

Daniels v City of New York

2005 NY Slip Op 30082(U)

March 23, 2005

Supreme Court, Queens County

Docket Number: 0014679/2006

Judge: David Elliot

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 10
Justice

----- Index
KATIE DANIELS, No. 14679/02

Plaintiff, Motion
-against- Date January 11, 2005

THE CITY OF NEW YORK, Motion
Defendants. Cal. No. 10

PAPERS
NUMBERED

Notice of Motion-Affid-Exhib..	1-5
Answering Affid-Exhib.....	6-7
Reply.....	8-10
Sur-Reply.....	11-15

In this action by plaintiff Katie Daniels (Daniels) to recover for injuries sustained upon a public street, defendant City of New York (City) moves pursuant to CPLR 4404(a) to set aside a jury verdict on the issue of liability.

Plaintiff Daniels was a pedestrian and fell as a result of an alleged defect in the street. Defendant City was not given prior written notice of the defect pursuant to NYC Code § 7-201(c)(2) [the Pothole Law]. Plaintiff asserts that prior written notice is not required, as the defect arose due to the active negligence of the defendant City in milling and resurfacing the street in question prior to the occurrence which gives rise to this lawsuit.

The occurrence in question took place on December 8, 2000, when plaintiff Daniels fell. The City, through its witness at trial, acknowledged that it performed a resurfacing of the street in question in 1992, some eight years prior to Ms. Daniel's accident.

Plaintiff's expert witness viewed photographs of the

street in question and opined that the defect, consisting of a trench between the street and curb, formed as a result of the failure of The defendant City to follow proper procedure in resurfacing the road, in that the asphalt "was not brought all the way out to interface with the street curb", the roadway "was not properly prepared, there were no anchoring mechanism, no wire mesh, nothing to secure that asphalt in place. The asphalt itself was not of sufficient depth to maintain stability."

After trial the jury rendered a verdict finding that defendant City was liable for the happening of the occurrence. Defendant City now moves to set aside the verdict on the law, as the City did not have prior written notice of the defect. Counsel asserts that the testimony of plaintiff's expert should not have been allowed because the only evidence to support his conclusions was photographs taken in the year 2000 and in addition, the alleged negligent acts of the City some eight (8) years prior to the occurrence cannot form the basis of a claim that the affirmative acts of defendant City some eight years prior to the occurrence created the condition complained of, thus obviating the need for prior written notice.

Defense counsel cites the Second Department cases of Capobianco v Mari, 272 AD2d 497, Arias v City of New York, 284 AD2d 354 and Carbo v City of New York, 275 AD2d 439. The Capobianco court held for the City in a case involving a system of tree roots because "[T]here is no evidence in the record that a dangerous condition existed when the Town completed its repairs." The Town had not received prior written notice of the alleged defect consisting of tree roots; the court held: "The allegation of a subsequent recurrence of a condition does not abrogate the need for prior written notice."

In Arias, the infant plaintiff fell after stepping in a hole in a paved pathway in a park. The plaintiff contended that prior written notice was not required because the defendant City had negligently constructed the pathway. In finding for defendant municipality the court cited Capobianco and added "...the plaintiffs failed to establish when the defect arose or when the walkway was constructed. In addition, there is no evidence that the defect arose when the walkway, when constructed, did not comply with established engineering practices". [citations omitted].

In Carbo, the court found for the municipality stating

"There is no evidence that a dangerous condition existed when the repair was completed, or that the City of New York created the condition [citing Capobianco]. Further, the plaintiff's expert merely speculated that the work may have been performed by the City of New York."

In opposition plaintiff's counsel distinguishes the cases cited by plaintiff, and relies heavily upon the Appellate Division First Department's decision in Torres v City of New York, 306 AD2d 191, wherein the court held that the trial court erred in finding that the City did not create a defect by an affirmative act of negligence, where plaintiff's expert's uncontradicted testimony was that a roadway was improperly constructed by leaving cobblestones in place and paving over them with only one inch of asphalt, leading to recurrent potholes.

Decision of the Court

The Appellate Division Second Department made clear in Capobianco that a recurrence of a dangerous condition caused by tree roots does not abrogate the need for prior written notice, despite the allegation of an inadequate repair of precisely the same condition. The Carbo and Arias courts, while citing Capobianco, also mentioned that there was no proof that the City created the condition (Carbo) and that plaintiffs failed to establish when the defect arose when the walkway was established or that the walkway did not comply with established engineering practices (Arias).

Clearly, in this case it is not controverted that defendant City resurfaced the street in question in 1992. Further, the uncontroverted testimony of plaintiff's expert is that the work was improperly performed. Nevertheless, it is the opinion of this court that Capobianco mandates that in order to abrogate the need for prior written notice of the defect, the dangerous condition must have existed at the time of the repair. Though the other cited cases raised other issues as well, at its core Capobianco stands for that proposition.

Although plaintiff's counsel relies heavily on the First Department's Torres decision, between the service of the papers and submission of the motion the First Department expressly overruled the Torres case in Bielecki v The City of New York, 14 AD3d 301, stating: "If we were to extend the affirmative negligence exception to cases like this one, where it is alleged that a dangerous condition developed

over time from an allegedly negligent municipal repair, the exception to the notice requirement would swallow up the requirement itself, thereby defeating the purpose of the Pothole Law. For this reason, we now overrule Torres v City of New York, [citation omitted]." The same considerations which were addressed by the Bielecki court are applicable in this case.

As a final matter, it appears to the court that the testimony of plaintiff's expert, based solely upon photographs of the scene taken some eight years after the resurfacing, was based on speculation as to the manner in which the road resurfacing was performed eight years prior to the event.

Accordingly, the motion of defendant City of New York to set aside the jury verdict is granted and the complaint is hereby dismissed.

Dated: March 23, 2005

.....
HON. DAVID ELLIOT