Damon v City of New York
2020 NY Slip Op 32884(U)
September 1, 2020
Supreme Court, New York County
Docket Number: 150034/2018
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART 5**
Justice

---X

DEWEY DAMON,
Plaintiff,

- v -

THE CITY OF NEW YORK,
Defendant.

---X

INDEX NO. 150034/2018

MOTION DATE 9/2/20

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number, were considered on this summary judgment motion (sequence 001): 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45

Plaintiff Dewey Damon commenced this action against Defendant City of New York (the "City") to recover damages for injuries sustained in a June 6, 2017 trip and fall on a section of sidewalk at East 135th Street between 5th and Madison Avenues, abutting 2201 5th Avenue a/k/a the Abraham Lincoln Playground in New York, New York. The City moves, pursuant to CPLR 3211(a)(7) and 3212, to dismiss the Complaint, arguing that the City failed to receive prior written notice of, and did not cause or create, the alleged sidewalk defect. Plaintiff opposes. For the reasons below, after oral argument, the Court denies the City's motion.

At the time of his fall, Plaintiff was walking east on 135th Street toward Madison Avenue. When Plaintiff fell, he was about halfway between Madison and Fifth Avenues with the playground on his right, approximately "halfway between the curb and the park" (*see NYSCEF 20/"50-h"* 22:25-23:22 and *NYSCEF 21/"Pl EBT"* 29:21-25, 31:13-22). "[A]ll of a sudden," Plaintiff "stumbled [on a] crack in the sidewalk" and fell (*50-h* 26:7-20). The crack was, according to Plaintiff, eight inches wide, four inches long, and two inches deep (*50-h* 27:20-28:9; *Pl EBT* 32:15-19). At Plaintiff's EBT, he described the defect as a rectangle about two inches wide, two inches long, and two inches deep (*Pl EBT* 33:4-20, *NYSCEF 29*).[1]

Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact (*id.*). To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant's initial burden is a heavy one; on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party

[1] In the photographs presented to Plaintiff at his deposition (*NYSCEF 29, Def Exh A*), Plaintiff first testified that he fell toward the left of the photograph, then, after a conversation with his attorney, corrected his testimony to indicate that he fell on a defect closer to the right side of the photo, marked with a circle and labeled "DD2" (*Pl EBT* 36, *et seq., Def Exh A*).

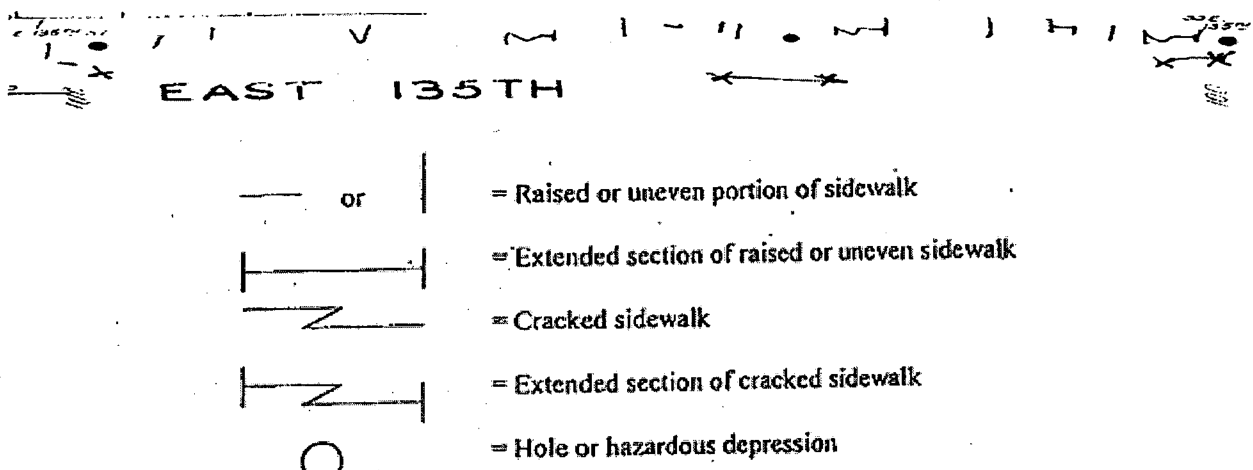
(*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

In order to hold the City liable for injuries resulting from roadway and sidewalk defects, a plaintiff must demonstrate that the City has received prior written notice of the subject condition (NYC Admin. Code § 7-201(c)(2) [the "Pothole Law"]; *Amabile v City of Buffalo,* 93 NY2d 471 [1999]) Where the City establishes that it lacked prior written notice under the Pothole Law (NYC Admin. Code 7-201), 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 [2008]; *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). Additionally, "the affirmative negligence exception is limited to work by the City that immediately results in the existence of a dangerous condition" (*Oboler v City of New York*, 8 NY3d 888, 889 [2007] [emphasis omitted], quoting *Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005]). Prior written notice provisions enacted by the legislature in derogation of common law are strictly construed (*see Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]).

"Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. ['Big Apple Maps'] and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon" (*Katz v City of NY*, 87 NY2d 241 [1995]). "Although the awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident, where there are factual issues as to the precise location of the defect that caused a plaintiff's fall *and whether the defect is designated on the map*, the question should be resolved by the jury" (*Reyes v City of NY*, 63 AD3d 615, 615 [1st Dept 2009] [emphasis added]; *Foley v City of NY*, 151 AD3d 431, 431 [1st Dept 2017] [reversing trial court's decision granting motion to set aside verdict and dismiss complaint and holding that issue was properly submitted to jury because, "while it is true that the Big Apple Map did not have an 'X' at the precise corner where plaintiff fell, the map did depict an 'X' in front of the subject address, which encompasses multiple storefronts within one building, stretching from the building on the corner towards the middle of the block."]; *Sanchez v City of NY*, 176 AD3d 490, 491 [1st Dept 2019] [holding that plaintiff raised a triable issue of fact as to whether the City had prior written notice of the defective condition through the affidavit of his expert, and of the Big Apple Map, showing an area of "raised or uneven portion of sidewalk" in the vicinity of the fall]; *cf Roldan v City of NY*, 36 AD3d 484, 484 [1st Dept 2007] [reversing denial of summary judgment where "the last Big Apple map received by [the City] prior to the accident noted that the sidewalk in the area in question was cracked or raised, or both," but did not mention a hole.]).

The City argues that the voluminous discovery produced, including permits, inspections, complaints, Big Apple Map, and Parks Department records, evidence a lack of prior written notice and that the City did not cause or create the subject defect. In opposition, Plaintiff disputes

only the City's contentions with respect to the Big Apple Map and Parks Department records (*NYSCEF 27* p 292-93). With respect to the Big Apple Map, the City acknowledges having been served with the Big Apple Maps; indeed, it produced them in discovery (*NYSCEF 14* ¶ 37). The City argues, however, that the Big Apple Map "do[es] not demonstrate prior written notice because there are no relevant symbols representing a cracked sidewalk where Plaintiff s accident occurred (*id.*). Plaintiff attaches an affidavit from Sanborn Map Company Associate Production Manager Ralph Gentles, who reviewed the subject Big Apple Map and concluded that the Big Apple Map displays a "hole or hazardous depression" which "corresponds with the location of the defect" as depicted in photographs marked by Plaintiff. Indeed, the relevant portion of the Big Apple Map, pasted below, depicts several defects which could plausibly depict raised, uneven, cracked, or otherwise defective portions of sidewalk halfway down the block that, at minimum, are sufficient to preserve an issue of fact (Madison Street to the right, playground is at the top):



With respect to the Parks Department records, the City also "acknowledges that there is one specific inspection that reveals an 'unacceptable' rating for the inspection of 'paved surfaces' on October 29, 2016 …" (*NYSCEF 14* ¶ 42), but argues that the "'paved surfaces' is not reflective of the sidewalk abutting Abraham Lincoln Playground, which Plaintiff claims caused him to trip and fall" (*id.*). As Plaintiff argues in opposition, however, the records evidence the City's inspections of the adjacent playground for the Winter and Spring 2016 and 2017 seasons including, as relevant here, the location at or near the subject sidewalk segment.[2] To the extent that the City, in reply and at oral argument, indicates that this condition was remedied, the Big Apple Map nevertheless preserves an issue of fact which is more appropriately evaluated by a jury. It is therefore

ORDERED that the City's motion to dismiss/for summary judgment is **DENIED**; and it is further

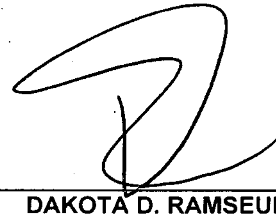
[2] Plaintiff is advised, for future reference, to utilize pinpoint citations, rather than general citations, to a 300-page long exhibit.

ORDERED that Plaintiff shall, within 30 days, e-file and serve a copy of this order with notice of entry upon all parties.

This constitutes the decision and order of the Court.

9/1/20

New York, NY



DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION			
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART		☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER			
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE	