Bonner v City of New Rochelle
2017 NY Slip Op 33475(U)
February 21, 2017
Supreme Court, Westchester County
Docket Number: Index No. 68652/2015
Judge: Mary H. Smith
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DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5531[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

KENIA BONNER

Plaintiff,

-against-

THE CITY OF NEW ROCHELLE, THE COUNTY OF WESTCHESTER, THE COUNTY OF WESTCHESTER DEPARTMENT OF TRANSPORTATION, THE BEE-LINE BUS SYSTEM AND LIBERTY LINES TRANSIT INC.,

Defendants.

MOTION DATE: 02/03/17
INDEX NO.: 68652/2015

The following papers numbered 1 to 8 were read on this motion by defendant The City of New Rochelle for an Order pursuant to CPLR 3212 granting defendant summary judgment, etc.

Papers Numbered

Notice of Motion – Affirmation (Powers) – Exhs. A-F – Memorandum of Law.....1-4
Answering Affirmation (Zeichner) – Exhs. A & 1.....5-6
Replying Affirmation (Powers) – Exhs H-I.....7-8

Upon the foregoing papers, it is Ordered that this motion by defendant for an Order pursuant to CPLR 3212 and General Municipal Law 50-i granting defendant The City of New Rochelle ("defendant City") summary judgment and dismissing plaintiff's complaint is disposed of as follows:

This is an action wherein plaintiff seeks to recover for alleged personal injuries she sustained on April 13, 2015, at approximately 7:40 a.m., as a result of her stepping into a hole in the roadway on Main Street, in front of 466 Main Street near the intersection with North Avenue, in New Rochelle, New York, when she was getting off the number 60 bus.

Plaintiff commenced this action, specifically alleging that defendant City was negligent in its ownership, operation, management, maintenance, control, inspection and repair of said roadway by allowing the existence of, and failing to warn of, the hole, which plaintiff characterizes as a dangerous, unsafe and trap-like condition. All discovery has been completed and the Note of Issue has been filed.

Now, defendant City is moving for summary judgment dismissing the complaint and all cross-claims against it arguing that liability may not be imposed upon it because it had lacked prior written notice of the alleged defective roadway condition as required by Article XII, Section 127A of the City of New Rochelle Charter. Plaintiff has submitted opposition but the co-defendants, the County of Westchester, the County of Westchester Department of Transportation, the Bee-Line Bus System or Liberty Lines Transit Inc., have not.

The movant for summary judgment has the burden of establishing a prima facie showing of entitlement to judgment as a matter of law and must do so by submitting evidentiary proof in admissible form. See CPLR 3212, subd. (b); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). It is well settled that a municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies. Forbes v. City of New York, 85 A.D.3d 1106 (2d Dept' 2011); Poirier v. City of Schenectady, 85 N.Y.2d 310 (1995); Hanover Ins. Co. v. Town of Pawling, 94 A.D.3d 1055, 1056 (2d Dep't 2012); Abano

v. Suffolk County Community Coll., 66 A.D.3d 719, 719 (2d Dep't 2009); Katsoudas v. City of New York, 29 A.D.3d 740, 741 (2d Dep't 2006). The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality "created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality." Conner v. City of New York, 104 A.D.3d 637, 638 (2d Dep't 2013); Methal v. City of N.Y., 116 A.D.3d 743, 743 (2d Dep't 2014); Phillips v. City of New York, 107 A.D.3d 774, 775 (2d Dep't 2013).

Defendant City cites the New Rochelle City Charter, Article XII, Section 127A which states that:

> No civil action shall be maintained against the city for damages or injuries to person or property sustained in consequence of any street, highway, trees, bridge, culvert, sanitary sewer or storm drains, sidewalk or crosswalk or any other public place being defective, out of repair, unsafe, dangerous or obstructed, or in consequence of the existence of snow or ice thereon, unless written notice thereof, specifying the particular place, had actually been given to the Commissioner of Public Works prior to the happening of the event causing such damage or injury to person or property, and there was a failure or neglect by the city to repair or remove the defect, danger or obstruction or to cause the snow or ice to be removed or the specified place to be made reasonably safe within a reasonable time after the receipt of notice relating to it.

In support of its motion, defendant City submits the affidavit of Scott Pickup, the Acting Commissioner of the Department of Public Works for the City of New Rochelle, whose responsibilities include supervising the day-to-day operations of the Department of Public Works. Mr. Pickup avers that after searching the records that contain the prior written notices, which are the Complaint Book, street file and block and lot file, he did not find any records of "the City ever receiving written notice of [a] defective roadway condition abutting 466 Main Street in New Rochelle, New York, prior to April 13, 2015." Defendant City also

submits plaintiff's 50-H deposition testimony in which she admits that she had taken this bus trip for the past the two years, five times per week, and had never noticed this hole nor did she know how long it existed.

Based on the foregoing, the Court finds that defendant prima facie has established entitlement to judgment. It therefore was incumbent upon plaintiff to raise a triable issue of fact with respect thereto and this she has failed to do. See, e.g., Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1990); Zuckerman v. City of New York, 49 N.Y.2d 557,562 (1980). Plaintiff does not address defendant's lack of written notice argument. Instead, the only argument plaintiff's counsel raises in his three-page attorney affirmation is that defendant City's use of this hole falls within a "special use" category because the hole "abuts a sewer in the roadway." The Court notes that plaintiff failed to raise this special use argument in her Notice of Claim, Complaint or Bill of Particulars. Furthermore, in support of said special use argument, plaintiff cites one inapposite case and fails to explain how defendant City gets any special use out of this hole.

Additionally, the co-defendants failure to have opposed this motion notwithstanding due notice of same must be deemed a concession as to the correctness of defendant City's presentation of the facts and legal arguments entitling it to judgment and the relief sought herein. See Kuehne & Nagel, Inc. v. F. W. Baiden, 36 N.Y.2d 539, 544 (1975); Springer v. Keith Clark Pub. Co., 191 AD.2d 922 (3d Dep't 1993), lv. to app. dsmd. 82 N.Y.2d 706 (1993); John William Costello Associates, Inc. v. Standard Metals Corp., 99 AD.2d 227, 228 (1st Dep't 1984), app. dsmd. 62 N.Y.2d 942 (1984). As a result, defendant's City motion is granted in its entirety.

Plaintiff and the remaining co-defendants shall appear for a Settlement Conference in the Settlement Conference Part on Tuesday, March 7, 2017, in room 1600, at 9:15 A.M.

Dated: February 21 ,2017
White Plains, New York

MARY H. SMITH, J.S.C.