must both plead and prove that the City had prior written notice of the condition, otherwise no liability may be imposed upon the municipality (see Hinton v. Village of Pulaski, 33 N.Y.3d 931 [2019]; De Zapata v. City of New York, 172 A.D.3d 1306 [2d Dept. 2019]; Estrada v. City of New York, 273 A.D.2d 194 [2d Dept. 2000]). The only exceptions to the requirement of prior written

notice are where the municipality created the defect or hazard through an affirmative act of negligence and where it made a special use of the area (see Amabile v. City of Buffalo, 93 N.Y.2d 471 [1999]; Taustine v. Inc. Vil of Lindenhurst, 158 A.D.3d 785 [2d Dept. 2018]).

The City exchanged a search for records from the New York City Department of Transportation ("DOT") for the relevant location, or Jamaica Avenue between Union Hall Street and Guy R. Brewer Boulevard for a two year period prior to and including the date of Plaintiff's accident. The search revealed 11 permits, 11 applications, 2 Notices of Violation, 6 inspections, and 2 Big Apple Maps.

A review of the relevant DOT records to the City's motion as well as the testimony of the DOT records searcher, Sherri Reid, establish that the DOT roadway search records do not provide prior written notice of the alleged defect here. The records do not reveal any permits issued to the City or to City agencies. Regardless, it is well established that the issuance of a permit by itself does not constitute prior written notice (see Gee v. City of New York, 304 A.D.2d 615 [2d Dept. 2003]; Levbarg v. City of New York, 282 A.D.2d 239 [1st Dept. 2001]; Meltzer v. New York, 156 A.D.2d 124 [1st Dept. 1989]). In the same vein, none of the annexed inspections nor the Notices of Violation are relevant to prior written notice of the complained of condition. Indeed, any prior written notice must describe the specific defect at the specific location (see Gorman v. Town of Huntington, 12 N.Y.3d 275 [2009]; D'Onofrio v. City of New York, 11 N.Y.3d 581 [2008]). Nor does a review of the relevant Big Apple Map provide any prior written notice of a broken sidewalk at the subject location.

The City also exchanged a search of records from the New York City Department of Environmental Protection ("DEP"). The first DEP search dated January 8, 2020 revealed no records except for a map/diagram of DEP owned manholes in the relevant vicinity. A second DEP search dated April 3, 2024 was conducted for the location of 162-16 Jamaica Avenue instead of the location of the accident, 162-10 Jamaica Avenue because it appeared to be the more relevant address according to the sewer map. This search revealed 2 customer service requests ("CSR") and 7 work orders. A review of the relevant records reveal that the CSRs reference a missing manhole cover and a catch basin in need of repair in front of 162-21 Jamaica Avenue. None of the work orders relate to the relevant defect here, or broken/uneven sidewalk surrounding the subject manhole located in front of 162-10 Jamaica Avenue. A third DEP search dated May 3, 2024 revealed no additional records. DEP records searcher, Kemal Babajanov, testified to the records

produced on behalf of DEP.

Only after the City establishes that it did not have prior written notice of the condition does "the burden shift to the plaintiff to demonstrate the applicability of one of the two recognized exceptions to the rule" (Yarborough v City of New York, 10 N.Y.3d 726 [2008]).

Plaintiff submits opposition to the City's motion, but essentially only with respect to the final branch of the motion, or that the subject defect was open and obvious (see infra), and therefore failed to raise an issue of fact with respect to any of the forgoing.

Lastly, the City argues that it is entitled to summary judgment because the alleged condition was open and obvious and not inherently dangerous. Any analysis regarding this branch of the motion would be purely academic in light of the above, and thus, the Court declines to reach it. In any event, whether the condition was open and obvious to plaintiff is not dispositive of the issue of liability, but merely raises an issue of a plaintiff's comparative negligence to be determined at trial (Cupo v. Karfunkel, 1 A.D.3d 48 [2d Dept 2003]). Regardless of the applicability of this legal concept, the City has otherwise established its entitlement to summary judgment (see supra).

Accordingly, the motion is granted and the complaint and any and all cross-claims are hereby dismissed as against the City of New York.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: March 4, 2025



KEVIN J. KERRIGAN, J.S.C.

