

Gray v City of New York
2019 NY Slip Op 33325(U)
October 31, 2019
Supreme Court, New York County
Docket Number: 157840/2013
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

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INDEX NO. 157840/2013

THELMA GRAY,

MOTION DATE 10/30/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - SUMMARY

This action arises out of alleged injuries sustained by plaintiff on June 15, 2012, as a result of a trip and fall on a manhole cover on the sidewalk on Dykman Avenue near its intersection with Nagle Avenue. Defendants, (collectively the City), now moves for summary judgment on the ground that it did not receive prior written notice of the sidewalk defect. Additionally, the City avers that it did not cause or create the defect nor is the use of the manhole cover conferring a special use on the City. Plaintiff opposes the motion arguing that the City did in fact cause and create the subject defect and that the manhole cover constitutes a special use. For the reasons set forth below, the City's motion is granted and the complaint is dismissed.

Applicable Law

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." Assaf v Ropog Cab Corp., 153 AD2d 520 (1st Dept 1989). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law.

Alvarez v Prospect Hospital, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY 2d 851 (1985). Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

To hold the City liable for injuries resulting from sidewalk defects, a plaintiff must demonstrate that the City has received prior written notice of the subject condition or there is written acknowledgment by the City of the subject condition. *See* Admin Code of the City of New York § 7-201(c)(2); *Amabile v City of Buffalo*, 93 NY2d 471 (1999). The only recognized exceptions to the prior written notice requirement are where the municipality itself created the defect through an affirmative act of negligence or where the defect resulted from a special use by the municipality. *See Yarborough v City of New York*, 10 NY3d 726 (2008); *Amabile v City of Buffalo*, 93 NY2d 471(1999).

Administrative Code of the City of New York § 7- 201(c)(2) reads in part:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe dangerous or obstructed condition, and there

was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger, or obstruction complained of, or the place otherwise made reasonably safe.

§ 7-201(c)(2).

Discussion

The City met its prima facie burden entitling it to summary judgment as a matter of law by submitting evidence demonstrating that it did not have prior written notice of the defect that allegedly caused plaintiff's accident. Accordingly, in opposition, "the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule — that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (Yarborough v City of New York, 10 NY3d 726, 728 [2008]). The Court of Appeals held that "the affirmative negligence exception is limited to work by the City that immediately results in the existence of a dangerous condition." *Id.* at 728. In opposition, plaintiff alleges that the City caused and created the alleged defect through its negligent installation of the manhole and manhole cover.

In support of this argument, plaintiff cites to the testimony of Mr. Thomas Verdone, an employee of the City of New York. Mr. Verdone testifies that he does not think that a manhole cover could be raised any other way than improper installation. Plaintiff does not provide any other admissible evidence to support its argument that the manhole cover was negligently installed or repaired. Mr. Verdone's testimony is speculative and insufficient to raise an issue of fact. Even if Mr. Verdone testified unequivocally that this defect can only be caused by a negligent installation, there has been no showing that such defect would have been immediately apparent at the time of the installation. In the alternative plaintiff argues that the manhole cover in question, which grants access to a water shutoff valve, that plaintiff contends would be

accessed during a water main break, is a special use by the City. The Court finds this argument unavailing.

“The special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property **unrelated to the public use**, and is therefore required to maintain a portion of that property” (*Poirier v City of Schenectady*, 85 NY2d 310, 315 [1995]; emphasis added.) Here, it cannot be said that the subject manhole cover furnished any special benefit upon the City that is unrelated to a benefit and use by the public in general.

Accordingly, it is hereby

ORDERED that defendant, the City’s motion for summary judgment is granted, and the action is dismissed, and it is further

ORDERED that he Clerk is directed to enter judgment accordingly.

10/31/2019

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

LYLE E. FRANK, J.S.C.

**HON. LYLE E. FRANK
J.S.C.**