

Mohamed v City of Buffalo

2020 NY Slip Op 31783(U)

April 4, 2019

Supreme Court, Erie County

Docket Number: 2017-803801

Judge: Timothy J. Walker

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

MOHAMED SAIF MOHAMED,

Plaintiff,

- against

DECISION AND ORDER
INDEX NO. 2017-803801

CITY OF BUFFALO,

Defendant.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **LOTEMPIO P.C., LAW GROUP**
Andrew T. Gill, Esq., Of Counsel
Attorneys for Plaintiff

CORPORATION COUNSEL, CITY OF BUFFALO
David M. Lee, Esq., Assistant Corporation Counsel
Attorneys for Defendant

WALKER, J.

Defendant has applied, pursuant to CPLR §3212, for summary judgment.

Plaintiff contends that on the afternoon of May 3, 2016, he suffered personal injuries upon tripping and falling on a sidewalk defect in the City of Buffalo on South Elmwood Avenue, approximately sixty (60) to one hundred (100) feet north of its intersection with West Huron Street, “caused by the remainder of a former parking meter post” (Notice of Claim, ¶5) (the “Incident”).

Section 21-2 of the City of Buffalo Charter requires, *inter alia*, written notice to the City Clerk of any defective sidewalk condition as a precondition to maintaining an action against

Defendant for personal injuries as a result of the defect.

Defendant's Chief Clerk, Gerald Chwalinski, submitted an affidavit confirming that his office has not received written notice of the defective condition alleged by the Plaintiff. Accordingly, Defendant demonstrated *prima facie* entitlement to summary judgement, and the burden shifted to Plaintiff to raise a triable issue of fact as to whether an exception to the prior written notice rule (the "Rule") applies (*Amabile v. City of Buffalo*, 93 NY2d 471 [1999] [post from missing stop sign raised above surface of sidewalk constitutes a condition encompassed by City of Buffalo's prior written notice law]; *Horan v Town of Tonawanda*, 83 AD3d 1565 [4th Dept 2011] ["Where . . . there is a prior written notice provision, a municipal defendant meets its initial burden by establishing that it did not receive prior written notice of the allegedly dangerous condition, and the burden then shifts to the plaintiff to raise a triable issue of fact whether . . . [an exception] applies"]).

Plaintiff contends that Defendant's motion should be denied, because Defendant allegedly created the defective condition that caused Plaintiff to trip and fall. Plaintiff relies on the deposition testimony of Peter Gospodarski, a meter mechanic supervisor for Defendant, whose duties include supervising the parking meter mechanics in his department and repairing and removing parking meters.

Mr. Gospodarski identified the metal pole protruding from the sidewalk, in the area of the Incident, as a pole that had previously supported a coin-operated parking meter owned by Defendant. Mr. Gospodarski further testified that Defendant removed the parking meter from the metal pole approximately eight (8) years prior to the Incident, as part of Defendant's transition from single coin-operated meters to pay and display machines.

Importantly, Mr. Gospodarski's deposition testimony about the cracked and uneven condition of the sidewalk in the immediate vicinity of the pole relates to said condition on March 5, 2019 - the day of his deposition. Mr. Gospodarski was unaware of the condition of the sidewalk approximately eight (8) years earlier, when Defendant removed the meter.

This distinction is critically important to Defendant's motion, because the affirmative negligence exception to the Rule "is limited to work by the [municipality] that **immediately** results in the existence of a dangerous condition" (*Oboler v. City of New York*, 8 NY3d 888, 889 [2007] [emphasis in original]). Mr. Gospodarski did not testify that the condition of the sidewalk was left in a state of disrepair and unevenness approximately eight (8) years ago when the meter was removed. Indeed, he testified that at the time the meter was removed, the sidewalk in the vicinity of the pole and Incident was **not** in a state of disrepair.

In Mr. Gospodarski's opinion, the complained of condition developed over years of snow and sleet, freeze/thaw cycles, and corrosion, the sum total of which is insufficient to satisfy the affirmative negligence exception to the Rule (*Diaz v. City of New York*, 56 AD3d 599, 601 [2d Dept 2008] ["where the defect develops over time with environmental wear and tear, the affirmative negligence exception is inapplicable"]). Accordingly, Plaintiff's reliance on *Kiernan v. Thompson* (73 NY2d 840 [2d Dept 1988]) and *Leon v. City of Jamestown* (254 AD2d 748 [4th Dept 1998]), is misplaced. In *Kiernan*, it was uncontested that the municipality cracked the sidewalk when it removed a tree stump, unlike the instant matter where the Defendant denies that the sidewalk was in a defective condition at the time it removed the meter. In *Leon*, there was evidentiary proof that the municipality affirmatively created the dangerous condition immediately prior to the plaintiff's slip and fall.

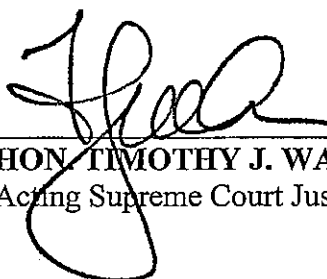
Plaintiff has not submitted proof in admissible form as to the condition of the sidewalk at the time Defendant removed the meter. Speculation that Defendant created the allegedly dangerous condition is insufficient to defeat Defendant's motion (*Hall v. City of Syracuse*, 275 AD2d 1022 [4th Dept 2000]).

In light of the foregoing, it is hereby

ORDERED, that Defendant's motion for summary judgment is granted and the Complaint is hereby dismissed.

This constitutes the Decision and Order of this Court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: April 4, 2019
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice