Brock v City of New York
2020 NY Slip Op 32887(U)
September 1, 2020
Supreme Court, New York County
Docket Number: 155607/2018
Judge: Dakota D. Ramseur

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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EVANGELA BROCK,

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 155607/2018

MOTION DATE 9/2/20

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number, were considered on the City's motion for summary judgment (sequence 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

Plaintiff commenced this cause of action against the City of New York (the "City") to recover damages allegedly sustained in a trip and fall on a "raised and uneven cobblestone protruding from the sidewalk of a pedestrian median/island near a tree pit" "60 feet west of the northwest corner of East 14th Street and Avenue C in Manhattan, south of the entrance to … 645 E. 14th Street, … 6-10 feet west of the MTA bus shelter on said island/median" (*NYSCEF 41* ["Notice of Claim"]). The City moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint, arguing that the City lacked prior written notice of the subject defect and did not cause or create it. For the reasons below, after oral argument, the Court grants the motion and dismisses the Complaint.

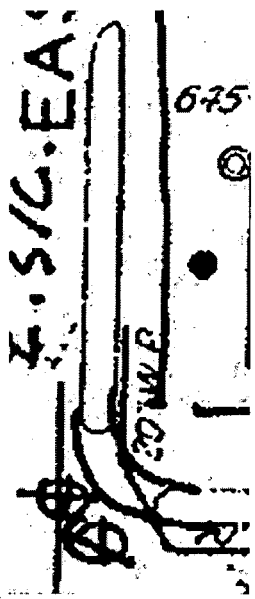
Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact (*id.*). To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material 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 (*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]).

As an initial matter, the Court agrees with the City's position that the subject defect, raised cobblestones on a median island, falls within the purview of NYC Admin. Code § 7-201(c)(2), which requires prior written notice for defects pertaining to "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*" (emphasis added). Based on Plaintiff's argument that the City has failed to demonstrate that it lacked prior written notice and that it did not cause or create the defect, Plaintiff appears to agree.

To satisfy its burden on summary judgment, the City must establish that establish, "through an affidavit from an appropriate official, that a search of the Department of Transportation's records was conducted and that there was no prior written notice of the defective condition" (*Campisi v Bronx Water & Sewer Serv.*, 1AD3d 166 (1st Dept 2003]). Here, the City, through an exhaustive records search and review by New York City Department of Transportation ("DOT") paralegal Naqi Syed (*NYSCEF 51*), DOT employee Danny Garcia (*NYSCEF 69*), Claims Specialist Sherri Reid (*NYSCEF 49*), and Record Searcher Jim Liriano (*NYSCEF 48*), has met its burden by demonstrating that the records (*NYSCEF 52-68*) produced did not provide prior written notice of the subject defect.

In opposition, Plaintiff argues that the Big Apple Map identifies the subject defect as an "obstruction protruding from the sidewalk," the symbol for which is a circled "x," "on the median at East 14th Street at Avenue C (*NYSCEF 74* ¶ 6). While Plaintiff is correct regarding the meaning of the marking, the Court disagrees with Plaintiff's argument for several reasons: First, the subject defect was not on a "sidewalk." Second, the relevant portion of the Big Apple Map highlighted by Plaintiff depicts two circled "X"s at a discernably different location on the opposite, eastern end of the median from the location of Plaintiff's fall and, indeed, some distance from the median itself (*NYSCEF 52* p 201, top of picture is west and bottom is intersection with Avenue C):[1]



[1] The Court utilized the City's version of the exhibit, which was much clearer (*compare NYSCEF 79/Pl Exh E* p 200 with *NYSCEF 52/City Exh L* p 201). At oral argument, Plaintiff conceded that the submissions were substantively identical.

To the extent that Plaintiff argues, in opposition and at oral argument, that Plaintiff's 50-h and/or deposition testimony rendered the exact location of the subject defect ambiguous, this is refuted by the Notice of Claim which, paired with exhibit photographs and the Big Apple Map, clearly describe and depict the subject defect at the edge of the only tree well "west of the MTA bus shelter," at the western tip of the median in front of 645 East 14th Street (*see NYSCEF 78, NYSCEF 51* p 201). Accordingly, there is no issue of fact as to whether the Big Apple Map depicts the subject defect, and therefore the City has satisfied its *prima facie* burden of demonstrating the lack of prior written notice (*Leary v City of Rochester*, 67 NY2d 866 [1986] ["A nearby defect is insufficient to constitute prior written notice of another defect."]). "Where the City establishes that it lacked prior written notice, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the [requirement of prior written notice]--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" (*Ortiz v City of NY*, 67 AD3d 21, 29 [1st Dept 2009], citing *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

With respect to the City's argument that it did not cause or create the subject defect, as an initial matter, the Court does not agree with the City's argument in reply that Plaintiff, for the first time in its opposition, attempted to blame Plaintiff's fall on a tree well rather than a raised cobblestone, and thus did not properly plead or allege the nature of the defect.[2] Under the circumstances here, the raised cobblestones and tree well are essentially indistinguishable; the City has known the specific defect blamed by Plaintiff for her fall since at least Plaintiff's 50-h hearing on May 2, 2018, when Plaintiff circled several raised cobblestones immediately adjacent to the tree well (*NYSCEF 46* p 12). In any event, Plaintiff does not spend any significant portion of its argument on the distinction between a tree well and the adjacent cobblestones identified by Plaintiff as the cause of her fall.

However, whether the defect was the cobblestones or tree well, the City has nevertheless demonstrated that it did not cause or create the subject defect. "The affirmative negligence exception [to prior written notice] is limited to work by the municipality that immediately results in the existence of a dangerous condition" (*Joyce v Vil. of Saltaire*, 126 AD3d 760, 761 [2d Dept 2015], quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). The City produced numerous permits pertaining to the subject stretch of 14th Street, and affidavits and deposition testimony attesting to absence of evidence that any of the permits, or other documents produced, clearly caused, or even related to, the subject defect (*NYSCEF 39* ¶¶ 44-52; *see also Meltzer v New York*, 156 AD2d 124, 124 [1st Dept 1989] ["...none of the street opening or work permits issued in and around the area provided the necessary notice to the city."]; *Acevedo v NY*, 128 AD2d 488, 489 [2d Dept 1987] ["the plaintiff failed to furnish any facts to support his allegation that the city was guilty of active negligence in issuing a curb cut permit or that vehicles entering the parking lot did, in fact, create the defect complained of in this case."]).

In opposition, Plaintiff highlights only the deposition testimony of New York City Department of Transportation witness Sherry Reid, who testified to the existence of "several

[2] In any event, there is no functional difference in analysis under Admin Code § 7-201, which also requires prior written notice to the City for tree wells (*see O'Reilly v City of NY*, 2010 NY Slip Op 32240[U], *9 [Sup Ct, NY County 2010, Jaffe, J.]).

permits that either involved – says tree pits or a median, issued to [C]oastal [C]ontracting Corp. … for the purpose of preparing sidewalk tree pits for street tree planting .. [on] East 14th Street between Avenue B and Avenue C … 602 East 14th Street" and "East 14th Street from Avenue B to Avenue C, street, sidewalk, center island and service road for the purpose of MTA contract P-3643733, and then 'Sandy' repair and core…" (*NYSCEF 49* 8-9, 11, 18-19, citing *NYSCEF 53-68*). With respect to the former, 602 14th Street is closer to Avenue B, on the other end of the block from the subject defect and well past the "maximum [sidewalk opening] length of 100 feet" (*NYSCEF 49* 9:21-24). Moreover, as the City argues in reply, the subject defect is not clearly alleged to be the tree well. With respect to the latter, by its terms the permits relate to work done by the MTA, not the City. Accordingly, Plaintiff has failed to raise an issue of fact as to whether the City caused or created the subject defect. It is therefore

ORDERED that the City's motion for summary judgment is **GRANTED**, and the Clerk of Court shall enter judgment dismissing the Complaint; and it is further

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

This constitutes the decision and order of the Court.

9/1/20
New York, NY

DAKOTA D. RAMSEUR, J.S.C.

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