

Gilmore v City of New York

2014 NY Slip Op 33640(U)

December 18, 2014

Supreme Court, New York County

Docket Number: 104095/2011

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

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12/22/14
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

FRANK P. NERVO
Justice Supreme Court

PRESENT: _____
Justice

PART 62

Index Number : 104095/2011
GILMORE, YVONNE
vs
THE CITY OF NEW YORK
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 104095/11
MOTION DATE 8/21/14
MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits <u>Submitted by plaintiff</u>	No(s). <u>2</u>
Repeating Affidavits <u>submitted by defendant</u>	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is granted in accordance with the attached decision and Order.

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

FILED
DEC 22 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
DEC 22 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 12/18/14

FRANK P. NERVO, J.S.C.
HON. FRANK P. NERVO

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

FRANK P. NERVO
Justice Supreme Court

LED

1957

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 62

-----X

YVONNE GILMORE,
Plaintiff,

Index Number:
104095/2011

-against-

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PRO-
TECTION, NEW YORK CITY DEPARTMENT
OF TRANSPORTATION and CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,
Defendants.

Decision & Order

FILED

DEC 22 2014

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X

FRANK P. NERVO, J:

Motion for summary judgment by defendant City of New York (City) is granted.

Plaintiff alleges negligence by defendant City in its ownership and maintenance of the crosswalk of East 86th Street at Third Avenue which caused her to fall and be injured on May 27, 2010, premised upon a number of alternate factual and legal theories:

- I. Construction debris in the crosswalk caused her to fall; or
- II. There was a hole in the pavement which caused her fall; or
- III. The defendant City created a dangerous condition in the vicinity of and around a water access gate which caused her fall; or
- IV. The defendant City failed to monitor the hardware and surrounding area abutting a water gate box resulting in the presence of uneven pavement which caused her to fall.

With respect to her theory of negligent maintenance and the defendant City's sufferance of a hole or uneven condition on the pavement, plaintiff relies upon a Big Apple map, undated, to establish the requisite notice requirement of Administrative Code §7-201(c)(2). While that Big Apple map indicates a number of defects warranting the attention of defendant City, it does not provide City with notice of any pavement defect such as alleged to have caused plaintiff's fall. The undated Big Apple map provides notice, at best, of a broken or uneven curb in the vicinity of the crosswalk; thus, the information on the map does not give notice of plaintiff's claim that she fell five to ten feet north of the southeast corner, as that distance is undoubtedly measured or estimated from the curb noted to be broken or uneven.

As to plaintiff's alternate theory that City's liability arises from it having caused and created a dangerous condition in the near vicinity of and around a water gate, plaintiff fails to provide any evidence in admissible form demonstrating any basis for such liability. Indeed, examination of plaintiff's testimony of January 18, 2011 reveals her initial attribution of her fall to pavement that "wasn't even" and the presence of ". . . a lot of debris on the roadway" (page 14 lines 14-15) which she attributed to "a lot of construction or whatever they were doing" (page 14 lines 19-20) and subsequently, on suggestion of her counsel, to a "hole" (page 21 lines 18-19) which hole is then identified by a photograph, referred to as Exhibit A during the course of that testimony, demonstrating a hole in close proximity to this water gate. In any event, debris is a transitory condition for which defendant City may not be held responsible and, as hereinbefore noted, plaintiff submits no evidence of prior written notice of a hole, or any pavement defect whatsoever, in the vicinity of her fall five to ten feet north of the southeast corner of the intersection.

Plaintiff's further theory that defendant City is liable for having failed to comply with a duty to monitor hardware such as water gates, and the surrounding area, is without statutory basis and, in any event, any non-compliance would not serve to vitiate the notice requirements of Administrative Code §7-201(c)(2). Plaintiff's cited authority in support of

this theory involve locations other than streets or sidewalks or parties not protected by the notice requirements of Administrative Code §7-201(c)(2).

The remainder of plaintiff's claims against defendants New York City Department of Environmental Protection and New York City Department of Transportation must be dismissed, as these are not independent agencies subject to suit.

FILED

It is therefore

DEC 22 2014

**NEW YORK
COUNTY CLERKS OFFICE**

ORDERED defendant City's motion for summary judgment is granted, and all claims and cross-claims against City are hereby dismissed, and it is further

ORDERED all claims and cross claims asserted against defendants NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW YORK CITY DEPARTMENT OF TRANSPORTAION are dismissed with prejudice, as these are not independent agencies subject to suit, and it is further

ORDERED the Clerk of the Trial Support Office and the Clerk of the Motion Support Office shall mark their records to note these dismissals, randomly reassign this matter to a non-City Part of this Court, and enter judgment accordingly.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

New York, New York

ENTER:

December 18, 2014



FRANK P. NERVO, JSC