

Fuhrmann v City of Binghamton

2005 NY Slip Op 30104(U)

August 30, 2005

Supreme Court, Broome County

Docket Number: 0013182/0021

Judge: Jeffrey A. Tait

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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York on the 11th day of May, 2005

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

LOUIS FUHRMANN,

Plaintiff,

DECISION AND ORDER

vs.

**CITY OF BINGHAMTON, WILLIAM P. GRACE
and KATHRYN M. GRACE**

Index No. 2002-1318
RJI No. 2004-0579-J

Defendants.

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

The plaintiff, Louis Fuhrmann, commenced this action against defendants, City of Binghamton and William and Kathryn Grace, to recover damages for injuries allegedly sustained on March 26, 2002 when plaintiff alleges he slipped and fell on an icy sidewalk located in front of 140 Helen Street in the City of Binghamton.

The defendant City of Binghamton now moves for summary judgment dismissing the complaint. The City asserts that it is entitled to summary judgment in its favor as it did not receive written notice of any defect under its local statute mandating such notice, and there is no material issue of fact regarding the lack of any active or affirmative negligence by the City. In support of its motion, the City supplies the affidavit of its counsel, its Corporation Counsel, its City Engineer, its First Deputy Commissioner of Public Works, and its Assessor.

In opposition to the motion, the plaintiff submits the affidavit of his attorney with operative portions of the deposition transcripts of the plaintiff, the City Engineer, and the individual defendants.

According to plaintiff's deposition testimony, the injuries for which he seeks damages in this action occurred when he fell after he caught his right foot on the lip of the pavement surrounding a carved out portion of the sidewalk. Plaintiff alleges, and it is not in dispute, that the carved out sidewalk was originally constructed or installed around an existing tree.¹

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While the record is not clear when the sidewalk was installed or even who installed it, the existence of a fact issue in that regard is not relevant to the issues on this motion.

Sometime later the tree was removed, leaving the carved out sidewalk in place.² Plaintiff alleges that defendants were negligent in failing to repair or properly maintain the carved out portion of the sidewalk. The defendant City now moves for summary judgment dismissing the complaint against it on the ground that it has not received prior written notice of the alleged defect as required by the Binghamton City Code, section 1, sub-part XV.

Summary judgment is a drastic remedy which should be granted only when it is clear that there is no material issue of fact for resolution by a jury (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Redcross v. Aetna Cas. & Sur. Co.*, 260 AD2d 908, 913 [3d Dept 1999]). It is well established that the function of the court on a motion for summary judgment is issue finding, not issue determination, and if a genuine issue of fact is found, summary judgment must be denied (*see Sillman*, 3 NY2d at 404; *see also Salvador v. Uncle Sam's Auctions & Realty, Inc.*, 307 AD2d 609, 611 [3d Dept 2003]; *Schaufler v. Mengel, Metzger, Barr & Co., LLP*, 296 AD2d 742, 743 [3d Dept 2002]; *Encotech, Inc. v. Cotton Fact, Inc.*, 280 AD2d 748, 749 [3d Dept 2001]). The moving party on such a motion bears the initial burden to establish a prima facie case of entitlement to judgment as a matter of law (*see Encotech*, 280 AD2d at 749). Once this initial burden is met, it is incumbent on the opposing party to lay bare his or her proof establishing the existence of a triable issue of fact (*see id.* at 749-750). Once the prima facie case is established, the opposing party must come forward with proof in admissible form to demonstrate the necessity of a trial on an issue of fact (*see id.*).

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It is not clear when the tree was removed. Although there is some confusion or dispute about that date or time frame, that fact issue is also not determinative on this motion

The pertinent part of the Binghamton City Code, section 1, sub-part XV states:

“No civil action shall be maintained against the City of Binghamton for damages or injuries to person or property sustained in consequence of any ... sidewalk ... being defective, out of repair, unsafe, dangerous or obstructed in consequence of the existence of ice or snow thereon, or out of repair, defective, dangerous, unsafe or obstructed in any other way or manner unless it is made to appear that written notice thereon relating to the particular time and place and condition of such ... sidewalk ... was actually given to the Commissioner of Public Works at least 24 hours previous to such damage or injury and that there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of.”

The City has met its initial burden on this motion by submitting proof via affidavit of the First Deputy Commissioner of Public Works stating that prior written notice of the allegedly defective sidewalk was not given to the Commissioner as required by the Binghamton City Code, section 1, sub-part XV. The record clearly establishes that the City has a notice of defect ordinance or statute that mandates written notice to the City before liability attaches for defects in, among other things, sidewalks. It also establishes that the City has no record of receipt of a notice under that statute. In light of this, the City has made out a prima facie case of entitlement to summary judgment unless the plaintiff can establish that there are, at a minimum, issues of fact regarding the applicability of one of the exceptions provided by the notice statute.

Plaintiff notes that Mr. Grace stated during his deposition that he had conversations with City employees about replacing the carved out section of sidewalk. There is no testimony whatsoever that this or any other notice was written or otherwise met the requirements of the notice statute. At best, this notice was in the form of casual conversations between co-defendant Grace and City workers. The Court of Appeals has held that constructive notice of a defect may not override the statutory requirement of prior written notice of a sidewalk defect (*see Amabile v. City of Buffalo*, 93 NY2d 471, 474 [1999]). Thus, the City has met its initial burden on the

motion for summary judgment (*see Wisnowski v. City of Syracuse*, 213 AD2d 1069, 1070 [4th Dept 1995]).

In the absence of prior written notice, the burden shifts to the plaintiff to demonstrate the availability of an exception to the notice requirement. The following two such exceptions are recognized: (1) where the municipality creates the defect or hazard through an affirmative act of negligence or (2) where a special use confers a special benefit upon the municipality (*see Hendrickson v. City of Kingston*, 291 AD2d 709 [3d Dept 2002]). Although both exceptions are mentioned in plaintiff's attorney's affidavit submitted in opposition to this motion, there are no facts alleged supporting the applicability of the special use/special benefit exception or any fact issues in that regard and mere speculation is insufficient to defeat the City's motion (*see Schaal v. City of Utica*, 6 AD3d 1070 [4th Dept 2004]). Thus, the plaintiff's defense to the motion for summary judgment revolves around the applicability of the affirmative act exception to the prior written notice requirement.

Turning to the affirmative act exception to the prior written notice requirement, the plaintiff alleges that the city was negligent in leaving the carved out sidewalk in place after removing the tree, thereby creating a dangerous defect. The plaintiff correctly limits this theory to the sidewalk conditions existing immediately after the tree was removed, as courts have held that affirmative negligence exceptions to the prior notice requirement must be limited to work by the municipality that immediately results in the existence of a dangerous condition (*see Bielecki v. City of New York*, 14 AD3d 301 [1st Dept 2005]). In *Bielecki*, the Court refused to extend the affirmative negligence exception to dangerous conditions which developed over time

from an allegedly negligent municipal repair (*see id.*; *see also Brooks v. Village of Horseheads*, 14 AD3d 756 [3d Dept 2005]).

The Appellate Division, Third Department, has recently held that an act of omission does not constitute affirmative negligence excusing noncompliance with the prior notice requirement. *Lifer v. City of Kingston*, 295 AD2d 695 [3d Dept 2002]). In *Lifer*, the plaintiff tripped on roots under and adjacent to a sidewalk which grew from a tree that had recently been cut down by either city employees or a city contractor (*see id.*). The Third Department granted summary judgment to the city, holding that the city's omission of not removing the roots or stump was not an affirmative act of negligence, since the City did not initially alter the condition of the sidewalk area (*see id.*). Thus, in order to fall under the affirmative act exception, the plaintiff here is limited to proving that a defective condition existed immediately upon the removal of the tree and was not the result of elements and time (*see generally Kiernan v. Thompson*, 73 NY2d 840, [1988] [where the municipality's removal of a tree stump caused a crack in a sidewalk upon which the plaintiff fell]).

The plaintiff's complaint alleges that his injuries occurred when he stepped in a "grassy depression or hole" that was covered by snow and/or ice (see Complaint at ¶5). To prevail, the plaintiff must raise an issue of fact regarding the City's affirmative negligence as to that portion of the sidewalk. For purposes of this motion, it is presumed that the City removed or caused the removal of the tree, thus leaving the carved out portion of the sidewalk. To create an issue of fact regarding the City's affirmative negligence, the plaintiff must point to something that occurred at the time the tree was removed, which the plaintiff does not do. In fact, the testimony of the defendant Mr. Grace establishes that he leveled the carved out portion of the sidewalk on

more than one occasion. There is no fact issue regarding the condition in which the sidewalk and the carved out portion of the sidewalk were left at the time the tree was removed. The law is clear that conditions that develop over time are subject to the prior written notice statute and cannot constitute affirmative negligence under the exceptions (*see Bielecki*, 14 AD3d at 301).

There is nothing in the record on this motion to establish (i.e. create a fact issue) that the City might be negligent regarding the condition of the carved out portion of the sidewalk after the tree was removed. In other words, there is no evidence that anything occurred other than the removal of the tree and there is evidence from Mr. Grace's deposition testimony that he periodically filled in the area with dirt to make it level after the tree was removed. The Court can find no issue of fact that the City was affirmatively negligent in removing the tree. Absent an issue of fact in that regard, plaintiff cannot prevail on the affirmative act exception.

Plaintiff asserts that the *Kiernan* case is controlling here and supports a denial of the City's motion (*see id.*, 73 NY2d at 840). It is true that in that case, which involves the City of Ithaca removing a tree located between the sidewalk and curb, summary judgment was denied (*see id.*). However, the denial of summary judgment and the finding of an issue of fact based on the affirmative act exception was based on allegations (i.e. fact issues) that the crack in the sidewalk upon which the plaintiff fell was caused by the City when the tree was removed (*see id.*).³ In other words, the tree removal effort caused cracks in the sidewalk (*see id.*).⁴ That is not

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That case also involved statute of limitations issues not directly relevant here.

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In the *Kiernan* record on appeal, that crack is referred to as being a "jagged split several inches wide and deep" (*see id.*).

the case here, as there is no evidence whatsoever regarding the condition of the sidewalk or carved out portion other than the fact that the tree was removed. No issue of fact regarding an affirmative act of negligence can be identified in this situation.

As noted earlier, the plaintiff submits the affidavit of its attorney and depositions taken from co-defendants Grace and City Engineer Holmes in opposition to the motion. While it is clear that the carved out portion of the sidewalk was left after removing the tree, this is not (by itself) an affirmative act of negligence and there is nothing in the record on this motion to create an issue of fact in that regard. Courts have relied on expert testimony in the past to establish an issue of fact regarding negligence. In *Brzytwa-Wojdat v. Town of Rockland*, the Appellate Division, Third Department, affirmed a grant of summary judgment where plaintiff produced no expert testimony or evidence to support her affirmative act of negligence theory (*see id.*, 256 AD2d 873 [3d Dept 1998]). Just like the plaintiff in *Brzytwa-Wojdat*, the plaintiff here “relies exclusively on his attorney’s affidavit which in turn relies upon selective reference to the deposition testimony of [Gary Holmes, City Engineer]” (*see id.* at 876).

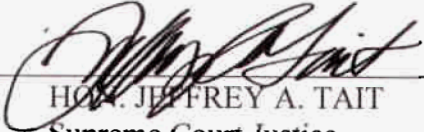
In *Hendrickson*, the Third Department held that an attorney’s affirmation alone in support of plaintiff’s negligent construction and/or repair theory was insufficient to defeat defendant’s motion for summary judgment (*see Hendrickson*, 291 AD2d at 710). In *Hendrickson*, the Court granted summary judgment to the defendant because “noticeably absent from the record is any expert affidavit or testimony as to the alleged nature of the defect and defendant’s culpability therefor” (*see id.*).

Like the plaintiffs in *Brzytwa-Wojdat* and *Hendrickson*, the plaintiff’s assertions here of affirmative negligence are not supported by expert opinion regarding the alleged defect of the

sidewalk. In this case, there is no testimony, expert or otherwise, that indicates that a defective condition existed immediately upon the City's removal of the tree. In fact, all of the relevant testimony indicates that the condition of the curved out portion of the sidewalk became defective over time (*see Bielecki*, 14 AD3d at 301; *Brooks*, 14 AD3d at 756). The record lacks expert testimony or other proof in admissible form raising a triable issue of fact concerning the sidewalk condition which immediately resulted upon the tree being removed (*see Lifer*, 295 AD2d at 695). Thus, the plaintiff has not met his burden to demonstrate an issue of fact on the availability of the affirmative act exception to the prior written notice requirement. Accordingly, the motion for summary judgment dismissing the complaint against defendant City of Binghamton is granted.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: August 30, 2005
Binghamton, New York



HON. JEFFREY A. TAIT
Supreme Court Justice

The following papers were filed with the Clerk of the County of Broome:

- Notice of Motion of Coughlin & Gerhart, LLP dated February 28, 2005 together with
 - Attorney Affidavit of Robert R. Jones, Esq. sworn to February 28, 2005
 - Affidavit of Greg Poland sworn to February 25, 2005
 - Affidavit of Mark Minoia sworn to February 25, 2005
 - Affidavit of Greg Precopio sworn to February 25, 2005
 - Attached Exhibits

- Affidavit of Mailing of Mary Louise Conrow sworn to February 28, 2005

- Attorney Affidavit in Opposition to Motion for Summary Judgment of Daniel L. Seiden, Esq., sworn to May 5, 2005