Cortez v Incorporated Vil. of Roslyn
2020 NY Slip Op 34945(U)
July 28, 2020
Supreme County, Nassau County
Docket Number: Index No. 603083/18
Judge: James McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

HERNANDO CORTEZ,

Plaintiff(s),

-against-

INCORPORATED VILLAGE OF ROSLYN,

Defendant(s).

TRIAL/IAS, PART 18
NASSAU COUNTY

Index No.: 603083/18

Motion Seq. No.: 001
Motion Submitted: 7/10/2020

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation In Opposition/Supporting Exhibits.....X
Reply Affirmation.....X

Defendant, Incorporated Village of Roslyn (the Village), moves this court for an Order, pursuant to CPLR § 3212, granting it summary judgment and dismissing the complaint. Plaintiff, Hernando Cortez, opposes the motion.

Cortez commenced this slip and fall action by summons and complaint dated March 7, 2018. Issue was joined by service of an answer by dated April 24, 2018. The

case certified ready for trial on September 19, 2019 and a note of issue was filed on November 27, 2019.

According to the complaint and Cortez's deposition testimony, on March 18, 2017, Cortez slipped on ice, and then tripped over a pothole in the Roslyn Municipal Parking Lot. He had parked in the parking lot and successfully walked through it to meet a friend at a restaurant. After leaving the restaurant and walking back to his car, he slipped on the ice and then his foot "fell into" the pothole, causing him an injury. The Village now moves for summary judgment arguing that they had no prior written notice of any defect.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which

require a trial of the action (*see Zuckerman v. City of New York,* 49 NY2d 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy,* 35 NY2d 361 [1974]).

"A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk" (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). "To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

"Where, as here, a municipality has enacted a prior written notice law, it may not be subject to liability for injuries caused by a dangerous roadway condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (*Wald v City of New York*, 115 AD3d 939 [2d Dept 2014]; *Phillips v City of New York*, 107 AD3d 774, [2d Dept 2013]; *see Martinez v City of New York*, 105 AD3d 1013, 1014 [2d Dept 2013]). "The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality" (*Wald v City of New York, supra; Long v City at Mount Vernon*, 107 AD3d 765 [2d Dept 2013]; *Oboler v City of New York*, 8 NY3d 888, 889-890 [2007]; *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008 [2d Dept 2012]). In addition, "the affirmative negligence exception is limited to work by the [municipality] that immediately results in the existence of a dangerous condition" (*Wald v City of New York, supra*, quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2007], quoting *Oboler v City of New York, supra* at 889).

Furthermore, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (*Amabile v City of Buffalo*, 93 NY2d 471, 474 [1998]; *Caramancia v City of New Rochelle*, 268 AD2d 496 [2d Dept 2000]). In order for a municipality to be held liable for a condition where no prior written notice was given, a plaintiff must set forth competent evidence that the municipality affirmatively

created the alleged offending condition in issue (*see Walker v Incorporated Village of Northport*, 304 AD2d 823 [2d Dept 2003]; *Monteleone v Incorporated Village of Floral Park*, 74 NY2d 917 [1989]).

In support of its motion, the Village submits, *inter alia*, the affidavit of of Anita Frangella. The Village Clerk. Ms. Frangella is also the Village Treasurer, an issue that is discussed, *infra*. As Village Clerk, it is one of Ms. Frangella's duties to research and investigate notices of claims and written complaints about alleged defects on Village roads, sidewalks and parking lots. In connection with Cortez's allegations, she "conducted a search *of Village records* for any written complaints" regarding the parking lot. (Emphasis added). Her search yielded one notice of claim regarding the parking lot, but Ms. Frangella stated that the prior notice of claim referenced a different defect in a different part of the parking lot. She submits the prior notice of claim and the pictures that were attached to it with her affidavit. Other than the other notice of claim, Ms. Frangella found no other written notices of a defect in the parking lot.

The Village also submits the deposition transcript of Selim Dalipowski, Superintendent for the Department of Public Works for the Village. Mr. Dalipowski testified that while he would inspect the streets and Village-owned parking lots daily, he was unaware of the subject pothole. He described the manner in which the parking lot would be plowed after a snow storm, and how ice would be treated with salt. He could not recall whether he had to plow the parking lot in the days leading up to the accident.

Based upon Ms. Frangella's affidavit and Mr. Dalipowski's deposition testimony, the court finds the Village has established entitlement to summary judgment as matter of law. The burden shifts to Cortez to raise a material issue of fact requiring a trial of the action.

Cortez first argues that the prior notice of claim constitutes written notice and raises an issue of fact. The court agrees with Cortez that the pictures annexed to the prior notice of claim, and then annexed to the moving papers herein, are not of great quality. However, they are clear enough to establish that the condition complained of in the prior notice of claim is different from the pothole that Cortez claims caused his injury.

The parking lot contains parking spots that run parallel to the street. After entering the parking lot, one could pull into a spot on the left or on the right. There are approximately 10 parking spots on either side of each entrance. After pulling into the parking lot, but before entering a space, a car would be facing a guardrail at the back of parking lot. A car would reach the guardrail if it did not pull into any of the approximately 10 parking spaces on the left or the right. There is a driving lane in between the last of the approximately 10 parking spaces and the guardrail. During his deposition, Cortez identified, in pictures, a pothole a few feet away from the guardrail at the back of the parking lot as the pothole that caused his injury. The prior notice of claim references a pothole much closer to the entrance of the parking lot. If a car pulled into that entrance, the pothole from the prior notice of claim would be at the second parking spot on the left. It is clear that the two potholes were in different areas of the parking lot.

(*Farrago v. Great Atl. & Pac. Tea Co., Inc.*, 17 AD3d 631 [2d Dept 2005]).

Cortez next argues that Ms. Frangella's affidavit is insufficient because the Village's prior written notice law indicates that written notice has to be given to "the Village Clerk/Treasurer", and Ms. Frangella only identified herself as the Village Clerk. There is case law that supports the argument that if the prior written notice can be given to different departments of a municipality, an affidavit from each department is necessary. (*Weinstein v. County of Nassau*, 180 AD3d 730 [2d Dept 2020]). However, herein Ms. Frangella's affidavit states she researched "the Village's" records, not just the Village Clerk's records. Further, the Village Clerk is also the Village Treasurer in Roslyn. Ms. Frangella explains as much in an affidavit annexed to the reply papers. While new information is not to be raised for the first time in reply papers, Ms. Frangella's affidavit is merely offering a clarification, and one the court can take judicial notice of since it is matter of public record. As such, Ms. Frangella's initial affidavit is sufficient to establish no written notice.

Cortez next cites to *Ferris v County of Suffolk*, 174 AD2d 70 (2d Dept 1992) for the argument that prior written notice was not required because the Village had actual or constructive notice. However, the Court of Appeals clearly held, in *Amabile v. City of Buffalo*, 93 NY2d 471 (1999) and its progeny, that constructive notice cannot suffice where there is a prior written notice statute. *Id.* To the extent that *Ferris* contradicts *Amabile*, this court finds *Amabile* to be controlling.

Finally, Plaintiff argues that the affirmative negligence exception applies in this

matter because Mr. Dalipowski testified that, in general, if he were to plow snow in the parking lot, the snow would be pushed into mounds at the back of the parking lot. Cortez argues, based upon meteorological records, that the weather leading up to the accident would have allowed for snow in mounds to melt and then re-freeze, causing an icy condition. However, there is no evidence that any such mounds existed, and Cortez, during his deposition, specifically denied seeing snow in the parking lot. As such, Cortez is unable to raise an issue of fact.

Accordingly, it is hereby

ORDERED, that the Village's motion for summary judgment is GRANTED. The complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: July 28, 2020
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

ENTERED
Jul 29 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE