Levenson v Department of Envtl. Protection
2022 NY Slip Op 33071(U)
September 12, 2022
Supreme Court, New York County
Docket Number: Index No. 153262/2018
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** — ***Justice*** **PART** **05RCP**

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SCOTT LEVENSON,

Plaintiff,

- v -

DEPARTMENT OF ENVIRONMENTAL PROTECTION, DEPARTMENT OF TRANSPORTATION, THE CITY OF NEW YORK, TIME WARNER CABLE NEW YORK CITY, C.A.C. INDUSTRIES INC.,CONSOLIDATED EDISON COMPANY OF NEW YORK, INC,

Defendants.

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INDEX NO. 153262/2018

MOTION DATE 04/26/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

TIME WARNER CABLE NEW YORK CITY

Plaintiff,

-against-

HYLAN DATACOM & ELECTRICAL INC., HYLAN DATACOM & ELECTRICAL LLC, OLD HDE INC.

Defendants.

---X

Third-Party
Index No. 595521/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 126, 127, 128, 129, 130

were read on this motion for JUDGMENT - SUMMARY.

Plaintiff commenced this action to recover for personal injuries allegedly sustained on March 15, 2017, after tripping and falling in a hole in the roadway at the northeast corner of West 55th Street and 7th Avenue, near a catch basin (NYSCEF Doc. No. 81 [GML §50-h Tr. at pp. 18, 20, 25-27]).

Defendants Time Warner Cable New York City, C.A.C. Industries Inc., and Consolidated Edison Company Of New York, Inc. each interposed answers asserting, as relevant here cross-claims against all other defendants for contribution and indemnification (See NYSCEF Doc. Nos. 4 [ConEd Answer at ¶6], 8 [Time Warner Answer at ¶¶14-15], and 9 [C.A.C. Industries, Inc. Answer at ¶¶7-8]).

Defendants Department of Environmental Protection ("DEP"), Department of Transportation ("DOT"), and the City of New York (collectively, with DEP and DOT, "the City") now move, pursuant to CPLR §3212, for an order granting summary judgment to the City on the grounds that the City did not receive prior written notice of the defect that allegedly caused Plaintiff's accident as required by Administrative Code §7-201.

In support of its motion, the City submits: (1) the affidavit of DOT employee Henry Williams attesting to his searches for DOT records for the two years up to and including the date of the alleged incident for the intersection of West 55th Street and 7th Avenue and the roadway segment of West 55th Street between 6th and 7th Avenues (NYSCEF Doc. No. 86 [Williams Aff. at ¶¶3-4]); (2) the affidavit of DEP Claims Specialist Kisha Miller, attesting to her search for DEP records for the intersection of West 55th Street and 7th Avenue, including sewer maps for the two years prior to and including the date of the alleged incident (NYSCEF Doc. No. 88 [Miller Aff. at ¶¶3, 5]); and (3) the records produced by these searches (NYSCEF Doc. Nos. 85 [DOT records] and 87 [DEP Records]). On October 21, 2021, the City produced Omar Codling a DOT Record Searcher for an examination before trial ("EBT") (NYSCEF Doc. No. 111 [Codling EBT at p. 8]). On October 28, 2021, the City produced Dylan Ryan, a DEP Supervisor of Water and Sewer Operations for an EBT (NYSCEF Doc. No. 114 [Ryan EBT at p. 10]).

In opposition, plaintiff argues that this motion is premature because only Ryan and Codling have been deposed[1]. Plaintiff further argues that these EBTs raised issues of fact precluding summary judgment, specifically that "Ryan has admitted he was not the person that should be testifying as to any work done on catch basins" and Ryan's testimony reveals that "the City never produced any of the correct records from the DEP regarding catch basins or road surfacing" (NYSCEF Doc. No. 109 [Recchia Affirm. at ¶10]). Plaintiff also notes that the City has not produced a witness to testify regarding records plaintiff obtained through a FOIL request (NYSCEF Doc. No. 113 [FOIL Records]). Finally, plaintiff asserts that Administrative Code §7-201 does not provide grounds for summary judgment at this juncture because a question of fact exists as to whether the City created the hazard through an affirmative act of negligence (in which case written notice would not be a prerequisite to this action).

In opposition, defendant C.A.C. Industries, Inc. also argues that summary judgment would be premature because discovery is not complete and further requests that the Court grant it summary judgment and dismiss it from this action on the grounds that the City is solely liable, pursuant to RCNY 34 RCNY §2-07(b)(2). In its partial opposition, defendant Consolidated Edison Company of New York, Inc., also seeks to be dismissed from this action on the same basis.

