Etra v City of New York
2013 NY Slip Op 32599(U)
October 16, 2013
Supreme Court, New York County
Docket Number: 113588/2011
Judge: Kathryn E. Freed
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This opinion is uncorrected and not selected for official publication.

SCANNED ON 10/23/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT Justice

FILED
OCT 23 2013
COUNTY CLERK'S OFFICE

PART 5

Index Number : 113588/2011
ETRA, DANIEL
vs
CITY OF NEW YORK
Sequence Number : 001
DISMISS CAL: # 25

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

FILED
OCT 23 2013
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10-16-13
OCT 16 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

DANIEL ETRA,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

----------X

DECISION/ORDER
Index No. 113588/2011
Seq. No. 001

FILED
OCT 23 2013
COUNTY CLERK'S OFFICE
NEW YORK

HON. KATHRYN E. FREED:

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.(exhs. A,B,E-H)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3 (exh.A)
REPLYING AFFIDAVITS.....	.....4.....
EXHIBITS.....	.....
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) or in the alternative, pursuant to CPLR§3212, granting summary judgment dismissing the complaint and any cross-claims. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court grants the motion for summary judgment.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries he allegedly sustained on May 26, 2011, when he tripped and fell in a pothole/depression adjacent to a manhole in the crosswalk at 9th Street and 5th Avenue in New York County. The subject manhole bore the letters WSNY, ("Water

Service of New York"). As a result, plaintiff suffered a comminuted foot fracture.

Thereafter, plaintiff commenced the instant action via Summons and Complaint on December 5, 2011. Issue was joined via the City's Answer on or about December 22, 2011. On November 29, 2012, the City exchanged its Response to the Case Scheduling Order ("CSO"), which included a two year search of the Department of Transportation ("DOT") records for the subject intersection of 5th Avenue between West 9th Street and West 10th Street. The City asserts that said search revealed two permits, no inspections, no corrective action requests ("CARS"), no notices of violation, no maintenance and repair records, no gangsheets for roadway defects, no milling and resurfacing records, and only one complaint. On December 7, 2012, DOT records searcher, Abraham Lopez testified as to these search results. Additionally, in an affidavit annexed as Exh. G, DOT paralegal Sean Williams states that he personally conducted the search which yielded the aforementioned results.

Positions of the parties:

The City argues that it is entitled to summary judgment because it did not have prior written notice of the subject defect. It also argues that the defective condition comes under the purview of the prior written notice provisions of §7-201(c)(2) of the Administrative Code of the City of New York. It further argues that is it entitled to summary judgment because it did not cause or create the subject defect, and that plaintiff has failed to submit evidence in admissible form to show that said defect was the immediate result of an affirmative act of the City.

Plaintiff argues that there is no prior written notice requirement for special uses of a roadway. He asserts that he does not dispute the requirement that prior written notice of roadway defects must be proven prior to any recovery from the City for roadway defects under ordinary circumstances.

However, he argues that courts have consistently recognized two exceptions to this rule, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a "special use" confers a special benefit upon the locality. Plaintiff argues that the special use exception imputes municipal liability despite lack of prior written notice when a structure in the street is constructed specifically to confer a special benefit on the locality rather than for public use. Plaintiff refers to and relies on various cases as support for his position.

The City responds that the special use exception does not apply to a municipal manhole cover in the roadway, and that the Court cannot even consider this exception because it was not formally plead in plaintiff's Notice of Claim or Summons and Complaint. Therefore, it is deemed null and void.

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.2d 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]).

"A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]; see also *Petersel v. Good Samaritan Hosp. of Suffern, N.Y.*, 99 A.D.3d 880, 881 [2d Dept. 2012];*Willis v. Galileo Cortlandt, LLC*, 106 A.D.3d 630 [2d Dept. 2013]; *Branham v. Lowes Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 320 [1st Dept. 2006], *affd* 8 N.Y.3d 931 [2007]). Only after the moving defendant has established this threshold, will the court consider the sufficiency of plaintiff's opposition (see *Perez v. Rodriguez*, 25 A.D.3d 506 [1st Dept. 2006]).

The "special use" doctrine is a recognized exception to the prior written notice requirement (see *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 [1999]). This doctrine essentially authorizes the imputation of liability against any entity that installs an object onto the sidewalk or roadway, for injuries arising out of circumstances where the entity has been permitted to interfere with a street solely for private use and convenience, which is in no way connected with public use (see *Kaufman v. Silver*, 90 N.Y.2d 204, 207 [1997]; *Petty v. Dupont*, 77 A.D.3d 466, 468 [1st Dept. 2010]; *Ausderan v. City of New York*, 219 A.D.2d 562 [1st Dept. 1995]). It applies when, *inter alia*, a structure erected on public land causes an adjoining private property to derive a special benefit from that land (*Petty v. Dupont*, 77 A.D.3d at 468). The party benefitting from the special use is required to maintain the property so used in a reasonably safe condition to avoid injury to others *Id.*; see also *Ocasio v. City of Middletown*, 148 A.D.2d 431 [2d Dept. 1989]).

A manhole cover has been deemed to be a feature constructed in the street for a special use, i.e., to provide access to underground equipment or mechanisms (*id.*; *Hare v. City of New York*, 182 A.D.2d 682; *Posner v. New York City Transit Auth.*, 27 A.D.3d 542 [2d Dept. 2006]. Plaintiff specifically cites to *Posner* as support for its position. However, in *Posner*, plaintiff alleged violations of the Administrative Code of the City of N.Y.§ 19-147, which requires the replacement of broken or slippery manhole covers at the direction of the Commissioner of DOT. That plaintiff also relied on the Department of Transportation Bureau of Highways Rules & Regulations § 2-33(h), which required that utilities, agencies, or other permitees maintain manhole covers and replace or repair broken or slippery manhole covers.

However, in the case at bar, even assuming that the special use doctrine is applicable to the subject manhole, plaintiff has failed to proffer any proof of any special benefit conferred upon the City by said manhole (see *Oboler v. City of New York*, 8 N.Y.3d 888 [2007]). Indeed, unlike the plaintiff in *Posner*, he cites no statute or other legal concept which establishes any semblance of a causal link between the subject manhole and the City. This omission leaves the Court with no other option but to grant the City's motion for summary judgment.

Therefore, in accordance with the forgoing, it is hereby

ORDERED that defendant City's motion for summary judgment is hereby granted and the complaint and any cross claims are hereby severed and dismissed against it, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the Trial Support Office is directed to remove this case from the Part 5 inventory. Defendant shall serve a copy of this order on plaintiff and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled;

and it is further

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

DATED: October 16, 2013

ENTER:

OCT 16 2013

Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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OCT 23 2013
COUNTY CLERK'S OFFICE
NEW YORK