

Gutierrez-Contreras v Village of Port Chester

2017 NY Slip Op 33462(U)

September 27, 2017

Supreme Court, Westchester County

Docket Number: Index No. 51972/2015

Judge: Terry Jane Ruderman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
MARIA MARTHA GUTIERREZ-CONTRERAS,

Plaintiff,

-against-

VILLAGE OF PORT CHESTER, TOWN OF RYE and
the COUNTY OF WESTCHESTER,

Defendants
-----X

RUDERMAN, J.

DECISION

Motion Sequence No. 2

Index No. 51972/2015

The following papers were considered in connection with the motion of defendants Village of Port Chester and Town of Rye for summary judgment dismissing the complaint pursuant to CPLR 3212:

Papers	Numbered
Notice of motion, affirmation, exhibits A - N and Memorandum of Law	1
Affirmation in opposition and Memorandum of Law	2
Reply affirmation	3

Plaintiff brought this personal injury action based on her trip and fall accident on February 16, 2014 at approximately 9:40 a.m. on a pothole in the crosswalk she was crossing on South Main Street at the intersection of Westchester Avenue in Port Chester, New York.

Initially, plaintiff concedes that the Town of Rye is entitled to dismissal because it does not own, maintain or control the site of the accident. In addition, this action has already been discontinued as against Westchester County by stipulation dated September 29, 2016 and filed October 4, 2016.

The only remaining defendant, the Village of Port Chester, contends that it is entitled to summary judgment dismissing the complaint against it because it did not have prior written notice of the alleged defect. Plaintiff does not dispute this assertion; rather, she contends that an exception to the written notice requirement applies.

Analysis

“Where [a municipality] establishes that it lacked prior written notice under the Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule – that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality” (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Plaintiff does not claim special use; rather, she relies on the exception that “the municipality affirmatively created the defect through an act of negligence” (*id.*).

“[T]he affirmative negligence exception is limited to work by the [municipality] that immediately results in the existence of a dangerous condition” (*id.*). “A negligent repair of the defective condition is insufficient to establish that the municipality affirmatively created the defect. To fall within the exception, the repair must immediately result in a dangerous condition” (*Wilson v Incorporated Vil. of Hempstead*, 120 AD3d 665, 666 [2d Dept 2014]).

To satisfy her burden of establishing that the Village of Port Chester affirmatively created the pothole, plaintiff relies entirely on the deposition testimony of Rocky Morabito, General Foreman for Port Chester. Specifically, plaintiff points to portions of Morabito’s testimony where he acknowledged his familiarity with that particular pothole, and his explanation of Village procedure. According to Morabito, there is a village employee on every street of the village on every day and if they see a pothole they call his office, where a work

order is generated, after which a worker is sent to repair the pothole, typically within a 24-hour period. He explained that potholes could develop due to wear-and-tear, or due to water and ice. He also explained that in the winter, if they cannot use hot blacktop because the plant is closed, they have to use cold patch, which “comes right out.”

In *Yarborough*, the Court rejected the plaintiff’s claim the City had negligently created the complained-of pothole, despite the opinion of the plaintiff’s expert engineer who said that “patching repairs to the roadway prior to the accident were negligently undertaken” (*id.*). “Even assuming the City performed the negligent pothole repair, plaintiff’s expert found that the deterioration of the asphalt patch – the condition that caused plaintiff’s injury – developed over time with environmental wear and tear” (*id.*).

Similarly, in *Wilson v Hempstead*, the plaintiff failed to make the necessary showing to create an issue of fact as to whether the municipality’s work immediately resulted in the defect. One of the plaintiff’s witnesses in *Wilson* had testified that “the patches quickly fell apart,” and the second witness claimed that the pothole reappeared only one week after the Village repaired it. This evidence was insufficient to establish that the municipality negligently created an immediate defect by its repairs: “the sworn statements of the plaintiff’s own witnesses indicated that the defect was not immediately apparent after repairs were made, and that when the defect thereafter reappeared, the defect was ‘in the same condition’” (*Wilson*, 120 AD3d at 667).

Morabito’s deposition testimony on which plaintiff relies to establish Port Chester’s affirmative creation of the defect fails to satisfy plaintiff’s burden here, because it did not establish that negligence by the Village immediately resulted in the creation of a dangerous condition. The portion of his testimony in which he said that cold patch “comes right out” does not, without more, establish the affirmative creation of a defect through an act of negligence.

Notably, he also explained that the cold patch would serve as a short-term solution. Therefore, Morabito's testimony can only be understood to indicate that sometimes in the winter, the only form of pothole repair immediately available to the Village is one that will be relatively short-lived and will need to be repeated; it does not mean that a defect is thereby immediately created. The temporary nature of a repair does not render the repair negligent, and if it does not make the condition any worse it does not amount to an affirmative act of negligence (*see Arzeno v City of New York*, 528 [1st Dept 2015], *lv denied*, 26 NY3d 914 [2015]).

Based upon the foregoing, it is hereby,

ORDERED that the motion by defendants Village of Port Chester and Town of Rye for summary judgment dismissing the complaint as against them is granted, the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 27, 2017


HON. TERRY JANE RUDERMAN, J.S.C.