Gutierrez v City of Yonkers
2019 NY Slip Op 34581(U)
March 29, 2019
Supreme Court, Westchester County
Docket Number: Index No. 53980/2016
Judge: Charles D. Wood
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 period 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

BRAULIA GUTIERREZ,

Plaintiff,

-against-

DECISION & ORDER
Index No. 53980/2016
Sequence Nos. 2&3

THE CITY OF YONKERS, ALEY PALAL As Administratrix of the Estate of PAUL PALAL, and ALEY PALAL, Individually,

Defendants.

----------x

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 40 through 78, were read in connection with separate motions for summary judgment pursuant to CPLR 3212, to dismiss the complaint and all cross claims as against defendant Aley Palal, as Administratrix of the Estate of Paul Palal, and Aley Palal, Individually, ("Palal") (Seq 2); and the City of Yonkers ("Yonkers") (Seq 3).

Plaintiff commenced this action against defendants to recover damages for personal injuries allegedly sustained by plaintiff on February 28, 2015, on the sidewalk in front of the building located at 82 Lawrence Street in Yonkers, as a result of being caused to slip and fall on a combination of a broken, cracked, uneven sidewalk, and the failure to properly remove snow and/or ice contributed to plaintiff's accident.

NOW, upon the foregoing papers, the motion is decided as follows:

It is well settled that a proponent of a summary judgment 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 Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court must view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320,324 [1986]). Here, Palal argues that plaintiff has set forth different theories of the cause of her fall. First in the Notice of Claim, she claims that she fell from acculumating snow and or ice on the sidewalk. In her Verified Bill of Parivuclars, she states that she fell from both tripping over a defective /cracked/uneven sidewalk condition, and slipping upon unremoved ice and/or snow. Plaintiff further testified that she took a photograph of the accident scene the day after her fall, that her

fall occured in the area where the seam between the two sidewalk slabs is seen in the photograph, she tripped before she slipped, and she couldn't see the uneven area where the slabs abut one another on the evening of her fall because it was then covered with snow and ice.

In further support of their motion for summary judgment Palel offers an affidavit from Steven Roberts, who has been qualifed in both Federal and State Courts as an expert in the field of forensic meteorology. He asserts that the last significiant storm activity was a week before the date of plaintiff's incident, when 3.5 snow and ice mix fell on Feburary 21, 2015, and continued into the morning of February 22nd, adding another .5 inches of newly fallen precipitation to untreated exterior surfaces. No precipitation fell on February 27, 2015, the day before the incident. The accident day began with approximately 10.4 inches of snow and ice cover.

Palal argues that they were not negligent in discharging their duty to remove snow and ice upon the sidewalk fronting their premises so as to keep same in a reasonably safe condition. But for the snow along the curb line, apparently resulting from prior street plowing activity, the entire sidewalk visible in plaintiff's relevant photograph has been cleared down to bare concrete. In fact, they argue that the snow removal efforts undertaken by or on behalf of Palal prior to plaintiff's fall rendered the sidewalk safer, and not more hazardous than had the naturally occurring snowfall condition had it not been addressed.

Aley Palal testified that her husband, who subsequently died on November 25, 2017, had owned the subject property at 82 Lawrence Street in Yonkers at the time of the accident.

Absent from the record is any competent evidence from a person with personal knowledge as to the actual snow removal efforts of Palal that were made on or near the day of

the accident. Under these circumstances, Palal failed to establish as a matter of law that its snow removal procedures for the subject accident location did not create the condition which caused plaintiff's injuries. An owner of real property is under no obligation to remove snow and ice that naturally accumulates upon the sidewalk that abuts his or her property, and liability will not result unless it is shown that the owner made the sidewalk more hazardous through negligent removal of the snow (Palopoli v City of New York, 305 AD2d 388, 388–89 [2d Dept 2003]). Thus, there is a question of fact as to Palal, as the owner of property abutting a public sidewalk will be held liable where it, or someone on its behalf, undertook snow and ice removal efforts which made the natural conditions more hazardous (Rodriguez v Cty. of Westchester, 138 AD3d 713, 716 [2d Dept 2016]). Accordingly, Palal's motion for summary judgment is denied.

Turning to the City's motion for summary judgment, generally, if a municipality has adopted a prior written notice law, it "cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies" (Forbes v City of New York 85 AD3d 1106, 1107 [2d Dept 2011]). Once a municipality establishes that it adopted a prior written notice law and lacked prior written notice of a defect, "the burden shifts to the plaintiff to demonstrate the applicability of one of the two recognized exceptions to the prior written notice requirement" (Hanover Ins. Co. v Town of Pawling 94 AD3d 1055, 1056 [2d Dept 2012]).

The Second Department recently found that where the bill of particulars alleged that the municipality affirmatively created the dangerous condition which caused the accident, in order to establish its prima facie entitlement to judgment as a matter of law, the municipality had to demonstrate, prima facie, both that it did not have prior written notice of the defect, and that it

did not create the defect, prior to the burden shifting to plaintiff (McManus v Klein, 136 AD3d 700 [2d Dept 2016]).“[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings” (McManus v Klein, supra).

