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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ PART 19

Justice

Index Number : 109186/2009
SCHWARTZ, BRYAN
vs.
EMPIRE CITY SUBWAY
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 5/25/12
which disposes of motion sequence(s) no. 5 and 6

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

MAY 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/25/12

Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ..... X CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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BRIAN SCHWARTZ and ARIANE GOLD,

Plaintiffs,

- against-

Index No.: 109186/2009
Submission Date: 02/29/2012

EMPIRE CITY SUBWAY COMPANY (LIMITED), VERIZON NEW YORK INC. and VERIZON COMMUNICATIONS, INC.,

Defendants.

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For Plaintiff:
Wingate, Russotti & Shapiro, LLP
420 Lexington Ave., Suite 2750
New York, NY 10170

For Defendants:
Conway, Farrell, Curtin & Kelly, P.C.
48 Wall Street
New York, NY 10005

Papers considered in review of this motion for summary judgment:

Notice of plaintiffs' motion 1
Aff in Opposition 2
Reply Aff 3
Notice of ECS's motion. 4
Aff in Opposition 5
Reply Aff 6

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, plaintiffs Bryan Schwartz ("Schwartz") and Ariane Gold ("Gold") (collectively "plaintiffs") move for summary judgment on the issue of liability (motion sequence no. 5). Defendant Empire City Subway Company (Limited) ("ECS") moves separately for summary judgment dismissing

the complaint (motion sequence no. 6). Motion sequence nos. 5 and 6 are consolidated for disposition.

This action arises from injuries Schwartz sustained on May 14, 2009 when he allegedly fell on a manhole cover (the "subject manhole cover") in a crosswalk at 73rd Street and Columbus Avenue in Manhattan. ECS owned and maintained the subject manhole cover. Schwartz testified that on the date of the accident, the weather was "misty," causing condensation on the manhole cover.

Leonard Ferguson ("Ferguson"), ECS's legal liaison and former project manager, testified at his deposition that it was ECS's practice to replace manhole covers after receiving complaints that they were too slippery, though ECS did not make periodic inspections of manhole covers to make sure their antislip surfaces were intact. Calvin Gordon ("Gordon"), a Specialist with ECS, attests that he performed a search of ECS's records and did not find any notices or complaints about the subject manhole cover.

Both parties retained experts to test the subject manhole cover's coefficient of friction, which measures a surfaces's resistance to slippage. Plaintiffs' expert, Stanley Fein ("Fein"), and ECS's expert, Ali Sadegh ("Sadegh"), both acknowledge that the American Society for Testing and Materials ("ASTM") recommends a coefficient of .5 or greater for roadway surfaces and hardware. Fein attests that he measured the subject manhole cover's coefficient of friction as .41, and that the subject manhole cover was degraded "as a result of vehicular and pedestrian traffic . . ." Sadegh took several

measurements, none of which were below .5. According to Sadegh, "[i]t would be impossible for a layman to determine when the minimum [coefficient of friction] threshold level is reached by physical inspection alone."

Plaintiffs commenced this action in June 2009, alleging that ECS was negligent in failing to properly maintain the manhole cover.[1] In their Bill of Particulars, plaintiffs assert violations of City Highway Rules, 34 RCNY §§ 2-08(b)(1), 2-13(n), 2-11, and Administrative Code of the City of New York § 19-147(d).

Plaintiffs now move for summary judgment on the issue of liability, arguing that the subject manhole cover's coefficient of friction was below the industry standard. Plaintiffs further contend that ECS's failure to inspect the subject manhole cover is a violation of City Highway Rules, 34 RCNY § 2-07(b) and thus negligence as a matter of law. Though plaintiffs do not argue that ECS had actual notice of the defect, they contend that ECS is imputed with constructive knowledge of the dangerous condition because ECS failed to make any inspections of its manhole covers.

In opposition, and in support of its summary judgment motion, ECS argues that the slippery condition of the subject manhole cover is not an actionable defect, and that Fein's affidavit is insufficient to establish that the condition was dangerous. ECS further maintains that it should not be imputed with constructive notice because the alleged

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[1] Gold asserts a derivative claim as Schwartz's spouse. In October 2011, the parties stipulated to discontinue the action as to Verizon New York, Inc. and Verizon Communications, Inc.

condition was latent. Lastly, ECS argues that it did not violate any code, rule or regulation, and that there is no regulation requiring manhole covers to be "slip-resistant."[2]

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, ECS has made a *prima face* showing of entitlement to summary judgment dismissing the complaint. To establish common law negligence liability, plaintiffs must show that ECS created or had actual or constructive notice of the alleged dangerous condition. *See Early v. Hilton Hotels Corp.*, 73 A.D.3d 559, 561 (1st Dept. 2010). Plaintiffs do not argue that ECS created the subject manhole cover's slippery condition, but that the cover degraded "as a result of vehicular and pedestrian traffic . . .". Further, ECS attests, and plaintiffs do not dispute, that ECS did not have actual notice that the subject manhole cover was too slippery.

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[2] Plaintiffs do not oppose ECS's assertion that ECS did not violate 34 RCNY §§ 2-13(n), 2-11, or Administrative Code of the City of New York § 19-147(d).

Plaintiffs maintain that the Court should impute ECS with constructive notice of the defect because ECS failed to inspect the subject manhole cover as required by 34 RCNY 2-07(b)(1).[3] However, constructive notice is not imputed where a layman could not have discovered the defect by a reasonable inspection, *see Rapino v. City of New York*, 299 A.D.2d 470, 471 (2d Dept. 2002), and plaintiffs do not contest Sadegh's attestation that a layman could not have determined the subject manhole cover's coefficient of friction by reasonable inspection alone.[4] *See Monroe v. New York*, 67 A.D.2d 89, 96-97 (2d Dept. 1979) (Though defendant had both a common law and statutory duty to inspect its property, and failed to make a reasonable inspection, negligence claim was properly dismissed because the alleged defect was latent.); *see also Hayes v. Riverbend Hous. Co., Inc.*, 40 A.D.3d 500, 501 (1st Dept. 2007); *Gonzalez v. Banzer*, 2004 N.Y. Misc. LEXIS 2485, at *5-6 (Sup. Ct. King Co. 2004). Accordingly, ECS is entitled to summary judgment dismissing the complaint.[5]

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[3] 34 § RCNY 2-07(b)(1) states that "the owners of covers or gratings are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware."

[4] Plaintiffs maintain that ECS should be precluded from presenting an expert affidavit in support of this motion because ECS allegedly did not respond to plaintiffs' demand for expert disclosure. However, failure to respond to a demand for disclosure does not automatically preclude a party from later offering expert testimony. *See Hernandez-Vega v. Zwanger-Pesiri Radiology Group*, 39 A.D.3d 710, 710-11 (2d Dept. 2007).

[5] Because "[m]ere notice of a general or unrelated problem is not enough" to establish notice of a particular defect, *Hayes*, 40 A.D.3d at 500, the Court rejects plaintiffs' argument that ECS was on notice of the subject manhole cover's slippery condition because ECS was previously sued in relation to a separate manhole cover in the

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by plaintiffs Bryan Schwartz and Ariane Gold is denied; and it is further

ORDERED that the motion for summary judgment by defendant Empire City Subway Company (Limited) is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
May 25 2012

ENTER:

Saliann Scarpulla, J.S.C.

Bronx.

Further, because the Court holds that ECS did not have actual or constructive notice of the allegedly dangerous condition, the Court does not address whether the alleged condition is an actionable defect, or whether Fein's affidavit is sufficient to establish a defect.