Cisek v Town of N. Hempstead
2018 NY Slip Op 34407(U)
October 15, 2018
Supreme Court, Nassau County
Docket Number: Index No. 606948/2015
Judge: Karen V. Murphy

Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

DANIELLE CISEK,

Plaintiff,

-against-

TOWN OF NORTH HEMPSTEAD, TOWN OF NORTH HEMPSTEAD DEPARTMENT OF PUBLIC WORKS-HIGHWAYS DEPARTMENT, COUNTY OF NASSAU and COUNTY OF NASSAU-DEPARTMENT OF PUBLIC WORKS,

Defendants.

Index No. 606948/2015

Motion Submitted: 08/17/18
Motion Sequence: 003 MG

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Defendants Town of North Hempstead and Town of North Hempstead Department of Public Works-Highway Department (the Town) move this Court for an Order granting summary judgment in their favor and dismissing the complaint as alleged against them. Plaintiff opposes the requested relief.[1]

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v Pomeroy,*** 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v Brite***

[1] By Short Form Order dated April 6, 2015, this Court granted the County of Nassau's motion to dismiss the complaint against all the named County defendants, as well as the Town's cross-claim against the County.

Ideas, LLC, 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Center***, 64 NY2d 851 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]).

A municipality that has enacted a prior written notice statute may not be subjected to liability for personal injuries resulting from a defect absent the required written notice, unless an exception to that requirement applies (***Forbes v. City of New York***, 85 AD3d 1106 [2d Dept 2011]). Actual or constructive notice of an allegedly defective condition does not satisfy the prior written notice requirement (***Simon v. Incorporated Village of Lynbrook***, 116 AD3d 692 [2d Dept 2014]).

It is undisputed that the Town has enacted a prior written notice statute (Town of North Hempstead Code § 26-1).

"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" (***Miller v. Village of East Hampton***, 98 AD3d 1007, 1008 [2d Dept 2012]; *see also* ***Masotto v. Village of Lindenhurst***, 100 AD3d 718 [2d Dept 2012]).[2] Moreover, "the affirmative negligence exception to the notice requirement [is] limited to work by the [municipality] that immediately results in the existence of a dangerous condition" (***Bielecki v. City of New York***, 14 AD3d 301 [1st Dept 2005]; *see also* ***Yarborough v. City of New York***, 10 NY3d 726 [2008]; ***Oboler v. City of New York***, 8 NY3d 888 [2007]).

The Court issued a trial Certification Order in this action on December 20, 2017. Plaintiff filed her Note of Issue on February 15, 2018. The instant motion was made on May 16, 2018; therefore, it is timely.

The Town contends that it is entitled to summary judgment dismissal of the complaint because it did not receive prior written notice of the claimed defective roadway condition, and that it did not create the condition. Anticipating that plaintiff will claim that telephone calls received through a "311" line constitute prior written notice, the Town also argues that calls received through such a call system, even if reduced to writing, do not constitute prior written notice required by statute (***Tortorici v. City of New York***, 131 AD3d 959 [2d Dept 2015]).

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[2] Plaintiff does not allege a special use of the subject roadway.

It is alleged that on September 3, 2014 plaintiff tripped and fell in the crosswalk located on Orchard Street, at its intersection with Plandome Road, Manhasset, New York, because the roadway at that location was cracked, broken, misaligned, raised, uneven, depressed and had a hole in it.

In support of its motion, the Town submits, *inter alia*, the pleadings, the General Municipal Law hearing (50-h hearing) and deposition testimony of the plaintiff, the December 19, 2017 deposition testimony of the Town's highway construction supervisor, the affidavits of the Town's acting superintendent of highways and Town Clerk, and the Town's service request summary reports.

Plaintiff testified that she stepped into a pothole with her right foot as she was crossing Orchard Street. Her right ankle twisted, and she fell to the ground sustaining various physical injuries. Plaintiff was somewhat familiar with Orchard Street as she testified that she frequented that location approximately once every one or two months. Plaintiff did not notice the pothole when she initially crossed the street on the date of the incident. She did not look at the crosswalk on her way to the other side of the street. On her way back to her car from the bakery, she crossed the same street, but stepped into the pothole when she was approximately three feet from the sidewalk. According to her testimony, "I was looking ahead. And I felt my foot go into a pothole. My ankle twisted out and within a split second I crashed down to the ground." Plaintiff described the pothole as being approximately one foot long, six inches wide and three inches deep. As plaintiff waited for assistance, she did not notice any other potholes or cracks in that intersection.

Plaintiff testified that she never made any complaints, written or otherwise, to the Town about the subject pothole prior to the incident, and she did not know anyone who had made a complaint to the Town in writing or by any other means. Prior to the date of the incident, plaintiff testified that she never noticed any potholes, breaks, or cracks in that crosswalk. Plaintiff also stated that she never saw anyone working in the subject roadway area prior to the day that she fell, and she did not know how long the subject pothole had been there prior to her fall.

The affidavit of the Town's acting superintendent of highways, Joseph Geraci, establishes that he searched the highway department's records for the time from September 3, 2009 through September 3, 2014. Those records establish that the subject location lies in an unincorporated area of the Town, that the highway department did not receive any written complaints about the subject roadway at its intersection with Plandome Road prior to September 2014, and that the Town's highway department did not issue any permits, contracts or easements for any construction or repair to the subject roadway during that time.

The affidavit of Wayne H. Wink, the Town Clerk, establishes that a search of the records of the Town Clerk for the period commencing in September 2009 through and including September 3, 2014 did not reveal any written complaints about the subject roadway.

The Town's highway construction supervisor, Craig Bates, testified that his duties in 2014, including on the date of plaintiff's fall, concerned manpower, scheduling, paving obligations, pothole repair, sidewalk repair, sweeping, cleanups, landscaping, snow removal and light tree work. His duties also included simple issues with respect to water drainage, including patching cracks around a drain grate.

According to his testimony, if a road was repaved in 2014, that was the responsibility of the Town's paving crew. Mr. Bates explained that if a Town road was to be repaved, any potholes would have to first be repaired before the repaving work could be done.

Mr. Bates testified that he had requested that the subject roadway be repaved some time prior to the date of plaintiff's fall because other roads in the area had already been repaved and Mr. Bates had noticed "[c]racking. Generally just wear and tear" on that roadway. When asked if there were repeated potholes on that roadway, Mr. Bates answered, "[n]ot potholes," but "[c]racks." The subject street where plaintiff's incident occurred was eventually repaved in 2015.

Mr. Bates was asked at his deposition to review service request summary reports dated from January to April 2014, prior to plaintiff's fall. The reports concerned potholes on Orchard Street, although not necessarily in the exact location where plaintiff fell. These reports were taken because of persons calling "311," a telephone notification line. In any event, Mr. Bates testified that if he was aware of a call to 311 for a pothole on a street, he would "check all of Orchard. I wouldn't just send my guys to one specific pothole. I would have my guys check Orchard from Plandome Road to the end of Orchard. That's the way we do it. When we go out patching we patch, we look for potholes or skid marks, whatever we have to do on that entire road. That's the way you do it." Mr. Bates emphasized that Orchard Street belongs to the Town and that Plandome Road is a Nassau County roadway. The Town would not be concerned with Plandome Road, only with Orchard, including the subject crosswalk on Orchard.

Mr. Bates was asked about a service request from September 27, 2011, which would have been approximately three years prior to the subject incident, and he testified that he could not tell from the request what work was actually being requested. Mr. Bates was also asked about a servicer request from 2009, five years prior to plaintiff's fall, concerning a patch in the street that was caving in at or about the area where plaintiff eventually fell. Mr. Bates testified that he did not know anything about that report, explaining that the service requests are reported as stated by members of the public, but that the caller does not necessarily describe the situation accurately. According to Mr. Bates, "[s]omeone says I got a cave in, it's a divot. So it's not exact. Some people say what they think is going to get the quickest response."

As to service requests made during 2014, Mr. Bates testified that a 311 complaint was received on January 27, 2014 concerning a pothole in the general area where the plaintiff later

fell in September 2014. Mr. Bates also testified to a number of log book entries and other service requests reflecting the patching of potholes at different locations in the Town.

The submitted service request summary reports (Exhibit L) reflecting 311 calls for pothole repairs at Orchard Street and Plandome Road date from April 25, 2013, January 27, 2014, February 19, 2014, February 20, 2014, February 21, 2014 and February 24, 2014. The submitted requests each indicate that all the potholes were patched by February 25, 2014.[3] Notably, plaintiff did not testify that she tripped on an area of Orchard Street that had been repaired, i.e. a patched pothole, but that her foot went into a pothole.

Based upon the foregoing, defendant Town has established that it had no prior written notice of the pothole that caused plaintiff to fall and become injured, and that it did not create the pothole, thereby demonstrating its *prima facie* entitlement to summary judgment as a matter of law.

In opposition, plaintiff submits the transcripts of both sessions of Mr. Bates' deposition testimony (June 8, 2017 and December 19, 2017), photographs of the incident location, and the affidavit of Stanley H. Fein, P.E.

Nothing in Mr. Bates' deposition testimony from June 8, 2017 raises an issue of fact as to prior written notice or the alleged creation of the condition. The same pothole service requests as were submitted in support of the instant motion were reviewed with Mr. Bates and they indicated as noted that the repairs to the holes at or near the subject location were completed in early 2014, by the end of February. The testimony elicited from Mr. Bates during the June 8, 2017 deposition fails to supply any evidence of a repair that immediately resulted in the creation of the alleged defect.

The affidavit of Mr. Fein, plaintiff's engineering expert, also fails to raise a triable issue of fact. To the extent that Mr. Fein states that he has reviewed "[r]elevant case law," and discusses the applicable statute, those statements are not within Mr. Fein's area of expertise and are disregarded by this Court.

Mr. Fein did not inspect the subject location until April 20, 2017, approximately two and one-half (2 ½) years after the incident giving rise to this action. Moreover, he observed that Orchard Street and the crosswalk had been repaved. Thus, conditions are not the same as they existed on the date of plaintiff's fall. Also, three photographs annexed to Mr. Fein's affidavit depict snow piles and melting snow, none of which conditions existed on the date of the subject incident. Plaintiff fell on September 3, 2014, a day that she described as being a "warm, sunny day." Plaintiff did not slip on accumulated ice in the pothole, nor was the pothole obscured by

[3] One of the submitted service request reports does not appear to refer to the subject location and one report concerns a repair made after the date of the subject incident.

standing water; therefore, the photographs as well as Mr. Fein's discussion of the drainage conditions on Orchard Street are inapposite to the facts of this case.

Mr. Fein's statements that there is "a longstanding issue with the pooling and collection of water runoff at the very location of the alleged defect in the crosswalk" is unsupported by the evidence. Mr. Bates testified that he did not have a recollection of the subject area often retaining water. He did testify that he would rake leaves that had collected near the tires of parked cars to allow the water to flow. Mr. Bates also testified that the fact that there was no drain in this area was not problematic "because of the way the road is pitched. . . the road is made for the water to flow away. It does flow." Mr. Bates further testified that, "[i]f you're indicating that you believe that patch area that you showed me in previous exhibits was flooded out, no. That didn't happen in the history that I've been there. And I've been with the Town a long time. That intersection doesn't flood that way. The corners where the cars park and the leaves back up along the gutter slab you get a little settling of water. Not across the whole intersection."

Mr. Fein compounds his speculative and unsupported opinion concerning a drainage condition by also discussing the methods of patching potholes, which does not comport with the facts of this case. There is no evidence that the Town engaged in any type of repair work of the subject pothole, or any other affirmative act of negligence, that immediately resulted in the existence of a dangerous condition. Accordingly, Mr. Fein cannot supply any reliable evidence as to the elements of the affirmative negligence exception to the prior written notice law upon which to base his opinion; rather, his affidavit appears designed to raise a feigned issue of fact.

For all the foregoing reasons, plaintiff has failed to raise a triable issue of fact sufficient to defeat the Town's summary judgement motion.

The Town's motion is granted, and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: October 15, 2018
Mineola, NY

Karen V. Murphy
J. S. C.
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ENTERED
OCT 17 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE