Elliott v City of New York
2018 NY Slip Op 31121(U)
March 26, 2018
Supreme Court, Queens County
Docket Number: 3311/15
Judge: Ernest F. Hart
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ERNEST F. HART** IAS PART 6
Justice

Vilma Elliott, as Administrator of the Estate of Darius Fletcher, deceased, and Vilma Elliott, individually,

Plaintiff(s),

-against-

The City of New York, Myrtle H. Stuckey and Andrew Jordon Gramm,

Defendant(s).

Index No.: 3311/15

Motion Date: October 18, 2017

Seq. No. 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Effie M. Gravely, as the Administratrix of the Estate of Crystal S. Gravely, deceased, Effie M. Gravely, individually, and Mervin T. Leader, as Administrator of the Estate of Jada M. Butts, deceased,

Plaintiff(s),

-against-

The City of New York,

Defendant(s).

Index No.: 643/15

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Dena Lewis-Feurtado, Administrator of the Estate of Jaleel N. Feurtado, Index No.: 697/15

Plaintiff(s),

-against-

The City of New York, New York City Economic Development Corporation,

Defendant(s).

The following papers numbered 1 to 8 read on this motion by defendant, The City of New York (City), seeking, among other things, summary judgment, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	1-3
Answering Affidavit - Exhibits	4-6
Reply Affidavit	7-8

Upon the foregoing papers, it is ordered that the City's motion is determined as follows:

On April 4, 2014, Andrew Gramm was operating a motor vehicle owned by his grandmother, Myrtle H. Stuckey, in which Crystal S. Gravely, Jada M. Butts, Jaleel N. Feurtado, and Darius Fletcher were passengers, westbound on 19th Avenue, west of 37th Street, Astoria, Queens. 19th Avenue became a "dead end" street approximately 491 feet west of 37th Street. Traveling at an excessive rate of speed, Mr. Gramm lost control of the vehicle and skidded beyond the terminus of 19th Avenue, across an expanse of land, and into Steinway Creek. All four passengers died. Leader and Effie M. Gravely, individually, and as Administrator of the Estate of Crystal S. Gravely, commenced separate wrongful death actions against the City, New York City Department of Highways, and New York City Department of Transportation, which actions were consolidated by order of this court, dated July 29, 2015. Vilma Elliott, individually, and as Administrator of the Estate of Darius Fletcher, commenced an action against the City, Stuckey and Gramm, under Index Number 3311/2015, and Dena Lewis-Feurtado, as Administrator of the Estate

of Jaleel N. Feurtado, commenced an action against the City and New York City Economic Development Corporation, bearing Index Number 697/2015. The Elliott and Lewis-Feurtado actions were judicially joined for trial with the consolidated action, under the decision and order of July 29, 2015.

Plaintiff, Elliott's complaint alleged that the City was negligent in that, among other things, it breached its duty to install and maintain proper roadway barriers, and violated a duty to maintain the roadway in a reasonably safe condition The City answered, and included a cross claim against codefendants, Myrtle H. Stuckey and Andrew Jordan Gramm. Defendant, City, moved for summary judgment dismissing the complaint in this action, alleging it had no "prior written notice of any alleged condition concerning 19th Avenue and its appurtenances;" no notice of a dangerous condition at the accident site; and "there is no evidence that the City's alleged actions or inaction was a proximate cause of ... the accident." Plaintiff opposes.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (*see Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]). Credibility issues regarding the circumstances of the subject incident require resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*,, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

The City, the owner of the public roadway of 19th Avenue and its appurtenances, contends that plaintiff's complaint should be dismissed against it because it did not receive prior written notice of the alleged defect, pursuant to NYC Administrative Code § 7-201 (c) (2), a condition precedent to commencing an action against the City.

"Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous condition which comes within the ambit of the law unless it has received prior written notice of the alleged defect or dangerous condition, or an exception to the prior written notice requirement applies" (*Trela v City of Long Beach*, 157 AD3d 747, 749 [2d Dept 2018], quoting *Palka v Village of Ossining*, 120 AD3d 641, 641 [2d Dept 2014]). One of the two recognized exceptions to the rule is "that the municipality affirmatively created the defect through an act of negligence," and such exception is limited to work by the municipality that immediately results in the existence of a dangerous condition (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see Pylarinos v Town of Huntington*, 156 AD3d 922 [2d Dept 2017]; *Doherty v Town of Lewisboro*, 154 AD3d 737 [2d Dept 2017]; *Piazza v Volpe*, 153 AD3d 563 [2d Dept 2017]). In order to establish its prima facie entitlement to judgment as a matter of law, the City must demonstrate it did not have prior written notice of the alleged dangerous condition complained of, and that it did not create such dangerous condition (*see Loghry v Village of Scarsdale*, 149 AD3d 714 [2d Dept 2017]; *Beiner v Village of Scarsdale*, 149 AD3d 679 [2d Dept 2017]).

Although the City demonstrated, prima facie, that it did not receive prior written notice of the alleged dangerous condition located at the terminus of 19th Avenue, and plaintiff has failed to rebut such lack of written notice, the City has failed to substantiate that it did not create said dangerous condition. Its submissions, lacking evidence relating back to the time of the construction of the roadway, the plans for same, and its maintenance of the roadway and appurtenances since, "failed to eliminate triable issues of fact as to whether its work on the (roadway area) immediately left it in a condition that was dangerous" to vehicles thereat (*Trela v City of Long Beach*, 157 AD3d 747, 750), or kept said roadway and appurtenances in a reasonably safe condition up to the time of the accident. As the City has failed to meet its prima facie burden in the first instance, the burden of proof does not shift to plaintiff, the City is not entitled to summary judgment, and its motion is denied, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Rokach v Taback*, 148 AD3d 1195 [2d Dept 2017]; *Pineda v Elias*, 125 AD3d 738 [2d Dept 2015]).

The movant's remaining contentions either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, the City's motion seeking summary judgment, dismissing Elliott's complaint, is denied.

Dated: March 26, 2018

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J.S.C.