Rogers v Nassau County
2019 NY Slip Op 34849(U)
June 17, 2019
Supreme Court, Nassau County
Docket Number: Index No. 607546/2015
Judge: Leonard D. Steinman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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FRANCIS ROGERS AND DONNA ROGERS,

Plaintiffs,

-against-

NASSAU COUNTY AND ROBERT LUDWIG,

Defendants.

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IAS Part 15
Index No. 607546/2015
Mot. Seq. No. 006

DECISION AND ORDER

MD

LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Defendant Nassau's Notice of Motion, Affirmation & Exhibits.....1
Plaintiffs' Affirmation in Opposition & Exhibits.....2

In this action plaintiff Francis Rogers seeks to recover damages for personal injuries he allegedly sustained in May of 2015. Plaintiff Donna Rogers asserts a derivative claim for loss of services. Francis was injured when he allegedly tripped and fell over a cracked and uneven portion of the crosswalk located at the intersection of Carol Road and N. Wantagh Avenue, in front of the premises located at 1 Carol Road in Bethpage, New York. Francis asserts that he stepped off a handicap ramp into the crosswalk and his foot became caught in a "cut" part of the roadway. The cut portion was approximately four inches lower than the surrounding area of the crosswalk. Francis alleges in his bill of particulars that the defendant Nassau had knowledge of the condition because "it created the...dangerous, unsafe and defective conditions...."

The County now moves for summary judgment pursuant to CPLR § 3212 on the grounds that it was not given prior written notice of the defective condition as required by Nassau County Administrative Code § 12-4.0 (e).

On a motion for summary judgment the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact in order to set forth a *prima facie* showing that it is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). "The 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." *Braver v. Village of Cedarhurst*, 94 A.D.3d 933, 934 (2d Dept. 2012), *quoting Foster v. Herbert Slepoy Corp.*, 76 A.D.3d 210, 214 (2d Dept. 2010). Where the movant fails to meet its initial burden the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc.*, 46 N.Y.2d 1065 (1979).

Nassau County Administrative Code §12-4(e) requires receipt of prior written notice by the County of an alleged defect before it can be liable in a civil action for damages. Such regulations are enforceable. *See Amabile v. City of Buffalo*, 93 N.Y.2d 471 (1999); *Donadio v. City of New York*, 126 A.D.3d 851 (2d Dept. 2015); *Oliveri v. Village of Greenport*, 93 A.D.3d 773 (2d Dept. 2012). "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 [roadway] unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies. *Griesbeck v. County of Suffolk*, 44 A.D.3d 618 (2d Dept. 2007).

Through the affidavit of Veronica Cox, an employee of the County assigned to the Bureau of Claims and Investigations, the County sufficiently established that it did not receive prior written notice of the defect, a condition precedent to liability. Plaintiffs do not contest that the County did not receive prior written notice of the defect at issue.

An exception to the prior written notice rule exists, however, "where a special use confers a special benefit upon the locality" or where the municipality "created the defect or hazard through an affirmative act of negligence." *Amabile v. City of Buffalo,* 93 N.Y.2d at 474. And because plaintiff alleges that the County created the defective condition it is incumbent on the County as the movant to eliminate any issue of fact in this regard. *Braver v. Village of Cedarhurst*, 94 A.D.3d at 934. The County may not, as it seeks to do, simply argue that "there has been no proof in admissible form that the [County] in anyway created the alleged defect." *See Deutsche Bank National Trust Co. v. Starr*, __A.D.3d__, WL 2440196 (2d Dept. 2019) (party not entitled to summary judgment based solely on deficiencies in plaintiff's proof); *Porter v. Uniroyal Goodrich Tire Co.*, 224 A.D.2d 674 (2d Dept. 1996)(same).

Because the County failed to eliminate all triable issues of fact as to whether it affirmatively caused the allegedly dangerous condition the motion must be denied without regard to plaintiff's opposition papers. *Braver v. Village of Cedarhurst*, 94 A.D.3d at 934. *See also Seegers v. Village of Mineola*, 161 A.D.3d 910 (2d Dept. 2018); *McManus v. Klein*, 136 A.D.3d 700 (2d Dept. 2016).

In all events, in their opposition papers plaintiffs demonstrated that an issue of fact remains as to whether the County caused or created the defective condition. Sheila Dukacz, who is employed in the Traffic Signal Construction and Operations Unit of the County's Department of Public Works, testified at her deposition that the County undertook a traffic light installation project from 2012 through 2015. As part of this project, the County (or third-party contractors on its behalf) made curb/sidewalk cut outs for the installation of handicap ramps at existing crosswalks. Dukacz testified that some of this work was performed at the subject intersection, although she could not definitively state that a handicap ramp was installed. Francis testified that he observed people installing the handicap ramp during the relevant time period, in 2013. Further, plaintiffs submitted photographs from Google Maps, of which the court may take judicial notice pursuant to CPLR 4511(c), reflecting that the handicap ramp did not exist in August 2011, prior to the County's

installation project. This is all circumstantial evidence that the County installed or caused to be installed the handicap ramp just several years before Francis' alleged fall and caused the defective condition.

Based on the foregoing, the County's motion for summary judgment is denied.

All other requested relief, not directly addressed herein, is hereby denied.

This constitutes the Decision and Order of this court.

Dated: June 17, 2019
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

ENTERED
JUN 20 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE