Mixon v City of New York
2018 NY Slip Op 31771(U)
July 25, 2018
Supreme Court, New York County
Docket Number: 150611/2014
Judge: Alexander M. Tisch

At an I.A.S. Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 80 Centre Street, Borough of New York, City and State of New York, on the 25th day of JULY 2018

PRESENT:

HON. ALEXANDER M. TISCH, A.J.S.C.

CLEMMIE MIXON,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendant(s).

MOTION SEQ. # 3

INDEX NO.: 150611/2014

The following papers numbered 91 to 124 read on this motion	NYSCEF Doc. Nos.
Notice of Motion, Affirmation & Exhibits	91–99
Affirmation in Opposition & Exhibits	104–16
Reply Affirmation & Exhibits	117–24

Hon. Alexander M. Tisch, A.J.S.C.:

Upon the foregoing papers, plaintiff moves this Court for an order precluding defendant The City of New York (City) from offering evidence at trial or upon dispositive motion and striking the City's answer, or in the alternative, granting summary judgment on the issue of liability in favor of the plaintiff against the City, or alternatively striking certain affirmative defenses and resolving the issue of prior written notice in favor of the plaintiff.

Plaintiff commenced this action seeking damages for personal injuries allegedly sustained on December 4, 2012, as a result of a trip and fall accident. Plaintiff alleges she was crossing Madison Avenue at its intersection with 106th Street in New York, New York, when she tripped over an uneven, unlevel, raised ridge, or "bump" or "hump" in the crosswalk (see NYSCEF Doc. Nos. 93, 105).

The Court assumes the parties' familiarity with the procedural history of this case, and notes only that, pursuant to the order dated April 12, 2018 resolving motion sequence no. 2 (plaintiff's prior motion to strike the City's answer), the City was directed "to provide a supplemental response enclosing

the records pertaining to the 311 complaint forms/SR #s marked at City's EBT as exhibits, to wit: SR# 1-1-631185413, SR# 1-1-776201983, SR# 1-1-785831660, SR# 1-1-801022738, SR# 1-1-752591217" (NYSCEF Doc. No. 89). On or about May 2, 2018, the City provided its response that included, inter alia, an affidavit by Dmitry Surkov from the Department of Transportation (NYSCEF Doc. No. 96). Mr. Surkov stated that he conducted a search for the subject SR numbers and the search did not reveal any records.

"The drastic remedy of striking an answer is inappropriate, absent a clear showing that defendant's failure to comply with discovery demands was willful or contumacious" (Daimlerchrysler Ins. Co. v Seck, 82 AD3d 581, 581–82 [1st Dept 2011]). Here, the City sufficiently responded to the order by providing an affidavit indicating that it conducted a specific search for records, and none exist. The Court rejects plaintiff's argument that a literal reading of the Court's prior order on motion sequence no. 2 necessarily requires that the Court sanction the City for failing to provide discovery. Indeed, it is likely an improvident exercise of discretion, under these circumstances, to sanction the City for failing to provide records that apparently do not exist (see, e.g., Vaca v Village View Hous. Corp., 145 AD3d 504, 505 [1st Dept 2016] ["The motion court providently exercised its discretion in issuing a conditional order striking the answer *after* defendants failed to comply with numerous orders directing them to provide discovery *or* an affidavit stating that a search had been conducted and the documents did not exist"] [emphasis added]). The Court does not find that the City's behavior was otherwise willful, contumacious, or in bad faith.

While the Court declines to impose any discovery related sanctions in this instance, the Court finds it more appropriate to grant plaintiff the alternative requested relief in the form of partial summary judgment, provided that she has met the requisite burdens entitling her to such relief.

"The 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 eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). "[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Pursuant to the New York City Administrative Code § 7-201 (c), in order to be held liable, the City must have had either prior "(1) 'written notice . . . actually given to the commissioner of transportation' or his designee; (2) 'previous injury to person or property . . . and written notice . . . given to a city agency'; or (3) 'written acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition'" (Bruni v City of New York, 2 NY3d 319, 324 [2004]). "[A] written statement showing that the city agency responsible for repairing a condition had first-hand knowledge both of the existence and the dangerous nature of the condition is an 'acknowledgement' sufficient to satisfy the Pothole Law" (id. at 325).

The Court finds that the plaintiff met her initial prima facie burden establishing that the City had notice of the defect and failed to remedy it. In support of her motion, plaintiff submitted, inter alia, her deposition testimony, detailing the location of the accident and nature of the dangerous condition upon which she fell, and 311 complaint forms. Notably the 311 complaint forms describe issues similar to the defect that allegedly caused plaintiff's accident (see NYSCEF Doc. No. 97 [stating, e.g., there is a "dangerous" "hump/heap in the street"; and street is "raised in one particular area"]). The Court finds

that plaintiff sufficiently demonstrated that 311 forms constituted an acknowledgment because they specifically state that the Department of Transportation inspected the area and/or referred the defect to be repaired by maintenance (see Sacco v City of New York, 92 AD3d 529, 529–30 [1st Dept 2012]). Plaintiff also submitted the City's most recent response, indicating that there are no repair records pertaining to the SR numbers identified in the 311 forms. Accordingly, because "the City had notice of a defect and failed to cure it, despite having an opportunity to do so, plaintiff's motion for partial summary judgment on the issue of liability" should be granted (id.; cf. Abott v City of New York, 114 AD3d 515 [1st Dept 2014] [where repair records existed, indicating that the defect was made safe]).

In opposition, the City failed to demonstrate that a material issue of fact exists requiring a trial. Contrary to the City's contention, this Court finds that the 311 complaint forms are specific and similar enough to constitute notice of the defect that plaintiff alleges caused her to fall. Also, while the City insinuates that the plaintiff must show that she is free from fault in her motion for partial summary judgment against the City (see Davidoff aff, NYSCEF Doc. No. 104, ¶ 26), the Court of Appeals recently ruled that a plaintiff need not make this showing in order for the Court to grant plaintiff's motion (see generally, Rodriguez v City of New York, 31 NY3d 312 [2018]). The Court finds the City's remaining arguments without merit.

Accordingly, plaintiff is granted partial summary judgment on the issue of liability against the City and the remainder of the motion is denied.This shall constitute the decision and order of the Court.

ENTER,

HON. ALEXANDER M. TISCH
A.J.S.C.

HON. ALEXANDER M. TISCH