Salazar v City of New York
2022 NY Slip Op 33130(U)
September 9, 2022
Supreme Court, New York County
Docket Number: Index No. 156549/2016
Judge: Leslie A. Stroth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH **PART** 52

Justice

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VALENTIN SALAZAR,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION

Defendant.

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INDEX NO. 156549/2016

MOTION DATE 05/02/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for DISMISS.

Valentin Salazar (plaintiff) brings this negligence action against the City of New York and the New York City Department of Parks and Recreation (together, the City) for personal injuries sustained on May 10, 2015 when plaintiff allegedly fell due to a defective guardrail on a pedestrian path in Riverside Park near 146th Street.

The City now moves for dismissal pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, or, in the alternative, for summary judgment pursuant to CPLR 3212. The City argues that plaintiff failed to plead that the City had prior written notice or caused and created the alleged defective condition as required by New York City Administrative Code § 7-201(c)(2). Plaintiff opposes the motion, arguing that his negligence claim was properly plead and that the City's alternate motion for summary judgment is premature.

I. Motion to Dismiss

Pursuant to CPLR 3211 (a) (7), a party may move to dismiss a claim on the ground that the pleading fails to state a cause of action. Upon such a motion the Court must accept the facts alleged

as true and determine simply whether plaintiff's facts fit within any cognizable legal theory. *See* CPLR 3026; *Morone v Morone*, 50 NY2d 481 (1980). The complaint shall be liberally construed, and the allegations are given the benefit of every possible favorable inference. *See Leon v Martinez*, 84 NY2d 83, 87 (1994).

To hold the City liable for injuries resulting from an allegedly defective condition, a plaintiff must demonstrate that the City has received prior written notice of the subject condition. *See* Administrative Code § 7-201; *Amabile v City of Buffalo*, 93 NY2d 471 (1999). The only 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).

Plaintiff's Notice of Claim and verified complaint allege that the City caused the guardrail that injured plaintiff to become dangerous. Specifically, the Notice of Claim alleges that,

> Claimant [plaintiff] was caused to be injured by reason of the negligence, recklessness and carelessness of THE CITY OF NEW YORK and THE NEW YORK DEPARTMENT OF PARKS AND RECREATION, its agents...in the ownership, operation, control and maintenance of the Riverside Park, more specifically, the guardrail in causing, permitting and/or allowing the said guardrail at the aforementioned location to be, *become* and remain in a *dangerous and hazardous* condition... (Notice of Claim, NYCEF doc. no. 22 [emphasis added]).

However, plaintiff does not assert in his Notice of Claim that the City had prior written notice of such condition. Rather, plaintiff argues that because he pleads that the City caused or created the hazardous guardrail, he need not assert that the City had prior written notice of the purpored hazard. Stated otherwise, plaintiff argues that an assertion of prior written notice is not required here, because the affirmative negligence exception to the prior written notice rule applies. *See Yarborough v City of New York*, 10 NY3d 726 (2008).

In opposition, the City argues that plaintiff concedes that he did not plead that the City had prior written notice of the condition at issue, and, therefore, plaintiff admits to the insufficiency of

his claim. The City maintains that, although an exception to the prior written notice rule exists, the pleadings here are deficient, because they do not allege plaintiff's prima facie case. The City also argues that, even if plaintiff need not plead prior written notice, the language in the complaint suggests that the City failed to maintain the guardrail, causing it to become dangerous over time. Accordingly, the City asserts that plaintiff fails to plead that it affirmatively caused the guardrail to immediately become dangerous, as required. *See Yarborough v City of New York*, 10 NY3d 726, 728 (2008).

A pleading that asserts the applicability of the affirmative negligence exception to the prior written notice requirement may be sufficient to defeat a motion to dismiss. *See Perez v City of New York*, 193 AD3d 432, 433 (1st Dept 2021); *Kales v City of New York*, 168 AD3d 585 (2019). The affirmative negligence exception "is limited to work by the City that immediately results in the existence of a dangerous condition." *Yarborough v City of New York*, 10 NY3d 726, 728 (2008), quoting *Oboler v City of New York*, 8 NY3d 888, 889 (2007). Plaintiff sufficiently pleads the affirmative negligence exception here. The Notice of Claim asserts that the City's agents negligently maintained "...the guardrail in *causing*, permitting and/or allowing the said guardrail at the aforementioned location *to* be, *become* and remain *in a dangerous and hazardous condition*..." (Notice of Claim, NYSCEF doc. no. 22). Affording the pleadings a liberal construction, as we must, the complaint sufficiently pleads the applicability of the affirmative negligence exception to the prior written notice requirement. *See Perez v City of New York*, 193 AD3d 432, 433 (1st Dept 2021). At this early stage, the Court declines to dismiss plaintiff's complaint.

II. Summary Judgment Motion

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), quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). 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. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. (*See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

Given that plaintiff fails to plead prior written notice of the alleged defect, the burden shifts to plaintiff to establish that the City caused or created the purportedly dangerous guardrail. The City argues that summary judgment should be granted to it and the complaint dismissed, because the documentary evidence already exchanged demonstrates that the City did not conduct any work that could have caused or created the subject condition. In support of its motion, the City submits an affidavit by Yolanda Cleveland, a Principal Administrative Associate with New York City Department of Parks and Recreation (Parks) assigned to the Manhattan Borough Operations Office (Manhattan Operations). (*See* Exhibit I, NYSCEF doc. no. 30). Ms. Cleveland attests that she personally conducted a search of records maintained by Manhattan Operations for Riverside Park - Zone 28. (*Id.* at ¶ 4). These include: 32 ad-hoc inspections, 609 complaints, 37 field inspections,

one logbook entry, five Parks Inspection Program (PIP) reports with photographs, and one completed work order report containing nine work orders. (*See* Exhibit H, NYSCEF doc. no. 29).

Plaintiff opposes the City's alternate motion for summary judgment, arguing that the motion is premature. Plaintiff sets forth that it has not had a reasonable opportunity to review the discovery produced by the City in support of its motion, which amounts to 211 pages of Parks records. Plaintiff also maintains that it is entitled to conduct the deposition of a person with knowledge of these documents and/or someone with personal knowledge of the actual work performed, as per the Case Scheduling Order and various discovery stipulations. (*See* NYSCEF doc. no. 9, 10, 11, 12, 13, 14, and 15).

Pursuant to CPLR 3212 (f), "[s]hould it appear from affidavits submitted in opposition to the motion [for summary judgment] that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had…" Plaintiff identifies a key fact that is essential to opposing the motion, namely, whether the City conducted any work that could have caused or created the subject condition. *See DaSilva v Haks Engineers, Architects & Land Surveyors, P.C.*, 125 AD3d 480 (1st Dept 2015); *A & W Egg Co. v Tufo's Wholesale Dairy, Inc.*, 169 AD3d 616 (1st Dept 2019). Therefore, the City's motion is denied as premature. The movant has yet to be deposed, and plaintiff identifies an issue of fact that is essential to the determination of the motion. *See Figueroa v City of New York*, 126 AD3d 438, 439 (1st Dept 2015) (holding that "this Court has held that a motion for summary judgment should be denied as premature where the movant has yet to be deposed").

III. Conclusion

Accordingly, upon the foregoing papers, it is ORDERED that the portion of defendants' motion seeking dismissal pursuant to CPLR 3211 (a) (7) is denied, and it is further

ORDERED that that portion of defendants' motion seeking summary judgment is also denied, without prejudice to re-file upon completion of discovery, and it is further

ORDERED that movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office within 30 days from entry; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office and filing with the Clerk of the Part 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 "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

9/9/2022
DATE

LESLIE A. STROTH, J.S.C.

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