The two exceptions to prior written notice are: “the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property” (Forbes v City of New York 85AD3d 1106, 1107). It must be noted that, “the affirmative negligence exception [is] limited to work by the City that immediately results in the existence of a dangerous condition” (Oboler v City of New York 8 NY3d 888, 889-90 [2007]; Yarborough v City of New York 10 NY3d 726, 728 [2008]). Wear and tear and environmental factors are not an affirmative act of negligence (Smith v Town of Brookhaven 45 AD3d 567, 568 [2d Dept 2007]). The special use exception can only be found “where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use, and is therefore required to maintain a portion of that property” (Poirier v City of Schenectady, 85 NY2d 310, 315 [1995]).

Also, “a telephonic complaint reduced to writing does not satisfy the requirement of prior written notice” (McCarthy v City of White Plains, 54 AD3d 828, 829-30 [2d Dept 2008]). Courts have repeatedly held that actual notice of an alleged hazardous condition does not obviate the requirement that the municipality be in receipt of written notice of said condition prior to the occurrence of the accident (Ferreira v County of Orange 34 AD3d 724 [2d Dept 2006]). If plaintiff argues that there has been a recurrence of the alleged defect between the time it was allegedly repaired and the time of the alleged incident, “such recurrence does not abrogate the need for prior written notice” (McCarthy v City of White Plains, 54 AD3d at 830).

Here, the City offers the affidavit of Lori Tangredi, employed by the City of Yonkers as an Administrative Assistant to the Commissioner of the Department of Public Works. She has held this position since the summer of 2014. She conducted a search of the records maintained by the City Department of Public Works Commissioner's Office relative to roadways/sidewalks for any prior written notice concerning the subject sidewalk condition received on or before February 28, 2015, and found no such prior written notice records for that location. (City's Ex K). The City also points out that plaintiff does not contend that the City affirmatively created the alleged condition, and that plaintiff did not even address defendant's argument based on the City Code 103-1 that the duty to maintain the subject sidewalk lies exclusively with the adjoining property owner. However, while Yonkers City Code §103–1 requires landowners to maintain sidewalks abutting their property in a safe condition, it does not impose tort liability upon them for injuries caused by a violation of that duty (Lagawo v Myers, 149 AD3d 1056, 1057 [2d Dept 2017]). Finally, Tangredi attested that the City does not even perform snow removal on sidewalks in front of private buildings.

In further support of its motion, the City relies on Section 244 of the Second Class Cities Law and , Section 24-11 of the Charter of the City of Yonkers provide prior written notice laws. The Charter provides in pertinent part that: (1) No civil action shall be maintained against the city for injury to person ...sustained in consequence of any street...sidewalk...or any portion of any of the foregoing being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the Commissioner of the Department of Public Works by certified or registered mail."

From this record, the City established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not receive prior written notice of the snow and ice condition which caused the plaintiff's accident, as required by section 24–11 of the Charter of the City of Yonkers, and did not endeavor to clean the sidewalk of snow and ice, thus, there is no evidence in the record that the City affirmatively created the alleged defect (Rodriguez v Cty. of Westchester, 138 AD3d 713, 715 [2d Dept 2016]). In opposition, plaintiff raised no triable issue of fact as to any exception to the prior written notice requirement, namely, whether the City affirmatively created the alleged defect, or whether the defect was created by the City's special use of the property (Gonzalez v Town of Hempstead, 124 AD3d 719, 721[2d Dept 2015]).

Further, plaintiff herself testified that she was unaware of any prior written notice of either the snow/ice or uneven sidewalk condition being given to the City of Yonkers. Not only is there an absence of prior written notice of the sidewalk's condition, but plaintiff has failed to allege and/or could not establish that either of the two recognized exceptions is applicable in this case. From this record, neither of the two exceptions is applicable in this case.

Finally, plaintiffs' contention that the summary judgment was premature is without merit, since they failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. There "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis for denying the motion" (Conte v Frelen Assoc., LLC, 51 AD3d 620 [2d Dept. 2008]). The record shows that at the October 16, 2018 Compliance Conference before court attorney referee, counsel for the parties stipulated that all pre-trial discovery was completed or waived and that the matter was ready for trial.

All matters not specifically addressed are denied. This constitutes the Decision and Order of the court.

NOW, therefore, it is hereby

ORDERED, that the motion by Aley Palal As Administratrix of the Estate of Paul Palal and Aley Palal, Individually, for summary judgment (Seq 2) dismissing the complaint and all cross claims asserted against it is Denied; and it is further

ORDERED, that the motion by the City of Yonkers for summary judgment (Seq. 3) is Granted, and the Complaint is dismissed as against the City of Yonkers, and all cross claims against it are dismissed; and it is further

ORDERED, that the remaining parties shall appear for an existing scheduled conference in the Settlement Conference Part, Court Room 1600, Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601, on

May 14, 2019 at 9:15 AM.

The Clerk shall mark his records accordingly.

Dated: March 29, 2019
White Plains, New York

CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF