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Anderson v. City of New York: A Cautionary Tale About Raising a New Theory of Liability in Opposition to Motion for Summary Judgment

In a recent decision, the Appellate Division, Second Department, reaffirmed the New York rule that a plaintiff opposing a motion for summary judgment cannot raise a new theory of liability *not already alleged* in her complaint in the opposition brief.

This principle came as an unpleasant surprise in 2016 to plaintiff Robin Anderson, who asserted negligence claims against the City of New York and the New York City Fire Department for injuries allegedly sustained when she drove over an uncovered manhole in Brooklyn. The plaintiff contended that the manhole cover, marked "FDNY," had been removed from the manhole and was sitting nearby, resulting in a hazardous condition on the road.

Under the Administrative Code of the City of New York § 7-201[c][2], a municipality may avoid liability for a defect or hazardous condition if it can establish, *inter alia*, that it has not been notified in writing of the defect or hazard at the specific location. Such prior notice is obviated, however, when the plaintiff demonstrates that that the municipality created the defect or hazard through an affirmative act of negligence or that a "special use" conferred a benefit on the municipality.

After the close of discovery, the defendants moved for summary judgment on lack of notice grounds. In opposition, the plaintiff did not dispute that the defendants established, prima facie, that they had no prior written notice of the alleged roadway defect. Instead, the plaintiff argued that the special use exception applied—an argument that the plaintiff had failed to assert in either the notice of claim or complaint. Based on the plaintiff's special use argument, the Supreme Court, Kings County, denied the defendants' motion.

On appeal, the Second Department reversed the decision. The appellate court held the plaintiff's new theory of liability was improperly raised for the first time in opposition to the defendants' motion for summary judgment dismissing the complaint. Because the plaintiff conceded that the defendants did not have prior notice of the defect, the Supreme Court should have granted the defendants' motion for this reason.

The Takeaway: On a motion for summary judgment, the court can only consider the legal theories alleged by the parties in the pleadings. Accordingly, litigants must carefully analyze their claims and counterclaims to ensure that all potential legal theories are incorporated in their pleadings.

Read the Decision: *Anderson v. City of New York,* 2025 NY Slip Op 00414 (2d Dep't Jan. 29, 2025)

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