Fornuto v County of Nassau
2015 NY Slip Op 32738(U)
April 29, 2015
Supreme Court, Nassau County
Docket Number: 10495-2010
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

TRIAL/IAS, PART 40
NASSAU COUNTY

PAUL FORNUTO and ELVIRA FORNUTO,

Plaintiff(s),

Index No. 10495-2010

-against-

COUNTY OF NASSAU, TOWN OF HEMPSTEAD, NASSAU COUNTY DEPARTMENT OF RECREATION AND PARKS, and EISENHOWER MEMORIAL PARK,

Defendant(s).

Motion Seq. No.: 002
Motion Submitted: 3/4/15

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Motion by defendants County of Nassau, Town of Hempstead, Nassau County Department of Recreation & Parks and Eisenhower Memorial Park (hereinafter referred to as "the County") for an order pursuant to CPLR 3212 granting the County summary judgment dismissing the complaint as against it is denied.

This is an action to recover personal injuries allegedly sustained by plaintiff on April 25, 2009 at approximately 12:30 p.m. At the time of the accident, plaintiff was

riding his bicycle on an asphalt bicycle fitness path/trail in Eisenhower Park. Plaintiff alleges, *inter alia*, that he was caused to fall as a result of the "obstructed, cracked, uneven, raised, depressed, missing and/or deteriorated roadway and roadway debris." (¶ 3 of Notice of Claim and ¶ 4 of Bill of Particulars).

Plaintiffs are essentially claiming that the County was negligent because pebbles on the road remained after pothole repair.

Procedural History

On July 22, 2009, plaintiffs served a Notice of Claim on the County. Plaintiffs then served a summons and complaint upon the County on June 1, 2010. On June 8, 2010, the County served a verified answer. On December 21, 2011, plaintiffs served a verified bill of particulars. On September 24, 2012, plaintiffs served a supplemental bill of particulars. On or about September 3, 2014, plaintiffs served a further supplemental verified bill of particulars ("further supplemental bill") without seeking court permission pursuant to CPLR 3042(b). The County argues that this further supplemental bill which alleges new theories of liability was served after the certificate of readiness in this matter was filed. By letter dated October 30, 2014, the County's attorney objected to the further supplemental bill of particulars and expert response. Plaintiffs assert that the further supplemental bill and expert response were timely served prior to the note of issue which was filed on September 5, 2014.

CPLR 3042(b) provides that: "[i]n any action or proceeding in a court in which a

note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue."

CPLR 3043(b) states that "[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed. . . ."

Applying these principles to the case at bar, plaintiffs were only permitted to serve an initial bill of particulars and then only one amended or supplemental bill of particulars without leave of court. A further supplemental bill of particulars which asserts new theories of liability could then only be served provided prior court permission was sought by motion and granted.

It is undisputed that plaintiffs did not seek court permission to serve a further supplemental bill of particulars. Accordingly, to the extent that plaintiff has alleged new theories of liability in the further supplemental bill of particulars, this Court need not consider same.

The County seeks summary dismissal of the complaint on the grounds that: (a) "plaintiff assumed the risk of any defects in the surface of the bicycle path on which he was riding, and the alleged defective condition about which plaintiff complains was open and obvious and as safe as it appeared to be; (b) there is no definitive evidence as to what, if anything, was the proximate cause of plaintiff Paul Fornuto's injuries; and (c) the

defendant County did not have actual or constructive notice of the alleged defect." (¶ 3 of Affirmation of Barry M. Dennis).

In support thereof, the County relies upon, *inter alia*, the notice of claim; the summons and complaint; the answer; the bill and supplemental bill of particulars; various photographs; the transcripts of testimony of plaintiff's General Municipal Law § 50-h hearing and examination before trial; the transcript of testimony of Anthony DiPrima, a Highway Maintenance Supervisor with the Department of Public Works; the transcript of testimony of Thomas Annas, Highway Maintenance Assistant with the Department of Public Works; the transcript of testimony of Mitchell Brumberg, a groundskeeper in the maintenance division of the Parks Department; and the transcript of testimony of Tom Rottkamp, Supervisor in the Public Works Department.

Plaintiff opposes the action.

In addition to the foregoing documents, plaintiffs rely upon, *inter alia*: an affidavit of plaintiff Paul Fornuto; an expert affidavit of Richard Balgowan, a licensed civil engineer; operation control logs regarding last pothole repair work; the note of issue; an order of this Court dated April 22, 2014 regarding discovery; and an expert response.

In ¶¶ 6 & 7 of his affidavit, Mr. Fornuto states, in pertinent part, as follows:

> "My accident was caused because my bicycle lost traction when it encountered the oily stones/pebbles which were dislodged onto the roadway as a result of the negligent repair work done by the defendants. The defendants and their employees created the dangerous condition that caused my accident when they negligently repaired a previously repaired pothole. The fact that they had at least

once before repaired this pothole, is a clear indication that they knew a defect existed in that area prior to my accident. Their poor repair job caused the loose oily debris/stones/pebbles to appear and remain at the accident location. . . . Further, the claim that I rode my bicycle earlier without incident in this same location is false. On the first ride, I did not go to the right of the path.

* * *

My attorney also advised that the maintenance records showed pothole repairs being done in Eisenhower Park up and until April 15, 2009, 10 days prior to my fall. She further advised that it was not uncommon for employees to repair potholes on their own initiative and not inform their superiors such that there could be a record of the repair job. With this information and based on the fact that there were these loose oily pebbles/stones surrounding the repaired pothole at a 4/5 feet radius, I do believe that the defendants repaired this previously repaired pothole a short time period if not within days prior to my fall."

In his affidavit, Mr. Balgowan states, in relevant part, that:

"It is my opinion within a reasonable degree of engineering and accident reconstruction certainty that the subject pothole repair was conducted by County employees within a relatively short time frame prior to the plaintiff's accident and was more likely one of the repairs done between April 3 to 15, 2009.

It is therefore my professional opinion with a reasonable degree of engineering certainty, based upon the various testimonies and documents reviewed that the defendants herein were negligent and departed from accepted standards of care in their repair of a previously repaired pothole; that said repair was negligently done such that a dangerous and hazardous condition existed particularly to two wheeled vehicles whereby the aggregate was caused to dislodge from the improperly repaired pothole resulting in the reduction in skid resistance on the pavement. It is further my opinion within a reasonable degree of engineering and accident reconstruction certainty that the utilization of the throw and go method was improper as said method resulted in repair failure causing repair aggregate to dislodge

> onto adjacent pavement. The defendants further failed to post warnings and/or signs to alert park users of the existence of the dangerous condition which was a further departure. These departures were the proximate cause of the plaintiff's bicycle experiencing a loss of skid resistance on the pavement, being violently thrown from the bicycle and sustaining the resulting injuries."

At his examination before trial, plaintiff testified that he was a New York City Firefighter for 25 years and that he retired from the department after 25 years because he broke his fibula while going down stairs. Plaintiff further testified that he retired when he was 51 and that he is currently receiving a disability pension in the amount of $144,000 per year tax free.

Plaintiff further testified that he has bicycled in the park for about 20 years. From 2006 to the date of the accident, he rode a bicycle almost every day depending on the weather and varied the locations. Specifically, he rode his bicycle in Eisenhower Park over 200 times prior to the date of the accident.

"Plaintiff further testified that the pathways consisted of asphalt, that he recalls riding on those pathways that day, and that something happened to him as he was riding that day. He testified that the was riding his bicycle on a flat path adjacent to a swimming pool facility at Eisenhower Park and there is a path that goes all the way around, that as he was riding on the path, there were some people coming towards him, maybe three or four people, they were walking abreast and they were taking up a lot of roadway where he wanted to go, that they were walking towards him and he was riding his bicycle towards them, and he had already gone around the path a couple of times, that he wanted to go left

by the amphitheater but they were blocking his path, that he had to avoid hitting the people, that he went around them, and as he went around them his bicycle slid and he fell on his left side, whereupon he fell off the bicycle.

He further testified that he tried to compose himself and he was not able to get up and he noticed that his shirt was covered with tar ridden small pebbles. He stated that looked around and that he was laying in a freshly repaired pothole and for four or five feet in radius of the pothole were those stones. . . ." (¶¶ 20 & 21 of Barry M. Dennis' Affirmation).

Mr. DiPrima testified that he is the "records keeper" and that there were no prior complaints and that maintenance work had been done on the roads in the park during the period of January 2009 to April 25, 2009.

Mr. Annas testified "that between the years 2007 and 2010, he was a 'highway maintenance supervisor' and Eisenhower Park was one of the areas that fell within his supervision concerning roadway maintenance, that roadway maintenance in Eisenhower Park was within the scope of his responsibility from 2009 to 2010, that he has repaired potholes, that from his records he cannot state with certainty whether any potholes which were repaired between March 6, 2009 and April 15, 2009 were located at the site of the incident herein, that based upon his records, the last date of pothole repair work performed at Eisenhower Park prior to the date of the incident was April 15, 2009, and that it was not 'typical' to use a 'barricade' to block off areas in which a pothole repair

had been made." (*Id.* at ¶ 28).

Mr. Rottkamp testified that on April 15, 2009, he personally repaved three potholes at Eisenhower Park but he cannot state the specific location where the repairs were made.

On a motion for summary judgment, the moving party has the burden to establish "a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Voss v Netherlands Ins. Co.*, 22 NY3d 728 [2014], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party meets this burden, the burden then shifts to the non-moving party to "establish the existence of material issues of fact which require a trial of the action" (*Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 852 [1985]). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Giraldo v Twins Ambulette Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]). Further, "[t]he courts function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)' " (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept

2009]).

Furthermore, "[n]egligence cases by their very nature do not usually lend themselves to summary judgment since often, even if all parties are in agreement as to the underlying facts the very question of negligence is itself a question for jury determination" (*Ugarriza v Schmeider*, 46 NY2d 471 [1979]).

Assumption of Risk

A person who chooses to participate in an athletic or recreational activity " 'consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation' " (*Custodi v Town of Ambert*, 20 NY3d 83, 88 [2012], quoting *Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *Simon v Hamlet Windwatch Development, LLC*, 120 AD3d 657 [2d Dept 2014]).

"Risks inherent in sporting activity are those which are known, apparent, natural or reasonably foreseeable consequence of the participation" (*Cotty v Town of Southampton*, 64 AD3d 251 [2d Dept 2009]; *see Morgan v State of New York, supra* at 484; *Turcotte v Fell*, 68 NY2d 432, 439 [1986]).

Indeed, "[i]t cannot be said, as a matter of law, that merely by choosing to operate a bicycle on a paved public roadway, or by engaging in some other form of leisure activity or exercise such as walking, jogging or roller skating on a paved public roadway, a plaintiff consents to the negligent maintenance of such roadways by a municipality or a contractor" (*Cotty v Town of Southampton, supra*).

Even though the plaintiff was an avid bicyclist, the County has failed to make a *prima facie* showing that the assumption of risk doctrine is applicable here.

No Prior Written Notice

Based upon plaintiff's own deposition testimony and the testimony of Anthony DiPrima, the County submits that it did not receive prior written notice of the defective condition as required by Nassau County Administrative Code § 12.0.

"Where, as here, a municipality has enacted a prior written notice law, it may not be subject to liability for injuries caused by a dangerous roadway condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (*Wald v City of New York*, 115 AD3d 939 [2d Dept 2014]; *Phillips v City of New York*, 107 AD3d 774, [2d Dept 2013]; *see Martinez v City of New York*, 105 AD3d 1013, 1014 [2d Dept 2013]). "The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality" (*Wald v City of New York, supra; Long v City at Mount Vernon*, 107 AD3d 765 [2d Dept 2013]; *Oboler v City of New York*, 8 NY3d 888, 889-890 [2007]; *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008 [2d Dept 2012]). In addition, "the affirmative negligence exception is limited to work by the [County] that immediately results in the existence of a dangerous condition" (*Wald v City of New York, supra*, quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2007],

quoting *Oboler v City of New York, supra* at 889).

Furthermore, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (*Amabile v City of Buffalo,* 93 NY2d 471, 474 [1998]; *Caramancia v City of New Rochelle*, 268 AD2d 496 [2d Dept 2000]). In order for a municipality to be held liable for a condition where no prior written notice was given, a plaintiff must set forth competent evidence that the municipality affirmatively created the alleged offending condition in issue (*see Walker v Incorporated Village of Northport*, 304 AD2d 823 [2d Dept 2003]; *Monteleone v Incorporated Village of Floral Park*, 74 NY2d 917 [1989]).

Here, the County established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it did not receive prior written notice of the alleged defective condition, and that it did not create the dangerous condition through an affirmative act of negligence (*Keating v Town of Oyster Bay,* 111 AD3d 604 [2d Dept 2013]; *Masotto v Village of Lindenhurst*, 100 AD3d 718 [2d Dept 2012]). When a municipal employee states by affidavit that a thorough search was conducted and that no prior written notice of the defect was found, there is *a prima facie* showing of entitlement to judgment as a matter of law (*Dobbs v City of Peekskill*, 178 AD2d 577 [2d Dept 1994]).

Viewing the evidence in the light most favorable to plaintiff (*Taylor v Rochdale*, 60 AD3d 930 [2d Dept 2008]; *Fundamental Portfolio Advisers, Inc. v Tocqueville Asset Mgt.*, L.P., 7 NY3d 96 [2006]), plaintiff has raised an issue of fact as to whether the

County created the allegedly defective condition. Plaintiff submits his own affidavit and an affidavit of Mr. Balgowan, a licensed engineer whose opinion, based on a reasonable degree of engineering certainty, states that the County negligently repaired the pothole which caused plaintiff's fall.

Accordingly, it is hereby

ORDERED, that the County's motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: April 29, 2015
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE