SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

HELAINE GIORGIO

INDEX NO. 160504/2015

MOT. DATE

- v -

MOT. SEQ. NO. 001 and 002

THE CITY OF NEW YORK et al.

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

This is a personal injury action. In motion sequence number 001, plaintiff moves for summary judgment in her favor. Defendants The City of New York (the "City") and New York City Department of Transportation ("Department of Transportation" and collectively the "City Defendants") oppose the motion. In motion sequence number 002, defendant Carlo Lizza & Sons Paving ("CL&S") moves for summary judgment in its favor. The City defendants oppose that motion. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available.

The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

In this action, plaintiff seeks to recover for personal injuries she sustained on December 14, 2014 when she tripped and fell in the street, within a crosswalk at the southwest corner of the intersection of Ninth Avenue and West 47th Street, New York, New York. The following facts are based upon plaintiff's deposition testimony. Plaintiff testified that immediately before the accident, she began to walk across the subject intersection from the raised portion of the concrete median into the street. Plaintiff took her first step into the street, and immediately and suddenly tripped and fell on a mound of raised asphalt that was situated directly in the crosswalk. Plaintiff testified as follows about her accident:

Q: You said there was such an indication at one of the corners of the inter section, correct?

A: Correct.

Dated: 9-21-18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED (002) ☒ DENIED (001) ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Q: When you got to that cut area from between the bike lane and the moving traffic lane, was there another such device indicating that pedestrians should walk or not walk?

A: There were not additional ones.

Q: It was the same ones?

A: Yes.

Q: Was there any moving traffic on 9th Avenue?

A: Not at the time of my accident.

Q: Did you accident happen in one of the travel lanes of 9th Avenue?

A: Yes.

Q: You told me before you were not sure how many travel lane there were?

A: Yes.

Q: But there was more than one?

A: Yes.

Q: Did your accident happen in the travel lane closest to the bike lane?

A: Yes.

Q: How far from the raised concrete area-I know there was a cut there- - was your accident?

A: First Step.

Plaintiff has provided a photograph of the alleged dangerous condition which she claims that her brother took on the date of the accident. Plaintiff has also provided the sworn affidavit of Leonard Karl, who states that he witnessed plaintiff's accident. He states that "[i]mmediately after [plaintiff] fell, [they] looked to see what had caused her fall and both noticed a large lump of asphalt that had caused the accident due to the fact that the condition created an uneven surface right in the cross-walk where pedestrians were walking."

In support of her motion, plaintiff argues that she is entitled to summary judgment because the City had prior written notice and the City failed to repair the dangerous condition. Plaintiff is silent as to CL&S. Plaintiff points to records it received as the result of a FOIL request from the Department of Transportation. Specifically, plaintiff points to a complaint from a pedestrian dated October 1, 2013 which described a dangerous condition as follows:

> 9th Avenue and West 47th Street, SE corner pedestrian island, street pavement not completed. Allowed a significant sized mound of tar to remain unsmoothed right at the crosswalk as you walk West on 9th Avenue. It's like encounter a curb where there should be no cur I know because I fell over and hurt the hell out of myself. If an old person fell there, they would probably die

A copy of the subject complaint, as well as other complaints about roadway conditions in the subject area, have been provided to the court. The other complaints include: [1] on October 7, 2011, a complaint was made that "the street was opened by Con Ed and there is no steel plate to cover the hole which is dangerous;; [2] on October 16, 2012, a complaint was made about "road work being done in roadway"; on October 24, 2012, a complaint was made about a "manhole cover that has sunken into the ground"; [3] on June 18, 2013, a complaint was made that "[t]he left-hand lanes of Ninth Avenue between W 53rd Street and W 47th Street are a mess since the water main work was completed"; [4] on July 27, 2013, a complaint was made about "a big bump in the street as if the street pavement has swollen"; [5] on August 30, 2013, a complaint was made "that after repaving the street that is a large amount of asphalt left near bike lane causing a trip hazard"; [6] on October 1, 2014, a complaint was made about "a huge, cave-in in the middle of the street" which "was large enough for someone on a wheelchair to get his wheelchair wheel stuck in the hole"; [7] on November 23, 2014, someone complained that there are no bike lanes; and [8] on December 10, 2014, someone complained that "[t]here is a small section near the south east corner of the street that needs to be repaired" "near pedestrian island" which "is a serious tripping hazard."

The City Defendants oppose plaintiff's motion, contending that plaintiff has failed to establish prior written notice and that the motion should be denied because plaintiff failed to annex certain photographs which plaintiff's counsel referred to in his affirmation in support of the motion. The City Defendants further contend, based upon illegible photographs taken from Google Maps of the accident location at various points in time, that the condition complained of in the complaints upon which plaintiff relies differ from the dangerous condition which caused her accident.

CL&S contends that it is entitled to summary judgment because it did not do any paving or repair work at the location of plaintiff's accident. CL&S produced John Flemming for a deposition, its project manager. Flemming testified as to a contract between CL&S and the New York City Department of Design and Construction in November 2011 to perform milling work on certain roadways in the City. Flemming further testified that based upon his review of records, CL&S began milling the subject roadway on May 2, 2012 and completed its work on May 7, 2012 and was only be responsible to safeguard the subject roadway until May 22, 2012. Flemming maintains that CL&S did not perform any paving work, and that the lump of asphalt depicted in photographs which plaintiff identified as the cause of her accident was created during the paving process or as a result of a repair.

In turn, the City Defendants maintain that there is a triable issue of fact as to whether CL&S caused the allegedly dangerous condition through milling. Further, the City Defendants represent that the Department of Transportation completed paving the subject roadway on May 17, 2012, prior to the expiration of CL&S' obligation to safeguard the roadway. The City Defendants' counsel argues that "[i]t is for a jury to decide whether [CL&S] properly safeguarded the alleged roadway after paving by the City was completed.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial

(CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Here, the court finds that plaintiff's motion must be denied. Pursuant to Admin Code § 7-201[c][2], plaintiff must prove that the City had prior written notice of the allegedly defective condition or that the City caused or created it. Plaintiff argues that she has demonstrated prior written notice through the various complaints made in the approximately 15-month period prior to her accident. The court disagrees. First, the 10/1/14 complaint describes a cave-in, which is distinguishable from the raised condition which plaintiff testified caused her accident. Therefore, the 10/1/14 complaint cannot serve as prior written notice of the dangerous condition which caused plaintiff's accident. Similarly, the complaints about a sunken manhole cover, missing bike lanes and a missing plate, or that the street was a "mess" cannot establish prior written notice.

While the 10/1/13, 7/27/13, 8/30/13 and 12/10/14 complaints concern a condition in the general vicinity of the location of plaintiff's accident which may be similar to the raised mound of asphalt that she fell on, plaintiff has not come forward with sufficient proof which would conclusively establish that the condition complained of is the same as the condition which caused her accident. Therefore, plaintiff has not eliminated all triable issues of fact and is not entitled to summary judgment. Indeed, some of the photographs of the subject condition which plaintiff has annexed to her motion are as illegible as the ones the City Defendants provided to the court. Otherwise, it remains for a jury to determine whether the complaints which were received by the Department of Transportation concern the same condition which caused plaintiff's accident, thereby giving the City prior written notice.

Since plaintiff has not met her burden on this motion, the sufficiency of the City Defendants' opposition is of no moment. Therefore, the court declines to address the City Defendant's arguments in opposition to plaintiff's motion and plaintiff's motion is denied.

The court will next consider CL&S' motion, which must be granted. CL&S has come forward with proof that the milling work it performed did not cause or create the dangerous condition plaintiff complained of. In turn, the City Defendants only offer speculation in opposition and incorrectly argue that CL&S had an obligation to safeguard the subject roadway. As CL&S correctly points out, the contract between it and the City did not obligate CL&S to pave the roadway or otherwise supervise the paving. The City Defendants cannot demonstrate that CL&S breached the subject contract.

Accordingly, CL&S' motion is granted and all claims and cross-claims against it are severed and dismissed.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence number 001 is denied; and it is further

ORDERED that motion sequence number 002 is granted and all claims and cross-claims against Carlo Lizza & Sons Paving, Inc. are severed and dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 9/21/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.