Aviles v City of New York
2014 NY Slip Op 33236(U)
January 23, 2014
Supreme Court, Bronx County
Docket Number: 304508/11
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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PEDRO AVILES,

Plaintiff(s),

- against -

THE CITY OF NEW YORK,

Defendant(s).
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DECISION AND ORDER

Index No: 304508/11

In this action for the negligent maintenance of the public roadway, defendant THE CITY OF NEW YORK (The City) moves for an order, *inter* alia, granting it summary judgment thereby dismissing the complaint. The City avers that with regard to the roadway defect alleged to have caused plaintiff's accident, it had no prior written notice and therefore it cannot be liable for the accident and injuries claimed. The instant motion is unopposed.

For the reasons that follow hereinafter, the City's motion is granted, without opposition and on default.

The instant action is for personal injuries allegedly sustained by plaintiff on December 3, 2010 on the public roadway located on Third Avenue, between East 163rd Street and Boston Road. Plaintiff alleges that the City failed to maintained the public roadway in a reasonably safe condition and that he was injured as a result.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets the initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

Pursuant to section 7-201(c)(2) of the New York City Administrative Code,

> No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice,

> or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Accordingly, generally, a municipal defendant bears no liability under a defect falling within the ambit of section 7-201(c) "unless the injured party can demonstrate that a municipality failed or neglected to remedy a defect within a reasonable time after receipt of written notice" (*Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]). The exception to the foregoing is where it is claimed that the municipal defendant affirmatively created the condition alleged to have caused plaintiff's accident, in which case, the absence of prior written notice is no barrier to liability (*Elstein v City of New York*, 209 AD2d 186, 186-187 [1st Dept 1994]; *Bisulco v City of New York*, 186 A.D.2d 85, 85 [1st Dept 1992]). A plaintiff seeking to proceed on a theory that the municipality created the defect alleged, however, must establish that the defective condition was defectively installed so as to bring the defect out the ambit of ordinary wear and tear (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Oboler v City of New York*, 8 NY3d 888, 890 [2007]). Stated differently, the proponent of a

claim that the municipal defendant created the dangerous condition which caused plaintiff's accident must establish that work performed by the municipal defendant was negligently performed such that it "immediately result[ed] in the existence of [the] dangerous condition" alleged (*Yarborough* at 728 [internal quotation marks omitted]).

Here, at his deposition, plaintiff testified that on December 3, 2010 he tripped and fell on a round, uneven portion of the roadway located on third Avenue, near its intersection with Boston Road in Bronx County. Specifically, plaintiff fell near a bus stop located thereat. Pursuant to this Court's Preliminary and Compliance Conference Orders, the City's Department of Transportation (DOT) performed several searches for records related the location of plaintiff's accident. Specifically, a search was performed for records related to the roadway located on Third Avenue, between East 163rd Street and Boston Road. The search performed was for a period of two years prior to the date of plaintiff's accident and included a search for permits, cut forms, repair orders, violations, contracts, complaints, milling/resurfacing records, and Big Apple Maps. According to Paul Cividanes (Cividanes), a paralegal employed by DOT, the search revealed the existence of eight permits, two Office of Construction Mitigation and Coordination files, one Corrective Action request, one Notice of Violation, 27 inspection reports, 12 maintenance and

repair orders, eight complaints and 11 gangsheets. With respect to potholes, all pothole defects for the roadway in question were closed. A review of the records referred to by Cividanes evinces that most recent repair to a pothole at the location alleged herein was performed on June 14, 2010.

Based on the foregoing, the City has established prima facie entitlement to summary judgment insofar as it has demonstrated that it had no prior written notice of the defect alleged by plaintiff within 15 days of his accident. Of all the documents unearthed by the City's search, the only documents which confer the requisite prior written notice are the non-citizen complaint and repair records evincing the existence of a pothole at the location where plaintiff alleges to have fallen. This is because it is well settled that neither permits (*Levbarg v City of New York*, 282 AD2d 239, 242 [1st Dept 2011]), nor citizen complaints, even if reduced to writing (*Kapilevich v City of New York*, 103 AD3d 548, 549 [1st Dept 2013]; *Lopez v Gonzalez*, 44 AD3d 1012, 1012 [2d Dept. 2007]), constitute prior written notice of a defect under section 7-201 of the New York City Administrative Code. With regard to the non-citizen complaint and repair orders regarding potholes at the location of plaintiff's accident, the City's records evince the most recent complaint regarding a pothole prior to plaintiff's accident was repaired on June 14, 2010, months before plaintiff's accident. Between the time the City performed the repair and

plaintiff's fall, there is no evidence that the City received prior written notice of another pothole (*Lopez* at 1013 [Municipal defendant granted summary judgment because, *inter alia*, while it had prior written notice of the condition alleged, it had repaired it and no further written notice existed at least 15 days prior to plaintiff's accident]). Accordingly, because

> [w]here the City establishes that it lacked prior written notice under the Pothole Law, 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* at 726), here the City has established prima facie entitlement to summary judgment. Because the instant motion is unopposed, no issues of fact preclude summary judgment in the City's favor. It is hereby

ORDERED that plaintiff's complaint be dismissed, with prejudice. It is further

ORDERED that the City serve a copy of this Decision and Order with Notice of Entry upon plaintiff within thirty (30) days hereof

Dated : January 23, 2014
Bronx, New York

Mitchell J. Danziger, ASCJ