

Lopez v Bell Sports, Inc.
2018 NY Slip Op 31099(U)
May 23, 2018
Supreme Court, Kings County
Docket Number: 502465/14
Judge: Carolyn E. Wade
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**KINGS COUNTY CLERK
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2018 JUN -5 AM 7:55**

At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 23rd day of May 2018

PRESENT:

HON. CAROLYN E. WADE,

Justice

-----X

CYNTHIA IMMACULADA LOPEZ,

Plaintiff,

Index No. 502465/14

-against-

DECISION/ORDER

BELL SPORTS, INC., BELL HELMET, INC., BELL HELMET CORP., BRG SPORTS, INC. f/k/a EASTON-BELL SPORTS, THE TOWN OF SOUTHAMPTON, MATTHEW STEVENS, and ISABEL STEVENS,

Defendants.

-----X

THE TOWN OF SOUTHAMPTON

Third-Party Plaintiff,

-against-

BICYCLE SHOWS, U.S. and GLEN GOLDSTEIN,

Third-Party Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiff's Motion:

Papers	Numbered
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1 _____
Cross-Motion and Affidavits/Affirmations.....	_____
Answering Affidavits/Affirmations.....	2 _____
Reply Affidavits/Affirmations.....	3 _____
Memorandum of Law.....	_____

Upon the foregoing cited papers and after oral argument, plaintiff Cynthia Immaculada Lopez ("Plaintiff") moves to strike defendant The Town of Southampton's ("Defendant") Answer and/or that it be conclusively presumed that it had prior written notice of the defect involved in the accident.

The underlying action was commenced by Plaintiff, who alleges that she was injured on June 1, 2013, while participating in a recreational bicycle ride/tour called "Ride to Montauk 2013." Plaintiff claims that while she was riding her bicycle the front tire struck, and got caught in a pothole.

In support, Plaintiff asserts that Alexander McGregor ("Mr. McGregor"), Defendant's Superintendent of Highways and Commissioner of Public Works, belatedly disclosed at a December 5, 2017 deposition, that the Town of Southampton had actual knowledge, approximately one year after the accident, that Suffolk County Water Authority's contractor created a hazardous condition by opening the roadway at the accident location. Plaintiff contends that Defendant's untimely disclosure resulted in the expiration of the statute of limitations to sue the Suffolk County Water Authority.

Defendant, by opposition, submits an affidavit from Mr. McGregor, who attests to conducting a few field inspections after Plaintiff's accident to assess the general condition of the area. Mr. McGregor avers that in December 2016, he conducted a field inspection

with a metal detector, and opined that the alleged defect was caused by the Suffolk County Water Authority, as there appeared to be a water main under the road. He maintains that he did not have any information prior to December 2016 to conclude that the entity was responsible. Thus, Defendant contends that it did not withhold information from Plaintiff that would have enabled her to sue the Suffolk County Water Authority within the one year and ninety day statute of limitations.

This Court notes that Mr. McGregor testified at his December 5, 2017 deposition with respect to inspections that he conducted at the accident site:

Q. Correct me if I am wrong, but I believe earlier in the course of this deposition today you did testify that you knew who had done the work, that it was the Suffolk County Water Authority; is that correct?

A. Yes, from my field observations. (Exhibit 17 of Plaintiff's motion, pg. 28/ lines 14-21).

Q. Was this field inspection done in response to these requests I talked to you about, the FOIL request and the preaction discovery petition?

A. **I would not know if it was exactly that. But my interaction with the town's counsel, we went out there.** [emphasis added]

Q. **Do you recall approximately how soon after the accident was the first time you went out there?** [emphasis added]

A. **No. I can't recall how soon after the accident I went out there.** [emphasis added]

Q. **Was it more or less than a year?** [emphasis added]

A. **I think it was approximately a year.** [emphasis added]

Q. **You were able to make the determination at that time?** [emphasis added]

A. First, I did a field inspection just observing the situation. And then at a later date, I went out there with a metal detector and wand. [emphasis added] (Exhibit "14" of Plaintiff's motion, pg. 29, lines 22-25; pg. 30, lines 1-23).

Contrary to Plaintiff's contentions, Mr. McGregor did not testify that approximately one year after the accident, he discovered that the Suffolk County Water Authority hired a contractor to open the entire road to install a water main. Rather, he stated that he first inspected the accident site about a year after the June 1, 2013 accident. Significantly, the deponent was not asked the specific date that he determined that the Suffolk County Water Authority was responsible for the hazardous road condition.

However, Defendant submits an affidavit from Mr. McGregor, who avers that he made this determination in December 2016. While Defendant should have informed its adversary of the finding at that juncture, Plaintiff has not shown any prejudice, as the one year and 90 days statute of limitations to sue non-party Suffolk County Water Authority had already expired.

Accordingly, based upon the above, Plaintiff's Motion to Strike Defendant's Answer, *inter alia*, is **DENIED in its entirety.**



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ACTING SUPREME COURT JUSTICE

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