DISCUSSION

As a preliminary matter, the purported cross-motions for summary judgment by C.A.C. Industries Inc. and Consolidated Edison Company of New York, Inc. are "an improper vehicle" to seek relief from plaintiff, a nonmoving party (Hennessey-Diaz v City of New York, 146 AD3d 419, 420 [1st Dept 2017] [internal citations omitted]), and are therefore denied.

[1] Plaintiff also notes that Codling and Ryan were deposed after the City made the instant motion. However, in light of the fact that plaintiff and C.A.C. Industries, Inc. submitted opposition to the motion after these depositions (See NYSCEF Doc. Nos. 109 and 130), the Court discerns no prejudice to its consideration of the motion on its merits.

Turning to the substance of the City's motion, "[t]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

Section 7-201 of the Administrative Code of the City of New York provides, in pertinent part, that:

> 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.
>
> (Administrative Code §7-201[c][2]).

The City has satisfied its prima facie burden through its submission of: the Williams and Miller affidavits, the DOT and DEP records produced by these searches, and the affirmation of its counsel (NYSCEF Doc. No. 73 [Igoe Affirm. at ¶¶21-49]) establishing that, as a matter of law, none of these records provided written notice of the hole at issue here (See e.g., Benjamin v City of New York, 178 AD3d 557, 557 [1st Dept 2019]; Harvey v Henry 85 LLC, 171 AD3d 531, 532 [1st Dept 2019]). Accordingly, the burden shifts to plaintiff to either submit evidence in admissible form that raises a question of fact as to whether the City had prior written notice (See Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]) or "demonstrate the applicability of one of two

recognized exceptions to the [written notice] 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] [internal citations omitted]).

Plaintiff has not met his burden. He argues the motion is premature because manifold issues of fact exist. However, "[a] party contending that a motion for summary judgment is premature is required to demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant" (Falkovich v The City of New York, 2019 NY Slip Op 31873[U], 4 [Sup Ct, New York County 2019] [internal citations and quotations omitted]) and plaintiff has not done so.

Plaintiff makes much of the fact that only Ryan and Codling—the City's "record people" —have been deposed. However, no more is needed to meet the City's prima facie burden (See Benjamin v City of New York, 178 AD3d 557, 557 [1st Dept 2019]; Harvey v Henry 85 LLC, 171 AD3d 531, 532 [1st Dept 2019]). Moreover, a review of these EBTs undercuts plaintiff's claims that Ryan was not qualified to testify as to work done on catch basins and that the City has not produced the relevant records from DEP related to catch basis or road surfacing.

Neither do the FOIL records obtained by plaintiff create an issue of fact. As the City notes, these records consist of various permits issued by the City to C.A.C. Industries Inc., Consolidated Edison, Time Warner Cable NYC and are therefore insufficient to provide written notice to the City (See Haulsey v City of New York, 123 AD3d 606, 607 [1st Dept 2014] [permits issued to Consolidated Edison insufficient to establish written notice to City]).

Finally, plaintiff's contention that summary judgment is inappropriate because the "City has failed to demonstrate that it did not create the hazard through an affirmative act of negligence" is without merit. This is the plaintiff's burden (See Yarborough v City of New York, 10 NY3d

726, 728 [2008]), which he has not met. Plaintiff points to no evidence in the record which suggests that the City created the defect or hazard through an affirmative act of negligence that immediately resulted in the existence of a dangerous condition (Oboler v City of New York, 8 NY3d 888, 889 [2007] [internal citations omitted]). Plaintiff's speculation that further discovery may uncover facts essential to establish opposition is insufficient to deny the City's motion (See Crimlis v City of New York, 179 AD3d 575, 576 [1st Dept 2020]).

In light of the foregoing, it is

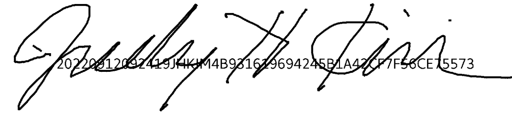
ORDERED that the motion for summary judgment by defendants Department of Environmental Protection, Department of Transportation, and the City of New York is granted in its entirety and the complaint and cross-claims against them are hereby dismissed; and it is further

ORDERED that within thirty days from entry of this order, counsel for the City of New York shall serve a copy of this order, with notice of entry, on plaintiff, the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "EFiling" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that, as the City of New York is no longer a party to this action, the Clerk of the Court shall randomly reassign this action to the inventory of a non-City Part.

This constitutes the decision and order of the Court.



9/12/2022					
DATE			HON. JUDY H. KIM, J.S.C.		
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[X] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE	