

Gadaleta v Warren George, Inc.
2015 NY Slip Op 30865(U)
May 5, 2015
Sup Ct, Richmond County
Docket Number: 150437/12
Judge: Thomas P. Aliotta
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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NICHOLAS GADALETA,

Plaintiff,

PART

-against-

C-2

Present:

Hon. Thomas P. Aliotta

DECISION AND ORDER

WARREN GEORGE, INC. and CITY OF NEW YORK,

Index No. 150437/12

Motion No. 412-002

Defendants.

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The following papers number 1 to 3 were marked fully submitted on the 11th day of March, 2015:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendants, with Supporting Papers and Exhibits (dated January 20, 2015).....	1
Affirmation in Opposition by Plaintiff, with Supporting Papers and Exhibits (dated February 24, 2015).....	2
Affirmation in Reply by Defendants, with Supporting Papers and Exhibits (dated March 4, 2015).....	3

Upon the foregoing papers, defendants' motion for summary judgment is denied.

In this personal injury action, plaintiff claims that on August 16, 2011, he was negligently caused to fall due to a "defect in the street... [i.e.] a square opening in the surface of the street in

which some sort of pipe was installed surrounded by dirt” (*see* Plaintiff’s Bill of Particulars, para 5). The alleged defect was located “in the streets of Wards Point Avenue between Tottenville Place and Amboy Road, Staten Island, New York” (*id.*). It is alleged that defendants were negligent “ in making a hole in the street yet doing nothing to safeguard it” (*id.* at 7).

According to the Verified Complaint, defendant the City of New York (hereinafter, the “City”) granted permission to defendant Warren George, Inc. (hereinafter, “WG”) “to do work on Wards Point Avenue” under “Permit # 501-2011220-027... [which] was valid from 8/9/2011 to 9/30/2011” (*see* Verified Complaint, paras 6-11). Violations of various statutes are alleged, including New York City Administrative Code §§19-102 (unlawful use or opening of street), 19-109 (protection at work site), 19-138 (injury to or defacement of streets), 19-146 (prevention of disturbances of street surface) and 19-147 (replacement of pavement and maintenance of street hardware) (*see* Plaintiff’s Bill of Particulars, para 13).

At his deposition, plaintiff testified that on the date of his accident, he was walking with his wife on Wards Point Avenue, where there are “some spots that have sidewalks and some areas that don’t” (*see* EBT of Plaintiff, pp 28-29, 32). According to the witness, he was “walking at a normal pace” at a “location [that] sloped downward”. At some point prior to his accident, plaintiff saw a wooden barricade or horse located “in front of a house... which [he] later learned to be 18 Wards Point Avenue” (*id.* at 35-36). Shortly thereafter, he purportedly “stepped in a hole that [he] had not seen... went off balance and... [his] ankle went one way and... [his] body went towards the right” (*id.* at 37-38). Plaintiff went on to describe the hole as “square... around twelve by twelve” and about “six to twelve inches deep”, in which was located “a round cylinder pipe” (*id.* at 42-43).

Also before the Court are copies of photographs taken by either plaintiff or his wife shortly after his accident (*id.* at 43-69; *see* Defendants' Exhibits "F", "G", "H").

Dmitriy Surkov, a research assistant employed by the City's Department of Transportation Litigation Services Unit was deposed on its behalf. According to the witness, a search was conducted for Wards Point Avenue between Tottenville Place and Amboy Road for the two years prior to and including August 16, 2011, the date of the accident (*see* EBT of Dmitriy Surkov, p 8). The results of the search revealed a street opening permit, number S012011220027, issued to WG on August 8, 2011, and valid from August 9, 2011 to September 30, 2011 (*id.* at 10). The permit granted WG permission to open the roadway at said location "for a maximum length of 200 feet for the purpose of test pit, cores or boring, soil borings, sub dash [and] sub face investigation" (*id.* at 10). Also revealed was a complaint dated August 16, 2011, *i.e.*, the date of plaintiff's accident, pertaining to a "[h]ole in [the] street apparently made by [a] construction crew with no protective plate or protective cones or barriers" (*id.* at 12).¹ The location was documented as "18 Wards Point Avenue" (*id.*). The search further revealed a second complaint dated June 25, 2011 regarding a pothole near "9 Wards Point Avenue" which was marked "closed" on July 5, 2011 (*id.* at 15).

Anthony Tirro, the president of WG, testified on its behalf that his company was hired by the City to do test borings on Wards Point Avenue (*see* EBT of Anthony Tirro, p 5). The project started on August 12, 2011, and finished sometime between August 20 and August 26, 2011 (*id.* at 6). As described, the first stage of the project was to "jackhammer [the street] open". Then a

¹It is not clear whether this complaint was made by plaintiff or someone else.

“vac truck [would] come in and suck... [the soil] out to five and a half feet”. The hole is then “backfilled and a plate is put over” it (id. at 11). According to the witness, WG “vac’d the hole on Friday [August] 12th [and covered it] with the steel plate but... did not get onto the hole until [August] 18th” (id. at 9-12,14).²

Luis Ramos, a driller for WG, also testified on its behalf. According to Ramos, he was the drill operator who created the hole where plaintiff claims to have tripped (*see* EBT of Luis Ramos, pp 19-28). When asked to describe the procedure for “plating”, the witness testified “[i]t’s a plate that would go over the hole... and inside [is] the pipe and we covered the whole hole and then you put blacktop around the plate” (id. at 14). Ramos further testified that this procedure is in accordance with DDC requirements (id. at 15). Purportedly, an inspector from an engineering company hired by the City (Techtonix) made sure that the hole was backfilled and paved at the end of the day or if they were not done, the hole would be plated (id. at 21-22). To this end, the Techtonix inspector would wait until WG finished and would then “take pictures of the holes that had been dug and covered” at the end of every day (id. at 22). According to the witness, the plates covering the holes are stolen “[a]ll the time”, a fact which was communicated to the DDC (id. at 51-53). Moreover, he stated “[e]very time they steal a plate, [we] make another one... [and the City is]... charged again” (id. at 52). Any charge for the steel plates would be recorded in the inspector’s logs, as they have to respond to the DDC (id. at 52).

Dominic Samone, a driller helper for WG, testified at his deposition that after they “vac the

²WG drilled three boring holes on Wards Point Avenue on August 12, 2011 (*see* EBT of Anthony Tirro, pp 12-15). The boring hole where plaintiff claims to have tripped was identified as “B3” (id.).

hole”, the procedure is to “put a steel plate over the hole or... backfill the hole” (*see* EBT of Samone, p 16). He further testified that he was unsure of the DDC inspectors’ requirements, but was certain that WG requires a plate to be placed on top of the hole (*id.* at 35-36). According to the witness, if WG “didn’t have any plates, I would backfill the dirt and the asphalt back in there... We don’t leave no holes wide open” (*id.* at 25).

In their motion for summary judgment, defendants argue, *inter alia*, that the sole proximate cause of plaintiff’s injuries was his own reckless conduct in disregarding an open and obvious condition. Defendants further maintain that they neither created a hazard, or had actual or constructive notice of same.

To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that defendant either created the condition or had actual or constructive notice of it (*see Oldham-Powers v. Longwood Cent Sch Dist*, 123 AD3d 681, 681-682 [2nd Dept 2014]). While a defendant has no duty to protect or warn against an open and obvious condition which is not inherently dangerous as a matter of law, the issue of whether a particular dangerous condition is open and obvious is fact specific, and usually presents a question of fact for a jury to determine (*id.* at 682). In addition, whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances. Thus, a condition that would ordinarily be apparent to someone making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (*id.*).

Here, the Court concludes that defendants have submitted sufficient evidence to establish their prima facie entitlement to judgment as a matter of law on the ground that the hole was not inherently dangerous; was readily observable to individuals employing the reasonable use of their

senses; and that they had neither actual nor constructive notice of the hole and reasonable time to cure (*see generally* Administrative Code of the City of New York, §7-201[2]).

However, in opposition, plaintiff has raised a triable issue of fact as to whether the condition, even if open and obvious, nevertheless constituted a trap or a snare. Plaintiff's affidavit³, along with the photographs taken shortly after his accident depicting an uncovered hole, are sufficient to raise a triable issue of fact as to whether defendants failed to keep the premises in a reasonably safe condition during construction. Under such circumstances, whether the condition may have been open and obvious merely creates an issue of fact as to the injured plaintiff's comparative negligence (*see DiVietro v. Gould Palisades Corp*, 4 AD3d 324, 325-326 [2nd Dept 2004]).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied.

ENTER,

/s/

Hon. Thomas P. Aliotta

J.S.C.

DATED: May 5, 2015

³In his affidavit, plaintiff attested that "[t]here were no metal plates anywhere in the vicinity... There were no orange cones or any other signs marking the holes. There was a barrier to the side of the road but no barriers around the holes" (*see* February 24, 2015 Affidavit of Nicholas Gadaleta, page 1).