Steinberg v City of New York
2016 NY Slip Op 31841(U)
September 30, 2016
Supreme Court, New York County
Docket Number: 151637/2013
Judge: James E. d'Auguste

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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ROBERT STEINBERG and SHARON STEINBERG,

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

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DECISION AND ORDER
Index No. 151637/2013
Mot. Seq. No. 001

Hon. James E. d'Auguste

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1, 2 (Exs. A-J)
AFFIRMATION IN OPPOSITION	3 (Exs. A-B)
REPLY AFFIRMATION	4

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action filed by plaintiffs Robert Steinberg and Sharon Steinberg for personal injuries allegedly suffered by Robert Steinberg and loss of consortium by Sharon Steinberg, defendant the City of New York (the "City") moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor and dismissing the complaint. For the reasons stated herein, the City's motion for summary judgment is denied.

Factual and Procedural History

This action arises from personal injuries allegedly sustained by Robert Steinberg on or about August 22, 2012 at approximately 3:00 p.m. when he was walking north on West 30th Street; specifically, on the far left side of the eastern crosswalk at the intersection of West 30th Street and Seventh Avenue in the County, City and State of New York. *See* Goldberg Aff. Exs. D (Mr. Steinberg's General Municipal Law ("GML") Section 50-h Hearing dated January 4, 2013), F (Mr. Steinberg's EBT dated January 29, 2014). Mr. Steinberg testified that as he approached the

northern sidewalk, while walking in the crosswalk, he was caused to trip and fall on the northern curb due to the presence of a hazardous and dangerous condition at said location. *Id.* Ex. E at 12:4-14. Plaintiffs filed a notice of claim on or about September 28, 2012.

Plaintiffs commenced the instant action by filing a summons and verified complaint on or about February 18, 2013, alleging that the City negligently permitted the aforementioned curb area to become dangerous and hazardous, broken, worn, cracked, deteriorated, and uneven so as to constitute a trap, and failed to warn Mr. Steinberg of this condition, despite having actual, prior written, and/or constructive notice of the defect. On or about April 3, 2013, the City joined issue by serving an answer. At both Mr. Steinberg's GML Section 50-h hearing, using photographic evidence, and his examination before trial, he established that he tripped on the northern curb of West 30th Street near the northeastern corner of its intersection with Seventh Avenue.

As a result of the pleadings and testimony, the New York City Department of Transportation ("DOT") conducted multiple searches for records pertaining to the roadway of West 30th Street between Seventh Avenue and Eighth Avenue for a period of two-years prior to and including the date of Mr. Steinberg's alleged accident for "permits, applications, Office of Construction and Mitigation and Coordination files, corrective action requests, notices of violation, notifications for immediate corrective action, inspections, contract information and resurfacing records, maintenance and repair orders, complaints, gangsheets, gangsheets for milling and resurfacing, special events records, and Big Apple Maps and legends." *Id.* ¶ 6, Ex. G. Though the search was performed by a Tiffany Jones, a DOT records searcher, the sum and substance of the records found as a result of her search were testified to on August 27, 2015 during the examination before trial of Abraham Lopez, "a DOT records searcher and testifier." *Id.*, Ex. H. As a result of Ms. Jones' search, a Big Apple Map for the subject location was found and was

provided to the City by the Big Apple Pothole and Sidewalk Protection Corporation, along with the "Key to Map Symbols." *Id.* ¶ 21, Ex. G. The Big Apple Map and the "Key to Map Symbols" were served on the DOT by the Big Apple Pothole and Sidewalk Protection Corporation and were received by the DOT on October 23, 2003. *Id.* ¶ 21. A second search for the above records in the relevant electronic databases and corresponding paper records was performed by Talia Stover, a DOT paralegal, in preparation for the instant motion. *Id.*, Exs. I, J (Stover Affidavit). Ms. Stover's roadway search revealed thirty-four permits, fifteen hardcopy permits, twenty-one permit applications, one corrective action request, thirty-five inspections, two maintenance and repair orders, eight complaints, five gangsheets for roadway defects, and two handwritten gangsheets. *Id.* ¶ 8, Exs. I, J. The search did not reveal any hardcopy Office of Constructive Management files, notices of violation, notifications for immediate corrective action, contract information or resurfacing records, gangsheets for milling and resurfacing records, or special events reports. *Id.* ¶ 8, Exs. I, J.

On February 16, 2016, the City filed the instant motion for summary judgment to dismiss the complaint asserting that (1) it did not receive prior written notice of the subject condition pursuant to Section 7-201 of the Administrative Code of the City of New York; and (2) it did not cause or create the alleged condition. On May 16, 2016, plaintiffs opposed the instant motion on the grounds that the City had prior written notice due to markings on a Big Apple Map.

Discussion

Pursuant to CPLR 3212(b), "[a] motion for summary judgment . . . shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The Court of Appeals has frequently stated that "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 demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

Relevant to this case is Section 7-201(c)(2) of the Administrative Code of the City of New York ("Section 7-201(c)(2)"), known as the "Pothole Law," which requires the City to have prior written notice of a "defective, unsafe, dangerous or obstructed condition" to a "street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any other part or portion of any of the foregoing including any encumbrances thereon or attachments thereto" in order for a plaintiff to file a claim against the City. The City has the burden of establishing that it did not have prior written notice, and, if successful, "the burden 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." *Yarborough v. City of New York*, 10 N.Y.3d 726, 728 (2008).

The decisive issue in this case is whether or not the marking on the Big Apple Map, consisting of a solid line with two "X's" at either end, that runs along Seventh Avenue at or adjacent to the location of the alleged accident, beginning in the intersection of Seventh Avenue with West 30th Street at the northeast corner on the eastern side of the crosswalk, which extends past the intersection, constitutes prior written notice of the alleged defect at issue. According to the legend on the Big Apple Map, a solid line with an "X" at either end refers to an "[e]xtended section of broken, misaligned, or uneven curb." Kaufman Aff. Ex. B (Key to Map Symbols, page 14 of 18). "It is well settled that Big Apple Pothole maps filed with the [DOT] serve as prior written notice to the City of the indicated defective conditions" on the map. *Patterson v. City of New York*, 1 A.D.3d 139, 140 (1st Dep't 2003); *see Katz v. City of New York*, 87 N.Y.2d 241, 243-

44 (1995). "The notice requirement of [Section 7-201(c)] is construed strictly against the City, and 'a notice is sufficient if it brought the particular condition at issue to the attention of the authorities.'" *Vasquez v. City of New York*, 298 A.D.2d 187, 187 (1st Dep't 2002) (alteration in original) (quoting *Weinreb v. City of New York*, 193 A.D.2d 596, 598 (2d Dep't 1993)). Accordingly, the City can only have prior written notice of the alleged defect if the Big Apple Map made them aware of the particular "broken or uneven curb" that caused Mr. Steinberg's accident and injuries. *Id.* Because the City must be put on notice of the particular condition at issue, "[t]he 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, at *1 (1st Dep't 2007) (citing *Waner v. City of New York*, 5 A.D.3d 288 (1st Dep't 2004)).

The City asserts that the Big Apple Map for the subject location does not demonstrate prior written notice because nowhere on the map is there any mark to indicate a defective or uneven curb condition located near the crosswalk at the northeast corner of Seventh Avenue and West 30th Street. Further, the City argues that "any claim to the contrary is irrelevant and without merit" because plaintiffs cannot argue that marks located elsewhere on the Big Apple Map are sufficient to constitute prior written notice of the defect that caused Mr. Steinberg's alleged accident.[1] Goldberg Aff. ¶ 22. Here, the issue is whether a particular defect of the type that allegedly caused Mr. Steinberg's accident that is marked on a Big Apple Map was at the precise location of the defect that caused his alleged injuries.

The City relies on *Leary v. City of Rochester*, 67 N.Y.2d 866 (1986), for the proposition that the markings on the Big Apple Map are nearby the defect that allegedly caused Mr. Steinberg's

[1] The City also argues that it is entitled to summary judgment on the grounds that it did not cause and create the alleged defective condition; however, since plaintiffs did not oppose that branch of the City's motion, it is conceded by plaintiffs and is not discussed herein.

accident and that a nearby defect is insufficient to constitute prior written notice of another defect, even if they are of the same kind. In *Leary*, the City was granted summary judgment because the City had prior written notice of a defective sidewalk condition that was 28 to 30 feet away from the defective condition that allegedly caused plaintiff's injury did not constitute prior written notice of the alleged defective condition. *Id. Leary*, however, is inapposite from the instant case because here, plaintiffs rely on markings on the Big Apple Map that are either precisely at the location of the defect at issue or in the immediate vicinity of said defect, which would constitute prior written notice of the defect, rather than relying on prior written notice of a defect located 28 to 30 feet away. *Cf. id.* In fact, the underlying decision in *Leary* acknowledges that the facts presented are unlike circumstances in which the defect causing the plaintiff's injury was "'a part of the condition'" in "the area complained of in the prior notice." *Leary v. City of Rochester*, 115 A.D.2d 260, 260 (4th Dep't 1985), *aff'd*, 67 N.Y.2d 866 (1986) (quoting *Brooks v. City of Binghamton*, 55 A.D.2d 482, 483 (3d Dep't 1977)).

Even if the marking on the Big Apple Map is not at the exact precise location of Mr. Steinberg's alleged accident, "where there are factual issues as to the precise location of the defect that caused a plaintiff's fall and whether the defect is designated on the map, the question should be resolved by the jury." *Reyes v. City of New York*, 63 A.D.3d 615, 615 (1st Dep't 2009) (finding that where the plaintiff testified that she fell as a result of a hole abutting a broken curb and "[t]he Big Apple Map showed an extended portion of broken or misaligned curb, as indicated by two 'x's' connected by a straight line," that this "corresponded to the broken curb as marked on the map, that such defects would be noted on the Big Apple Map as a 'curb defect' because the curb was broken and misaligned, and that a curb defect 'also encompassed whatever happens at that particular location.'"). It appears from Mr. Steinberg's description of his alleged accident that the

particular defect that caused his injury could be considered reasonably encompassed by the aforesaid defect marked on the Big Apple Map and is a question of fact and should be resolved by a jury. *See id.* (citing *Almadotter v. City of New York*, 15 A.D.3d 426, 427 (2d Dep't 2005); *Johnson v. City of New York*, 280 A.D.2d 271, 272 (1st Dep't 2001)). Accordingly, the City's motion for summary judgment is hereby denied as the City failed to make a prima facie showing of entitlement to summary judgment.

Conclusion

Based upon the foregoing, the City's motion for summary judgment is denied in its entirety. This constitutes the decision and order of this Court.

Dated: September 30, 2016

Hon. James E. d'Auguste, A.J.S.C.