

D'Onofrio v City of New York

2005 NY Slip Op 30375(U)

November 22, 2005

Supreme Court, New York County

Docket Number: 111838/01

Judge: Erin M. Peradotto

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. ERIN M. PERADOTTO, J.S.C.

PRESENT: _____

PART _____

0111838/2001

D'ONOFRIO, PASQUALE
VS
CITY OF NEW YORK

INDEX NO. 111838/01
CITY FILE # 01TT005464
FILING DATE _____

SEQ 1

INDEX SEQ. NO. _____

SPECIAL PREFERENCE

INDEX CAL. NO. _____

The following papers were read on this motion: 1-4

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

1
2
5
3+4

Replying Affidavits
TRIAL TRANSCRIPT
Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

See Attached Decision & Order GRANTED November 22, 2005

FILED
DEC - 5 2005

Dated: 11/22/05

Erin M. Peradotto
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

PASQUALE D'ONOFRIO and
CHRISTINE D'ONOFRIO,

Plaintiffs,

vs.

Index No. 111838/01
City File No. 01TT005464

THE CITY OF NEW YORK and THE
NEW YORK CITY TRANSIT AUTHORITY

Defendants.

DECISION and ORDER

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PERADOTTO, J.,

The defendant, The City of New York ("City") has moved, pursuant to CPLR 4404, for an Order setting aside the jury verdict as contrary to the weight of the evidence and for a directed judgment as a matter of law. The City also has moved, pursuant to CPLR §5501(c), for an Order reducing the amount of the damages award. The City moved at the close of the plaintiffs' proof and at the close of all the proof, pursuant to CPLR 4401, to dismiss the plaintiffs' case on the grounds that a *prima facie* case was not established. The City also moved at the close of the

proof for a judgment of indemnification against the New York City Transit Authority ("Transit Authority"). The plaintiffs opposed the motions.¹

Decision

The City contends that the verdict should be set aside because the plaintiff did not establish a *prima facie* case of negligence on the part of the City and that the City had prior written notice of the alleged defect that caused the accident. Alternatively, the City asserts that the apportionment of liability between the City and the Transit Authority should be set aside because it was contrary to and against the weight of the evidence. Finally, the City contends that the damages verdict should be set aside as excessive. The plaintiffs respond that: (1) a *prima facie* case was established; (2) the evidence established that the City had prior written notice; (3) the apportionment of liability was supported by the evidence; (4) the verdict was not excessive; and (5) the City's motion is procedurally defective because a copy of the trial transcript was not served on the plaintiffs' counsel with the motion.

As a preliminary matter, this Court finds that the City's motion was not procedurally defective for failing to include a trial transcript with the motion because there is no such requirement. The case on which plaintiffs rely, namely *Tesciuba v Cataldo*, 189 AD2d 655, does not stand for the proposition that a trial transcript must be served with this sort of post-trial motion. The plaintiffs' argument in this regard borders on the frivolous (*See* NYCRR § 130-1.1[c][1]).

¹ The plaintiffs settled the claim against the Transit Authority shortly before jury selection and the City's claim against the Transit Authority was converted to a third-party action.

a.) Prima facie case

The City argues that the plaintiffs failed to establish a *prima facie* case against the City because the evidence concerning negligence was speculative. The City specifically contends that the plaintiff did not introduce sufficient evidence demonstrating that the sidewalk grating actually moved, so any conclusion that the grating was defective or that movement of the grating contributed to the happening of the accident is based on speculation.

The only evidence introduced regarding the happening of the accident was the testimony of the plaintiff. The plaintiff testified, in summary, that when he stepped on a sidewalk grate covering a subway vent, the grate moved, thereby causing him to fall when his feet were caught in an area of broken cement within the grating. While the City correctly notes that the plaintiff testified that he did not see the sidewalk grate move, he also testified that he felt the grate move at the time of the accident. This Court finds that the plaintiff's testimony sufficiently established that the sidewalk grating moved at the time of the accident.

b.) Notice

The plaintiffs introduced a map from the Big Apple Pothole and Sidewalk Protection Corporation ("Big Apple") as evidence of prior written notice against the City (Exhibit 5). The City contends that the map did not establish that the City had prior written notice of the defect that caused the plaintiff's accident, because the map only showed an unrelated defect that was nearby (*See New York City Administrative Code § 7-201*). Administrative Code § 7-201 provides that no action may be maintained against the City for injuries sustained as a result of a defective street or highway unless prior written notice of the defect was given to the City, and the City did not repair the defect within 15 days of receipt of that notice. The prior notice requirement is a condition precedent to maintaining an action against the City (*Katz v City of*

New York, 87 NY2d 241, 243). It is well established that Big Apple maps may serve as prior written notice under Administrative Code § 7-201 (*see Weinreb v City of New York*, 193 AD2d 596).

The plaintiff testified that the defect that caused his fall was moving metal grating in an area of broken concrete within the section of grating. The plaintiff further described the defect as a hole in the sidewalk grating, and identified the area where he fell on a photograph in evidence (*see Exhibit 3a*). The plaintiff testified that the photograph depicted the broken concrete that contributed to his accident. The broken concrete identified by the plaintiff was within the grating and was not part of the surrounding sidewalk (*see Exhibit 3a*).

The Big Apple map depicts a defect in front of 20 Broad Street with a horizontal line, which is described in the map key as “raised or uneven portion of sidewalk” (*see Exhibit 5*). Andrea Kinlock, an employee of Big Apple, testified that the map does not depict grating in front of 20 Broad Street, or that any grating at 20 Broad Street was defective. Ms. Kinlock testified further that the map key does not contain symbols denoting grating or defective grating.

It is well established that the prior written notice must be of the specific defect that a plaintiff alleges caused an injury (*Belmonte v Metropolitan Life Insurance Company*, 304 AD2d 471, 474). The testimony of Ms. Kinlock demonstrates that the only defect reflected on the Big Apple map is “raised or uneven portion of sidewalk.” The Big Apple map of the vicinity of 20 Broad Street does not provide notice of the particular condition that caused the plaintiff to fall, namely the defective grating and broken concrete within that grating. The notation on the map of “raised or uneven portion of sidewalk” provides notice of only that condition, and is not notice to the City of a defective sidewalk grate in the sidewalk.

Further, the undisputed evidence established that the defective grating and broken concrete were part of the sidewalk grating, not of the surrounding sidewalk. As noted by the City, notice of one pavement defect does not qualify as notice to a municipality of another pavement defect simply because it happens to be nearby (*Goldston v Town of Babylon*, 145 AD2d 534). The defect on the map does not depict the defect identified by the plaintiff as causing his fall, and the alleged defect was isolated from, and not part of the “raised or uneven portion of sidewalk” noted in the Big Apple map. Accordingly, the evidence simply did not establish that the City received prior written notice of the defect that caused the plaintiff’s accident, as required by Administrative Code § 7-201 (*Leary v City of Rochester*, 67 NY2d 866; *Camacho v City of New York*, 218 AD2d 725).

c.) Apportionment of liability between the City and the Transit Authority

The City’s motion to set aside the apportionment of liability between the City and the Transit Authority reiterates the arguments raised in its motion seeking indemnification from the Transit Authority at the close of the proof. The City correctly notes that the evidence established that the Transit Authority had assumed responsibility for the maintenance and repair of the subway ventilation grate where the plaintiff fell. The City relied upon the Transit Authority to repair any defects in the subway ventilation grates of which the Transit Authority was apprised. However, there was no evidence that the Transit Authority assumed responsibility for inspecting the subway ventilation grates to perform maintenance and repairs as necessary. The Transit Authority witness testified that he was not aware of any regular inspection procedures to monitor the condition of the grates. Presumably, the Transit Authority relied on the City to provide notice of a defect, or some other notice, to trigger a repair.

Because this Court already determined that the City did not receive notice of the defect that caused the plaintiff's injuries, the issue of apportionment of responsibility between the defendants is moot. However, even if the defect noted in the Big Apple map constituted adequate notice of the defect, there was no evidence that the City provided the Transit Authority with the information on the map. Nor was evidence presented that the Transit Authority had actual or constructive notice of the defect. For the Transit Authority to be required to indemnify the City, it would have had to have been apprised of the defect. As a result, even if the map provided proper notice of the alleged defect, this Court would not disturb the apportionment of responsibility between the defendants because there was no evidence that the Transit Authority assumed responsibility for inspecting the subway ventilation grates or had actual or constructive notice of the defect that caused the plaintiff's injuries.

d.) Damages

Given this Court's determination that adequate prior written notice was not provided, as required by Administrative Code § 7-201, the issue whether the damages awarded by the jury were excessive also is moot. However, if the issue was not moot, this Court would set aside the future damages award as it deviates materially from what would be reasonable compensation.

The plaintiff sustained two fractured elbows, one of which required surgery and insertion of hardware. The other elbow was reduced without surgery. The plaintiff underwent five months of physical therapy and thereafter returned to his employment as a teacher and to many of his usual activities. He testified that he experiences a sense of discomfort in his right arm, which worsens somewhat with changes in the weather. While the plaintiff has minimal permanency associated with his injuries, the evidence demonstrates that he suffered more from the date of the accident to the date of the verdict than he will in the future. Therefore, the jury's award of future

damages of an amount 1.5 times the award for past damages is incongruous and inconsistent with the evidence. Thus, this Court would order a new trial on the issue of future damages only, unless the parties would agree to stipulate to reduce the future damages award to fifty thousand dollars (\$50,000.00).

Based on the foregoing, it is hereby

ORDERED that the City's motion to set aside the jury verdict and for a directed judgment in favor of the City is granted on the basis that prior written notice was not provided to the City, as required by Administrative Code § 7-201; and it is further

ORDERED that the City's motion for an Order reducing the amount of the damages award is denied as moot; and it is further

ORDERED that the City's motion for a judgment of indemnification against the Transit Authority is denied as moot.

The foregoing Decision constitutes the Order of this Court. No further Order need be submitted.

Dated: November 22, 2005

Erin M. Peradotto
Erin M. Peradotto, J.S.C.

GRANTED:

FILED
DEC - 5 2005
COURT CLERK'S OFFICE

GRANTED

NOV 22 2005

BY *Janet M. Marchinda*
JANET M. MARCHINDA
COURT CLERK