Chaconas v County of Nassau
2018 NY Slip Op 34429(U)
April 3, 2018
Supreme Court, Nassau County
Docket Number: Index No. 601155/2014
Judge: Karen V. Murphy
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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

LEONORA S. CHACONAS,

Plaintiff,

-against-

COUNTY OF NASSAU,

Defendant.

Index No. 601155/2014

Motion Submitted: 02/13/18
Motion Sequence: 001 MD

The following papers read on this motion:

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

Defendant County of Nassau moves this Court for an Order granting summary judgment in its favor and dismissing the complaint. Plaintiff opposes the requested relief.

The incident giving rise to this action occurred on December 13, 2012, as plaintiff was crossing Central Avenue in Bethpage, New York. Plaintiff was on foot, carrying a child in her arms when her foot went into a hole located in the roadway. Plaintiff fell onto her right knee, fracturing her kneecap.

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 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]).

The County contends that it should be granted summary judgment on the ground that it did not receive prior written notice of the alleged defect in the roadway, that the alleged defect was open and obvious, and because there is no proof that the alleged condition resulted from any work done by the County at the incident's location.

Nassau County Administrative Code § 12-4.0 (e) (the Code) is a prior written notice law; however, when an alleged defect is located on a County roadway, the Code provision "should be construed in accord with Highway Law § 139 (2), which allows for tort recovery based on constructive notice where written notice is lacking" (***Bernardo v. County of Nassau***, 150 AD2d 320 [2d Dept 1989]; *see also* ***Rauschenbach v. County of Nassau***, 128 AD3d 661 [2d Dept 2015]; ***Phillips v. County of Nassau***, 50 AD3d 755 [2d Dept 2008]; ***Nodelman v. L.C.V. Realty Corporation***, 143 AD2d 122 [2d Dept 1988]; ***Carlino v. City of Albany***, 118 AD2d 928 [3d Dept 1986]).

In support of its summary judgment motion, the County submits the Notice of Claim, the pleadings, the deposition transcripts of the plaintiff, the County's highway maintenance supervisor, and the County's head of the Traffic Signal Management Unit, as well as the affidavit of the County's Bureau of Claims and Investigations employee.

It is apparently undisputed that the roadway in question is a County roadway. The affidavit of the County's Bureau of Claims and Investigations employee, Veronica Cox, taken together with the deposition testimony of the County's witnesses (Richard Carbone and Sheila M. Dukacz), establish that the County did not have prior written notice of the alleged defect in the roadway that caused plaintiff to fall.[1]

Notwithstanding the lack of prior written notice, plaintiff's deposition testimony establishes that the defect had been present for "for years" prior to December 13, 2012. According to plaintiff's testimony, her home is located on a street that is "right off of Central Avenue." Plaintiff traveled on Central Avenue almost daily, and she would always pass the defect while she was traveling in her car. Plaintiff described the defect as a "square cutout in the road," approximately four feet by three feet in size. To the plaintiff, the area appeared to have been cut out by some sort of a machine, and it was raised in one area, and dimpled and cracked in other areas, "[w]here the seams are." Although plaintiff did not witness anyone repairing the area since the accident, she testified that it appears to have been repaired, but it is still dimpled and cracked.

Plaintiff stated that she was looking forward at the time she was crossing the street, not down. Her "foot hit the dimple or something in that cracked area. [She] lost [her] footing and [she] was facing in the one direction on [her] way to the other side of the street and [her] body literally turned around 180 and [she] felt [her]self going down

[1] In opposition, plaintiff concedes that, "[t]here is no prior written notice" (Affirmation in Opposition, ¶ 24).

and [she] grabbed [the child] close to [her], so [she] was not to slam [the child] against the floor and [she] landed on [her] right knee." When plaintiff landed on the ground, she was facing in the direction from which she had come.

The County's highway maintenance supervisor, Richard Carbone, acknowledged that he was no longer inspecting the roadways at the time of plaintiff's fall because he had been promoted; thus, he did not offer any testimony about the condition of the roadway in question at the time of the subject incident. Mr. Carbone did not recall receiving any complaints about road defects in the subject location, or seeing any road work/patch work in that vicinity, but he did acknowledge that, "sometimes utilities have emergencies. . . we do the work as an emergency before they get a permit and sometimes they just sneak work in and if they don't get caught, we don't know who did it." He also testified that, "there's been times I found stuff and no one knew who did it. It had already happened."

The head of the County's Traffic Signal Management Unit, Sheila M. Dukacz, testified that she went to the scene of plaintiff's fall in April 2017, as a result of the County Attorney's request, and in connection with the investigation of this matter. Although she testified that she did not see any problem with the traffic signal detector as having anything to do with this matter, "[t]here were two other things that [she] saw that [she] felt could be related to this particular case." Ms. Dukacz observed a "mound of concrete or asphalt that had been dumped on the roadway and hardened and was sticking up above the roadway," and the "other thing was a utility patch that had been cut out on the road and not restored." She relayed that information to the County Attorney, and according to her, "my involvement, I thought, had ended." She placed a note on the notice of claim indicating that "the patch was not traffic signal related." Ms. Duckacz did not know who put the mound of asphalt or concrete on the roadway, nor did she know who put in the utility patch. Her department does not get notified if a utility gets a permit to open a roadway. Ms. Dukacz also testified that routine inspections of traffic signal devices by her inspectors do not also involve inspections for potholes or other roadway defects. The inspections are related only to the operation of the traffic signals.

Based upon the foregoing testimony of the plaintiff and Ms. Dukacz, there was some sort of "patch" in the roadway at the location where plaintiff fell. Furthermore, according to plaintiff, that condition existed "for years" prior to her accident. Accordingly, the County has failed to establish that it did not have constructive notice of the alleged dangerous condition; therefore, the County has failed to establish its *prima facie* entitlement to summary judgment as a matter of law notwithstanding that it did not receive prior written notice of said defect.

The County's contention that the defect was open and obvious does not absolve it of liability. Whether a condition is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making

reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (***Stoppeli v Yacenda***, 78 AD3d 815, 816 [2d Dept 2010]). Proof that a dangerous condition is open and obvious merely negates the defendant's obligation to warn of the condition but does not necessarily preclude a finding of liability against a landowner for failure to maintain the property in a safe condition. (***Cupo v Karfunkel***, 1 AD3d 48, 52 [2d Dept 2003]). Rather, the fact that a condition may have been open and obvious is relevant to the issue of the plaintiff's comparative negligence (***Clark v AMF Bowling Centers, Inc.***, 83 AD3d 761 [2d Dept 2011]; ***Gradwohl v Stop & Shop Supermarket Company, LLC***, 70 AD3d 634 [2d Dept 2010]; ***Westbrook v WR Activities-Cabrera Markets***, 5 AD3d 69 [1st Dept 2004]; ***Cupo***, ***supra***). Whether a certain condition qualifies as dangerous or defective is usually a question of fact for the jury to decide (***Guerrieri v. Summa***, 193 AD2d 647 [2d Dept 1993]).

Moreover, the fact that defendant contends that the condition was open and obvious tends to indicate that the County may have had constructive notice of same (*see* ***Pasternak v. County of Chenango***, 156 AD3d 1007 [3d Dept 2017]).

The Court need not reach defendant's remaining contention.

In view of the foregoing determination that defendant has failed to establish its *prima facie* entitlement to summary judgement as a matter of law, it is unnecessary to determine whether the plaintiff's papers submitted in opposition are sufficient to raise a triable issue of fact (*see* ***Levin v Khan***, 73 AD3d 991 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581[2d Dept 2010]).

The defendant's summary judgment motion is denied.

The foregoing constitutes the Order of this Court.

Dated: April 3, 2018
Mineola, NY

Karen V. Murphy
J. S. C.

ENTERED
APR 06 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE