SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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KENNETH ROBERTS,

Plaintiff,

Index No. 159177/2014
[Motion Sequence No. 002]

- against -

THE CITY OF NEW YORK and N.Y.C. DEPARTMENT OF PARKS AND RECREATION,

Defendants.

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ALEXANDER M. TISCH, J.:

On October 2, 2013, plaintiff's right leg collided with a three-foot tall bollard while he was riding his bicycle on the Hudson River Greenway in Riverside Park, in the City of New York. Plaintiff claims that as a result, he sustained serious personal injuries to his right leg and ankle, requiring surgery.

Plaintiff initiated this action against the City of New York and the New York City Department of Parks and Recreation ("City"), alleging that the accident was caused by their negligent placement or installation of the bollard. A photograph annexed to the complaint as an exhibit depicts the area where the accident occurred. It shows a walking/bike path consisting of two lanes. In the center of each lane stands a pole/bollard with striped yellow markings, and yellow diamond markings on the ground surrounding it.

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the grounds that (1) they did not have prior written notice of the allegedly dangerous positioning of the bollard, (2) the bollard was open and obvious, readily observable, and not inherently dangerous, and (3) the positioning of the bollard was not a proximate cause of the accident, rather plaintiff's inattention was the sole proximate cause. In support of their

motion, defendants submit plaintiff's deposition testimony (Plaintiff's EBT Transcript, Defendants' Exhibit D). Plaintiff testified that on the morning of the accident he left his apartment on West 110th Street in Manhattan at approximately 8 a.m., and headed towards an appointment on his bicycle (*id.* at 8). He rode his bicycle to the same location several times before, using the same route (*id.* at 9-10).

Plaintiff entered Riverside Park at 103rd Street (*id.* at 9). As he rode southbound along the Hudson River Greenway, he came upon a single-file line of three bicycles and "fell in stride with them" (*id.* at 15). In that section of the Greenway, there are two lanes of traffic, one traveling north and the other traveling south (*id.* at 16). The lanes are shared by pedestrians and bicyclists (*id.* at 17). At the time, there were "a few bikers and pedestrians going both ways" (*id.* at 14).

Plaintiff was traveling in the line of riders in the right-side of the southbound lane, when "for no particular reason," he pulled into the middle of the southbound lane (*id.* at 17-18). As soon as he pulled out, he saw a "pole" (*id.* at 18). He swerved to the left to try to avoid the pole, but his right ankle caught on the "pole" (*id.*). He fell to the pavement, hitting his right knee and ended up on his back on the pavement (*id.*).

In further support of their motion, defendants submit the deposition testimony of Parks Supervisors Nicole Brewer and Larry Durante. Brewer testified that the "pole" involved in the accident is referred to as a "bollard" (Brewer's EBT Transcript, Defendants' Exhibit E, at 12). Brewer and Durante testified that the bollards are used to prevent vehicles from driving on the Greenway (*id.*; Durante's EBT Transcript, Defendants' Exhibit G, at 27). Brewer was unaware of any other incidents in which a bicyclist had been injured by a bollard (Brewer's EBT Transcript, Defendants' Exhibit E, at 14, 35-36). Durante, also testified that he had no knowledge

of any other incidents involving the bollards (Durante's EBT Transcript, Defendants' Exhibit G, at 40).

In support of their motion, defendants also submit the deposition testimony of Parks Team Leader Desmond Spillane, who is responsible for managing capitally funded projects (Spillane EBT Transcript, Defendants' Exhibit J, at 16). Spillane testified that the bollards at issue were installed by Lomma Construction pursuant to a change order on the Hudson River Greenway Project to keep motor vehicles out of the Greenway (*id.* at 23, 27-28, 49). The Hudson River Greenway Project began in or around 2007 and ended in approximately 2010 (*id.* at 23-24). Spillane testified that the bollards are made of steel (*id.* at 29). They are not flexible. A regular passenger vehicle could drive over a flexible bollard (*id.* at 50).

In further support of their motion, defendants submit their "Response to the Case Scheduling Order," which includes a list of accident and incident reports for the two years prior to the accident, indicating that there were no reports involving the bollards on the Greenway (Defendants' Exhibit G). The records also do not include any complaints about an improperly installed bollard (*id.*).

In opposition to defendants' motion, plaintiff contends that defendants may not rely on the prior written notice requirement in seeking to dismiss the complaint because the requirement does not apply where a municipality creates the defect or hazard through an affirmative act of negligence. Plaintiff asserts that in this case, defendants acted negligently when they affirmatively created an inherently dangerous condition that violated applicable industry standards.

In support, plaintiff submits the affidavit of Eric Wodecki, who, on September 28, 2014,

took photographs and measurements at the scene of the accident. He states, among other things, that the bollards at issue measured 35-7/8 and 36-5/8 inches in height (Wodecki Affidavit, at ¶ 5). He also took measurements of their circumference as well the distance between the poles and the width of the lanes (*id.*).

Plaintiff also submits the affidavit of safety expert Dr. Dennis Andrews, wherein Dr. Andrews opines, based upon, among other things, Wodecki's photographs and measurements, the deposition testimony summarized above, and the pleadings, that the path in the area of the accident did not conform with the standards set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways ("MUTCD"). Andrews states that MUTCD standards specify that bicycle path warning signs should be appropriately placed indicating that the path narrows or is obstructed and that one pole, instead of two poles would be sufficient, and safer, to accomplish the purpose of keeping cars off the path. He further states that MUTCD standards specify that lane markings should precede the obstruction by a distance sufficient to warn oncoming traffic of its presence, whereas there were no such markings shown in the photographs of the area leading to the bollard with which plaintiff collided. Dr. Andrews opines that an appropriate set-up would have been a single pole, with a yellow centerline leading directly to the diamond shape on the path surface, for a distance sufficient to warn oncoming traffic in either direction that there was an obstruction ahead, and to go around it or avoid it. Further, taper warning marking lines should have been used to alert path users that a hazard was ahead (Andrews Affidavit, at ¶¶ 8-11).

Dr. Andrews also opines that the placement of the bollards failed to conform with standards set forth by the American Association of State Highway and Transportation Officials ("ASSHTO"). These standards provide:

> "The routine use of bollards and other similar barriers to restrict motor vehicle traffic is discouraged, unless there is a known history of use by unauthorized motor vehicles. Barriers such as bollards, fences, or other similar devices create permanent fixed object hazards to path users. Bollards on pathways are often struck by cyclists and other path users and can cause serious injury. Approaching riders may shield even a conspicuous bollard from a following rider's view until at one point where he lacks sufficient time to react"

(Andrews' Affidavit, at ¶ 16). The standards further state that where the need for bollards or other barriers can be justified despite the hazard posed to cyclists, certain measures should be taken, including that the bollards should be a minimum height of 40 inches and a minimum diameter of 4 inches (*id.*). Further, "use of one bollard in the center of the path is preferred" and where more than one is used, an odd number of posts at 6-foot spacing is desirable (*id.*).

Dr. Andrews states that the foregoing guidelines were in effect at the time the bollards were installed and the path was constructed (*id.* at 17). He concludes that defendants' "failure to adhere to these standards is a failure to construct and keep the path in a reasonable safe condition" and that within a reasonable degree of scientific and safety certainty, the area where plaintiff was injured "was in violation of the applicable standards and best practices and that it constituted an unsafe and hazardous condition" (*id.*).

In opposition to defendants' motion, plaintiff also submits his own affidavit, wherein he states: "For more than ½ mile, while riding up towards the pole and immediately prior to my accident, my view of the pole was hidden by bike-riders riding in front and ahead of me. When the pole revealed itself, it was too late" (Plaintiff's Affidavit, at ¶ 4). He did not have sufficient time to maneuver around the pole. He further states that the only pavement marking present was a diamond shape on the ground around the pole, which could not be seen from a distance. He did not see the diamond markings prior to the accident and there were no flags, signs or other

elevated indication of the pole's presence (*id.* at ¶ 5).

In reply, defendants contend that they are entitled to rely on the prior written notice requirement because the affirmative negligence exception to that requirement only applies where the action of the municipality immediately results in the existence of a dangerous condition, which was not the case here. Defendants also assert that they are entitled to summary judgment dismissing the complaint inasmuch as the bollard was plainly observable, open and obvious, and as a matter of law, not inherently dangerous. Defendants maintain that ASSHTO standards do not impose a legal duty or mandate on the City and therefore the City was not negligent when it installed the bollard in that location for the purposes of restricting vehicles from traversing the path. Further, defendants contend that the ultimate opinion of plaintiff's expert is based upon speculation and unsupported by any evidentiary foundation. For the reasons that follow, defendants' motion is granted.

DISCUSSION

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The proponent of the "motion must make 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a

trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see Zuckerman v City of New York*, 49 NY2d at 562).

> "Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street or sidewalk unless it has received written notice of the defect, or an exception to the written notice requirement applies. Recognized exceptions to the prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it"

(*Toscano v Town of Huntington*, 156 AD3d 837, 838 [2d Dept 2017][internal quotation marks and citations omitted]; *see* Administrative Code of the City of New York § 7–201 [c][2]). In this context, the prima facie showing a defendant is required to make is "governed by the allegations of liability made by the plaintiff[ ] in the pleadings and bill of particulars" (156 AD3d at 838 [quotation marks and citations omitted]).

Here, plaintiff alleges in his complaint and bill of particulars that defendants created a hazardous condition by their affirmative negligent act of installing the bollard in the middle of the bike lane. Therefore, to establish their prima facie entitlement to judgment as a matter of law on the ground that they did not have prior written notice of the condition, defendants were required to establish, prima facie, both that the they did not receive prior written notice of the condition and that they did not create the condition through an affirmative act of negligence (*see Larenas v Incorporated Vil. of Garden City*, 143 AD3d 777, 778 [2d Dept 2016]).

Defendants established, prima facie, that they lacked prior written notice of the alleged dangerous condition. As to the requirement that they establish, prima facie, that they did not create the condition through an affirmative act of negligence, defendants assert that the "affirmative act of negligence" exception applies only where the action of the municipality "*immediately results* in the existence of a dangerous condition" (*Yarborough v City of New York*,

10 NY3d 726 728 [2008][emphasis added][internal quotation marks and citations omitted]). Defendants argue that since plaintiff's accident occurred seven years after the installation of the bollard, the installation of the bollard did not create an *immediately* hazardous condition. Therefore, the exception does not apply. This argument lacks merit because assuming the placement of the bollard posed a danger, the danger would have been created immediately upon installation. Moreover, the "immediacy test" upon which defendants rely is applicable to "pothole cases" (*San Marco v Village/Town of Mount Kisco*, 16 NY3d 111, 116 [2010]). Defendants cite no authority indicating that the test should be extended to a case involving bollards installed on walking/bike paths.

Nevertheless, defendants established their entitlement to summary judgment dismissing the complaint on the ground that the condition complained of was both open and obvious and, as a matter of law, not inherently dangerous.

> "Although property owners have a duty to maintain their property in a reasonably safe condition, and to warn of latent hazards of which they are aware . . . , they have no duty to protect or warn, and a court is not precluded from granting summary judgment, where the condition complained of was both open and obvious and, as a matter of law, not inherently dangerous . . . . In such circumstances, the condition which caused the accident cannot fairly be attributed to any negligent maintenance of the property"

(*Boyd v New York City Hous. Auth.*, 105 AD3d 542, 542-543 [1st Dept 2013][internal quotation marks and citations omitted]). "[P]roof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence" (*Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]). However, a court is not "precluded from granting summary judgment to a landowner on the ground that the condition complained of by the

plaintiff was both open and obvious *and, as a matter of law, was not inherently dangerous"* (*id.* [emphasis in original]). "While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence" (*Tagle v Jakob*, 97 NY2d 165, 169 [2001] [citations omitted]).

Defendants established, prima facie, that the bollards were open and obvious and not inherently dangerous. The photograph attached to the complaint as "Exhibit A," establishes that the bollards were "plainly observable and did not pose any danger to someone making reasonable use of his or her senses" (*Boyd v New York City Hous. Auth.*, 105 AD3d 542, 543 [1st Dept 2013] [internal quotation marks and citations omitted]). The bollards were more than three-feet tall, covered with striped yellow markings, and there were yellow diamond markings on the ground surrounding them. Plainly visible bollards, placed in a pedestrian/bike path for the purpose of preventing motor vehicles from driving on the path, is not an inherently dangerous condition (*see Puma v City of New York*, 36 AD3d 517, 517 [1st Dept 2007]).

Plaintiff asserts that since the bollard with which he collided was obscured from view by other bike riders, it constituted a "trap for the unwary," and therefore defendants are not entitled to summary judgment (*Mauriello v Port Auth. of N.Y. and N.J.*, 8 AD3d 200, 200 [1st Dept 2004]). However, plaintiff testified that the path was not congested at the time of his accident. He also testified that he rode his bicycle on the same route on prior occasions and even assuming the line of three bicycles in front of plaintiff obscured his view as he approached the bollard with which he collided, the photographs evince that the bollards would have been readily observable

from a distance (*see Villanti v BJ's Wholesale Club, Inc.*, 106 AD3d 556 [1st Dept 2013]).

Further, although "ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards . . . preclude[s] a grant of summary judgment in favor of the defendants" (*Diaz v N.Y. Downtown Hosp.*, 99 NY2d 542, 544 [2002], quoting *Murphy v Conner*, 84 NY2d 969, 972 [1994]; *see Trimarco v Klein*, 56 NY2d 98 [1982]), the expert affidavit offered by plaintiff in this case did not create a triable issue with respect to the existence of an accepted industry practice or standard. Dr. Andrews does not state that the ASSHTO provisions upon which he relies are mandatory in nature. Indeed, AASHTO states that they serve as guidelines rather than mandates (*see AASHTO Guide for the Development of Bicycle Facilities* [1999 Edition]["This guide provides information to help accommodate bicycle traffic in most riding environments. It is not intended to set forth strict standards, but rather, to present sound guidelines that will be valuable in attaining good design sensitive to the needs of both bicyclists and other highway users"]; *AASHTO Guide for the Development of Bicycle Facilities* [2012 Edition]["This guide has been updated from the previous guide published in 1999. . . . The intent of this document is to provide guidance to designers and planners by referencing a recommended range of design values and describing alternative design approaches"]; *see Diaz v New York Downtown Hosp.*, 99 NY2d at 544-545 ["plaintiff's expert affirmation, offered as the sole evidence to defeat the hospital's summary judgment motion, did not create a triable issue with respect to the existence of an accepted industry practice or standard. The guidelines of both professional organizations merely recommend the presence of female staff members for vaginal sonogram procedures; in fact, the materials from the American College of Radiology clearly state that its guidelines 'are not rules'"]; *Capotosto v Roman Catholic Diocese*, 2 AD3d 384, 386 [2d Dept 2003]["The plaintiffs

may not rely on the nonmandatory recommendations and guidelines promulgated by governmental and professional entities to prove" that the use of asphalt or blacktop as a playground surface for touch football is inherently dangerous]).

As to Dr. Andrew's reference to MUTCD standards, he fails to identify the specific provisions of the MUTCD upon which he relies (*see Abraido v 2001 Marcus Ave., LLC*, 126 AD3d 571, 572 [1st Dept 2015] ["affidavit of plaintiff's expert was vague and conclusory, and thus insufficient to raise a triable issue, as it failed to reference specific, applicable safety standards or practices in support of his conclusions"]; *Thornberg v Town of Islip*, 127 AD3d 1162, 1163 [2d Dept 2015]["plaintiff's expert . . . failed to identify any specific industry standard upon which he relied in concluding that the Town was negligent"]); *Samuels v Lee*, 2016 NY Slip Op 31023[U] ,*8 [Sup Ct, NY County 2016][Heitler, J.][finding expert's "general reference to the American National Standards Institute to be insufficient as he fails to identify the specific code provision upon which he relies in his analysis"], *affd* 160 AD3d 539). Therefore, the affidavit of Dr. Andrews was insufficient to raise a triable issue of fact in response to the defendants' establishment of entitlement to judgment as a matter of law.

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: October 31, 2018

ENTER:

Alexander M. Tisch A.J.S.C.

HON. ALEXANDER M. TISCH

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