Haulsey v City of New York
2013 NY Slip Op 31940(U)
August 14, 2013
Supreme Court, New York County
Docket Number: 111382/2009
Judge: Kathryn E. Freed
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SCANNED ON 8/19/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED, JUSTICE OF SUPREME COURT — Justice

PART 5

Index Number : 111382/2009
HAULSEY, SANDRA
vs
CITY OF NEW YORK
Sequence Number : 003
DISMISS

CAL H 43

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). ____

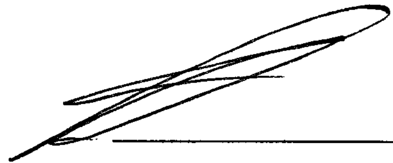
Replying Affidavits ____ | No(s). ____

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

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
AUG 19 2013
COUNTY CLERK'S OFFICE
NEW YORK



Dated: 8-14-13
AUG 14 2013

____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: .... ☐ 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5
---X
SANDRA HAULSEY,

Plaintiff,

DECISION/ORDER
Index No. 111382/2009
Seq. No. 003

-against-

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and NICO ASPHALT PAVING, INC.,

Defendants.
---X
HON. KATHRYN E. FREED:

FILED
AUG 19 2013
COUNTY CLERK'S OFFICE
NEW YORK

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. C-K)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED...........	....
ANSWERING AFFIDAVITS..	.........3 (Exs. A-D)
REPLYING AFFIDAVITS..	.... 4...........
OTHER..	....

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

Defendant The City of New York ("the City"), moves for an Order pursuant to CPLR §3211(a)(7), dismissing the complaint for failure to state a cause of action, or in the alternative, pursuant to CPLR§ 3212, granting summary judgment. Plaintiff and co-defendant Nico Asphalt Paving, Inc. ("Nico") oppose.

After a review of the papers presented, all relevant statutes and case law, the Court **denies** the motion.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries she allegedly sustained on December

10, 2009, when she tripped and fell on a pothole in the crosswalk of West 143rd Street along the west side of Adam Clayton Powell Boulevard in New York County. Thereafter, plaintiff commenced the instant action via service of a Summons and Complaint on or about August 11, 2009. The City served its Answer on or about September 4, 2009. The co-defendants also served their respective Answers. On August 5, 2009, plaintiff appeared for a General Municipal Law§ 50-h hearing. On or about January 26, 2010, plaintiff served her Verified Bill of Particulars and subsequently two Supplemental Bills of Particulars.

Positions of the parties:

The City argues that it is entitled to summary judgment because it did not have prior written notice of the alleged condition, and because the gravamen of plaintiff's claim comes under the purview of Administrative Code §7-201(c)(2), a statute intended to limit its liability for nonfeasance, except where it fails or refuses to remedy a situation within a reasonable time after receipt of notice. The City also argues that it is entitled to summary judgment because it did not cause or create the alleged hazardous condition. It asserts that should plaintiff or a non-City defendant argue that it caused or created the alleged defect which caused plaintiff to trip and fall, this argument would inevitably fail because none of the thirteen permits returned to the Department of Transporation ("DOT"), were issued to City agencies or its contractors. Additionally, the City asserts that the only record which reflects that the City performed any work in the subject area is the maintenance and repair report ("FITS" report), dated April 23, 2007, as well as the corresponding gangsheet for the roadway work performed on April 24, 2007.

The City refers to and relies on the testimony of DOT Supervisor of Highway Repair, Como Mordente, supervisor of the subject scene on April 24, 2007, when the roadway work was conducted,

testified regarding the FITS reports and the handwritten version of the corresponding gangsheet. (See Exhibit 1, p.13; Exhibit I, p.13 (FITS report and gangsheet). Mr. Mordente testified that the pothole referenced in the FITS report was filed on April 24, 2007. He also testified that any existing defect on the block would have been repaired.

Plaintiff argues that the City's motion warrants dismissal for two reasons. First, the City had prior written notice of the pothole from its own agency. Second, the City was on notice of the work it had performed on its behalf by Consolidated Edison Company of New York, Inc. ("Con Ed") and Nico. Additionally, plaintiff argues that the failure of the City's Answer to raise an affirmative defense regarding written notice warrants dismissal of its motion. Plaintiff also argues that the instant case falls into one of the exceptions to New York Administrative Code §7-201(c)(2), that being the fact that the City had its own written acknowledgment of the defect and failed to correct it within fifteen days.

Nico argues that the instant motion necessitates denial because the City cannot establish with any degree of certainty, that it did not have written notice of the subject pothole. It asserts that the City performed pothole repair at the crosswalk on April 24, 2007. Nico also argues that the City's motion is deficient because it does not seek dismissal of any cross-claims asserted by the co-defendants. Therefore, even if plaintiff's causes of action are dismissed, the cross-claims still remain. Moreover, Nico argues that the City conveniently omitted the deposition transcript of Grey-Talen Oneza, who testified on behalf of the City at a deposition on October 19, 2012. Mr. Oneza, a Supervisor of Highway Repair Division of the DOT, testified as to the existence of the defect on West 143rd Street between 7th and 8th Avenues, which is listed on the FITS report and corresponding computerized gangsheet marked into evidence during his deposition. The "defect detail sheet" for

this specific defect indicates that the defect was "located at crosswalk" (pp. 15-16), and the location was 7th Avenue to West 143rd Street (pp. 15-16). Said defect was ultimately repaired by the City on April 24, 2007.

Con Ed adopts and incorporates the arguments proffered by Nico. It essentially argues that genuine issues of material fact exist as to whether the subject defective condition was either caused or created by the City, which would naturally defeat its motion for summary judgment.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.3d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

Pursuant to New York Administrative Code §7-201(c)(2), no civil action may be maintained against the City arising from a dangerous or defective condition on a sidewalk unless the plaintiff pleads and proves that the City received prior written notice (see *Minew v. City of New York*, 106

A.D.3d 1060 [2d Dept. 2013]). Where a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries emanating from a dangerous roadway condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies (see *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 [1999]). The Court of Appeals recognizes only two statutory exceptions to the prior written notice requirement: where the municipality itself created the defect through an affirmative act of negligence, or where the defect resulted from a special use by the municipality (see *Amabile v. City of Buffalo*, 93 N.Y.2d 471 at 474; see also *Oboler v. City of New York*, 9 N.Y.3d 888, 889 [2007]; *Yarborough v. City of New York*, 10 N.Y.3d 726, 728 [2008]).

While it is plaintiff who bears the burden of establishing trial that the City had written notice at trial,(see *Katz v. City of New York*, 87 N.Y.2d 241, 243 [1995], she does not bear this burden at the pleading stage. Indeed, it is the City, as the moving party, who must establish the absence of written notice (*McNeill v. City of New York*, 40 A.D.3d 823, 824 [2d Dept. 2007]).

The Court has reviewed the transcribed deposition testimony of Mr. Como Mordente, annexed to the City's motion as Exhibit I. Mr. Mordente is employed by DOT as a Supervisor of Highway Repair, wherein he oversees the repair and/or the "ripping out" of streets. (*Id.* at lines 6-7). During his testimony, a four page gangsheet, which he reviewed prior to testifying, was marked into evidence. The first page was a FITS report. Mr. Mordente identified the FITS report as "basically an interoffice piece of paper...which are seen, but not worked with on a daily basis. (Id. at lines 15-21). Said FITS report indicated that a pothole patch was performed at the location of 131 West 143rd Street, Adam Clayton Boulevard on April 24, 2007, and five potholes had been filled in the vicinity of West 143rd Street and Adam Clayton Powell Boulevard.

The Court also reviewed the transcribed testimony of Patrick Keough, (annexed as Ex. B in plaintiff's Aff. in Opp.). Mr. Keough testified that he is a Specialist employed by Con Edison. During his testimony, Mr. Keough identified and explained the contents of a permit authorizing Con Ed to open the roadway and or sidewalk at West 143rd Street between 7th and 8th Avenues. Accompanying documentation also indicated that said opening/cut was "backfilled" (a closing of the excavation), on May 9. 2008. The Court further reviewed the deposition testimony of Gre-Talan Oneza, Supervisor of Highway Repair for DOT. During his deposition, Mr. Oneza was shown gangsheets and FITS reports, which indicated that a defect in the form of a pothole existed in the vicinity of 7th Avenue to West 143rd Street. Said documents also indicated that this defect had been remedied.

Additionally, the Court reviewed the transcribed deposition testimony of John Denegall, (Id., Ex. C). Mr. Denegall testified that he is a Superintendent for defendant Nico. Mr. Denegall testified that he oversees all of the asphalt paving crews, interfaces with Con Ed and manages the office. He testified that Nico supplies the permanent restoration of asphalt roadways in Manhattan, and would come to a job site after an excavation had been backfilled and based. Prior to testifying, Mr. Denegall stated that he reviewed several opening tickets and also a paving order, which revealed that Nico had worked on the southwestern corner of Seventh Avenue and West 143rd Street between 7th and 8th Avenues.

Finally, the Court also reviewed the affidavit of Stacey Williams, annexed as Exhibit J in the City's Affirmation in Support. In her affidavit, Ms. Williams states that she is employed by the DOT in the Office of Litigation Services and Records Management. She also states that at the behest of the New York City Law Department, she conducted a search in the relevant electronic databases, and

identified and requested a search for corresponding paper records of permits, applications for permits, corrective action requests, notices of violation, inspections, contracts, maintenance and repair orders, complaints, gangsheets for roadway work, milling and resurfacing records and Big Apple Maps for the roadway located at West 143rd Street between Adam Clayton Powell Boulevard (a.k.a. 7th Avenue) and Frederick Douglass Boulevard, (a.k.a. 8th Avenue) in Manhattan.

Said search encompassed a period of two years prior to and including December 10, 2008, and revealed 13 permits, 3 applications for permits, 14 inspections, 3 notices of violation, 1 maintenance and repair record, 1 gangsheet for roadway work, and a Big Apple Map. Ms. Williams also states that she determined that said Big Apple Map had been served upon DOT by the Big Apple Pothole and Sidewalk Protection Corporation on October 23, 2003. However, it is important to note that a copy of said Big Apple Map has not been annexed to any of the papers presented, thus denying the Court an opportunity to review it.

The Court finds that all of the referenced testimony clearly indicates that potholes existed at the subject location, and that repairs to same were done. Moreover, plaintiff testified at her 50-h hearing that she personally called 311 on two separate occasions and reported the subject pothole, describing it in great detail. After a review of the aforementioned testimony, the Court finds that a real question of fact exists as to whether the City had prior written notice of the subject pothole.

The Court notes that it is well aware that other courts are of the opinion that repair orders and reports, such as FITS reports, do not constitute prior written notice (see *Marshall v. City of New York*, 52 A.D.3d 586, 587 [2d Dept. 2008]; *Cross v. The City of New York*, 32 Misc.3d 1219(A), 2011 Slip Op. 51362(U) (Sup Ct, NY County 2011)). However, the Court is mindful that the FITS reports indicate that a pothole existed at the subject location, that its existence had been reduced to

writing after being reported via plaintiff's telephone calls, and that it was ultimately repaired. Certainly, at the very least, these reports raise an issue of fact as to whether the City had obtained the requisite prior notice of the defect (see *Bruni v. City of New York*, 2 N.Y.3d 319 [2004]). The Court also finds instructive, the holding rendered by Court of Appeals in Bruni, that "a written statement showing that the city agency responsible for repairing a condition had first-hand knowledge both of the existence and the dangerous nature of the condition is an 'acknowledgment' sufficient to satisfy the Pothole Law" (*Id.* at 325; see also *Sacco v. City of New York*, 92 A.D.3d 529 [1st Dept. 2012]; *Boniello v. The City of New York*, 106 A.D.3d 612 [1st Dept. 2013]).

In the case at bar, the Court finds that the City has failed to make out a prima facie entitlement to summary judgment as a matter of law.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the City's motion for summary judgment is denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: August 14, 2013

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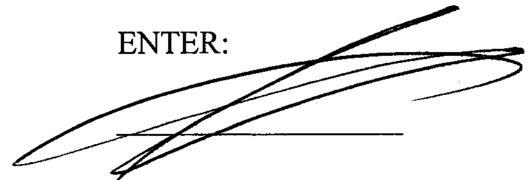

Hon. Kathryn E. Freed
J.S.C.

FILED
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