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| Diaz v City of New York |
| 2011 NY Slip Op 34260(U) |
| August 9, 2011 |
| Supreme Court, New York County |
| Docket Number: 114182/05 |
| Judge: Barbara Jaffe |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
JUAN DIAZ JR.,

Plaintiff,

- against -

Index No. 114182/05

Motion Date: 5/31/11
Motion Seq. No.: 006

DECISION AND ORDER

THE CITY OF NEW YORK, CONSOLIDATED EDISON,
INC., and POWER CONCRETE CO., INC.,

Defendants.

-----X
BARBARA JAFFE, JSC:

For plaintiff:
Victor Gomelsky, Esq.
Goidel & Siegel, LLP
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New York, NY 10168
212-840-3737

For City:
Peter C. Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St.,
New York, NY 10007
212-442-6851

By notice of motion dated December 3, 2010, defendant City moves pursuant to CPLR 2221 for an order granting it leave to reargue a prior decision and order dated October 22, 2010 denying its motion for summary judgment and, upon re-argument, granting the motion. Plaintiff opposes.

Plaintiff was allegedly injured on September 15, 2005, when he tripped and fell on a raised portion of a large metal plate on the sidewalk on Laurel Hill Terrace adjacent to High Bridge Park in Manhattan. (Affirmation of Peter C. Lucas, ACC, dated Dec. 3, 2010 [Lucas Aff.], Exh. A). In denying City's motion for summary judgment, I found that:

City presents no evidence pertaining to 181st Street and Laurel Hill Terrace. Moreover, the searches were conducted by unknown individuals and City's witness had no personal knowledge of the pertinent facts and did not address whether any other City agency may have received written notice of a dangerous condition . . . Thus, having failed to show

that it searched the location of plaintiff's fall or that the searches it conducted eliminated the possibility of written notice, City has not met its *prima facie* burden.

I also observed that the Big Apple Maps provided by City did not appear to include 181st Street.

City now argues that I incorrectly identified the location of plaintiff's accident as the sidewalk at 181st Street and Laurel Hill Terrace instead of the sidewalk at Laurel Hill Terrace, the location identified by plaintiff in his notice of claim, complaint, and bill of particulars. (Lucas Aff., Exh. A). Having searched its records for the sidewalk at Laurel Hill Terrace and submitted a Big Apple Map reflecting that location, City asserts that I erred in finding that its search was insufficient and that it had failed to establish that it lacked written notice of the metal plate. (*Id.*).

Plaintiff maintains that the location of his accident is irrelevant as City failed to establish that it lacked prior written notice of the defect at either location. (Affirmation of Victor Gomelsky, Esq., dated Feb. 17, 2011).

Absent any dispute that the location of plaintiff's accident was Laurel Hill Terrace and not 181st Street and Laurel Hill Terrace, leave to reargue is granted. And, as I observed in the prior decision, City's searches of Laurel Hill Terrace do not reflect that City had prior written notice of the defect, and the Big Apple Map also fails to reflect the specific defect at issue on Laurel Hill Terrace. Thus, City has established, *prima facie*, that it had no prior written notice of the raised metal place at the location of plaintiff's accident. (*See Glaser v City of New York*, 79 AD3d 600 [1st Dept 2010] [“(a)ffidavits submitted by representatives of the City attesting to standard record searches they personally conducted in their departments for roadbed defects, complaints and repairs dating back three years from the accident date supported the City's position that no record of road repairs to the area where plaintiff fell could be located”];

D'Onofrio v City of New York, 11 NY3d 581 [2008] [as defect shown on Map was not defect on which plaintiff allegedly fell, claim was properly dismissed]).

As the only symbol reflected on the Big Apple Map for the sidewalk on Laurel Hill Terrace does not correspond with the notation for an obstruction protruding from the sidewalk, which is the only defect that corresponds with a raised metal plate on the sidewalk (*see eg Cuccia v City of New York*, 22 AD3d 516 [2d Dept 2005] [where plaintiff tripped over metal stump or remnant of traffic control device in sidewalk, City had no prior written notice as Map did not show symbol for “obstruction protruding from sidewalk”]; *see also D'Onofrio*, 11 NY3d at 585 [even assuming metal grating was part of sidewalk, Map only depicted symbol for raised and uneven portion of sidewalk and no evidence that plaintiff walked across raised or uneven portion of sidewalk as he fell while walking over grating]), plaintiff has failed to establish that any triable issues remain. (*See Roldan v City of New York*, 36 AD3d 484 [1st Dept 2007] [Map did not reflect hole on which plaintiff fell; “the awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident”]). Nor has plaintiff alleged or demonstrated that City caused or created the defect.

Accordingly, it is hereby

ORDERED, that defendant City of New York’s motion for leave to reargue is granted; it is further

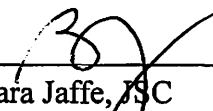
ORDERED, that upon re-argument, defendant City of New York’s motion for summary judgment is granted and the complaint and all cross-claims are hereby severed and dismissed as against defendant City of New York, and the Clerk is directed to enter judgment in favor of said

defendant; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City trial waiting list. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: August 9, 2011
New York, New York
AUG 09 2011

FILED
AUG 11 2011
COUNTY CLERK'S OFFICE
NEW YORK