Laracuente v City of New York
2011 NY Slip Op 33279(U)
June 28, 2011
Supreme Court, Queens County
Docket Number: 17543/06
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Justice   Part **10**

Robert Laracuente, Individually and as Administrator of the Estate of Robert T. Laracuente, Deceased, Plaintiffs,	Index Number: 17543/06
- against -	Motion Date: 6/14/11
The City of New York and Kim M. Yohan,	Motion Cal. Number: 17
Defendants.	Motion Seq. No.: 3

The following papers numbered 1 to 14 read on this motion by defendant, The City of New York, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits................	1-4
Affirmation in Opposition(Pltf)-Affidavit-Exhibits...	5-7
Affirmation in Opposition(Kim).......................	8-9
Reply to Kim...	10-11
Reply to Plaintiff-Exhibits..........................	12-14

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment dismissing the complaint and all cross-claims against it upon the grounds that it did not have prior written notice of the condition and that plaintiff failed to plead compliance with the prior written notice requirement pursuant to §7-201(c) of the New York City Administrative Code is denied. The record on this motion raises questions of fact precluding summary judgment.

Plaintiff's decedent, Robert T. Laracuente, a pedestrian, was struck and killed by the motor vehicle operated by Yohan Kim (sued herein as Kim M. Yohan) at the intersection of Horace Harding Expressway and Springfield Boulevard in Queens County as Laracuente attempted to cross Horace Harding on September 28, 2005. Plaintiff alleges that the City negligently maintained fencing and foliage which blocked the line of sight of drivers approaching the subject intersection on Horace Harding Expressway and of pedestrians trying to cross the intersection and that said negligence was a proximate

cause of the accident. More precisely, Kim was traveling westbound in the left lane of Horace Harding Expressway approaching the intersection of Springfield Boulevard. Horace Harding Expressway is elevated above the Long Island Expressway which runs parallel to and below it, thus dividing the westbound from the eastbound Horace Harding. Springfield Boulevard runs in a north-south direction perpendicular to Horace Harding and the LIE below. The section of Springfield Boulevard between the westbound Horace Harding and the eastbound Horace Harding thus spans the LIE, forming an overpass over it. Guardrailing and a chainlink fence run along the southern edge of the westbound left lane of the Horace Harding, wrap around the southeast corner of Springfield Boulevard and run along the easterly side of Springfield Boulevard to protect vehicular traffic traveling on Horace Harding and pedestrians walking on Springfield Boulevard from the LIE below. Presumably, the protective fencing continues to the northwest corner and wraps around the northerly edge of the eastbound Horace Harding and that the same arrangement is in place on the westerly side of Springfield Boulevard. Laracuente, walking north on the sidewalk on the easterly side of Springfield Boulevard, stepped off the curb on the southeast corner of Springfield Boulevard and Horace Harding Expressway, into the left lane of Horace Harding within the crosswalk and into the path of Kim's vehicle. Kim testified in his deposition that the traffic light controlling said intersection was green in his favor, that Laracuente attempted to cross against the light and that he did not see Laracuente until he had stepped in front of his car. Kim struck Laracuente with the front passenger side of his vehicle.

Pursuant to Administrative Code §7-201(c)(2), prior written notice is a condition precedent to maintaining an action against the City for damages relating to a street defect (see Katz v. City of New York, 87 NY 2d 241 [1995]; Quinn v. City of New York, 305 AD 2d 570 [2nd Dept 2003]); Campisi v. Bronx Water & Sewer Service, Inc., 1 AD 3d 166 [1st Dept 2003]). Plaintiff must both plead and prove that the City had prior written notice of the condition, otherwise no liability may be imposed upon the municipality (see Estrada v. City of New York, 273 AD 2d 194 [2nd Dept 2000]; Quinn v. City of New York, supra). The only exceptions to the requirement of prior written notice are where the municipality "created the defect or hazard through an affirmative act of negligence" and where it made a special use of the area (see Amabile v. City of Buffalo, 93 NY 2d 471, 474 [1999]). The prior written notice requirement, moreover, applies to any obstructed condition in the street, including fencing (see Seymour v City of New York, 235 AD 2d 470 [2nd Dept 1997]).

The City has proffered sufficient evidence that it did not have prior written notice of the condition. Sherry Johnson-O'Neill,

record searcher for the Department of Transportation, averred in her affidavit in support of the motion that she conducted a search for records of written complaints concerning the roadway at 221-1 Horace Harding Expressway, which is located at the intersection of Horace Harding Expressway westbound and Springfield Boulevard, for the two-year period prior to September 26, 2005 and that the search revealed no records. Moreover, she avers that her search would have revealed all written complaints including any regarding foliage or fencing.

No evidence to the contrary has been proffered by plaintiff in opposition so as to raise an issue of fact as to whether the City had prior written notice. The contention of plaintiff's counsel that the location of O'Neill's search was not the location of the accident is without merit. O'Neill stated that the search encompassed the intersection of Horace Harding Expressway westbound and Springfield Boulevard, which is the location complained of by plaintiff. Counsel's argument that the location of the accident was not the premises 221-1 and, therefore, a wrong search was performed, is disingenuous. The record searcher did not state that she searched said premises. Rather, the location she searched was the roadway at the subject intersection where the premises 221-1 are situated. Counsel for plaintiff does not deny, and provides no evidence, that said address is not at the location of the accident.

Since the City has established that it did not have prior written notice of the condition, "the burden shift[ed] to the plaintiff to demonstrate the applicability of one of the two recognized exceptions to the rule" (Yarborough v City of New York, 10 NY 3d 726 [2008]). There is no issue of special use in this matter. However, plaintiff has proffered sufficient evidence that the City created a dangerous condition through an affirmative act of negligence so as to raise an issue of fact.

As heretofore stated, the prior written notice requirement is obviated where the municipality created the hazardous street or sidewalk condition through an affirmative act of negligence. The "affirmative act of negligence" exception is limited to work that immediately results in the existence of the dangerous condition (see Yarborough v City of New York, 10 NY 3d 726 [2008]; Amabile v City of Buffalo, 93 NY 2d 471 [1999]; Muszynski v City of Buffalo, 29 NY 2d 810 [1971]) as opposed to one where the defect develops over time as a result of normal deterioration or wear and tear (see Muszynski v City of Buffalo, supra; Bielecki v. City of New York, 14 AD 3d 301 [1st Dept 2005]).

Plaintiff alleges that the fence limited drivers' view of pedestrians stepping onto the roadway of Horace Harding from behind

the fence at the southeast corner of Springfield Boulevard and likewise limited the pedestrians' view of approaching traffic on Horace Harding. He also alleges that the foliage growing through the fence also obscured the sight of drivers and pedestrians.

Steven Schneider, a professional engineer, averred in his affidavit annexed to plaintiff's opposition that a dangerous condition was created by the installation of the fence because the small, one-inch, mesh of the fence obstructed the vision of both drivers and pedestrians and the 22-inch clearance between the fence and the roadway was too short, considering that the average person's stride is 30 inches. Among the documents reviewed by him were the photographs of the fence taken on October 25, 2005. He also opines that the foliage growing through the fence also contributed to obscuring Laracuente's and Kim's view.

No evidence was presented by plaintiff that the City planted the foliage or maintained it in such a way as to create a visibility problem. There is no evidence that the foliage did not grow over time to the condition that presented the alleged dangerous condition and, therefore, plaintiff has failed to show that the cause and create exception to the prior written notice requirement for negligence that immediately results in the dangerous condition applies with respect to his allegation that the dangerous condition was caused by the City's failure in maintaining the foliage at the subject location. However, there is sufficient evidence, on this record, to raise a question of fact as to whether the installation of the fence itself created the dangerous condition.

In reply, the City does not contest that part of the affidavit of plaintiff's expert that the type of fence and its placement created a dangerous condition by obscuring the view of drivers and pedestrians. The City merely contends that the portion of the expert's opinion that the City installed the subject fence, since the original fence installed by the New York State Department of Traffic prior to transferring the highway to the City in 1959 was of a different specification, is entirely speculative and, therefore, plaintiff has failed to prove that the City installed, maintained or repaired the fence.

Even were the Court to disregard as speculative that portion of Schneider's opinion that the City installed the subject fence, the record on this motion raises a question of fact as to whether the City installed the subject fence. The City's witness, Anthony Camera, employed as supervisor of highway repairs for the New York City Department of Traffic (NYCDOT), testified in his deposition (the transcript of which is annexed to the City's moving papers)

that he supervised the maintenance of chain-link fences in the subject area. He explained that if a fence is struck by a vehicle and it "was open or pushed down", the NYCDOT removes and replaces it. When asked, "Have you ever removed or are you aware of removal and replacement of the fencing around the westbound service road of the Horace Harding Expressway at Springfield Boulevard?", he responded, "Yes." Asked to specify when he did so, he replied, "I believe we did one last year." He could not recall exactly when before that time he replaced the fence. However, when queried, "But there were other times prior to that, correct?", he responded, "Correct." He further stated that the fencing had been replaced because it had been "compromised", meaning, "it was down or open." Therefore, the evidence presented by the City in its own moving papers, through its own witness, raises an issue of fact as to whether the City installed the fence in question and, therefore, whether it created a dangerous condition through an affirmative act of negligence.

Without merit is the City's argument that the cause and create exception to the prior written notice requirement is not applicable under the facts of this case, even if the City replaced the fencing, because the alleged defect or dangerous condition was not immediately apparent. Counsel for the City misrepresents the holding in Yarborough v City of New York (supra) when he states in his reply affirmation, "The Yarborough standard does not turn on whether the defect was *created* immediately. Rather, the standard for determining the applicability of this exception to written notice is whether the defect was *immediately apparent* to those doing the work." On the contrary, the Court of Appeals in Yarborough stated that the exception "requires that the affirmative negligence of the City immediately result in the existence of a dangerous condition" (10 NY 3d at 728). In that case, the plaintiff who tripped and fell in a pothole in the street contended that the cause and create exception to the prior written notice requirement applied because the City negligently performed roadway repair which allowed a pothole eventually to form. The Court of Appeals, citing Oboler and Bielecki (supra) held that since the dangerous condition – the pothole – developed over time through environmental wear and tear, the exception did not apply. Nowhere in Yarborough, Oboler or Bielecki is there a requirement that the work that itself constitutes the dangerous condition must also be recognized as dangerous by the road repair crew that created it in order for the exception to apply. Therefore, since there are questions of fact as to whether the City installed the fencing and whether it created a dangerous condition by said installation, the motion must be denied.

Finally, inasmuch as there are questions of fact, on this record, as to whether the cause and create exception to the prior written notice requirement applies under the facts of this case, the City is also not entitled to summary judgment at this time upon

the ground that plaintiff failed to plead compliance with the prior written notice requirement of §7-201(c).

Accordingly, the motion is denied.

Dated: June 28, 2011

KEVIN J. KERRIGAN, J.S.C.