Warren v City of Peekskill
2020 NY Slip Op 35058(U)
December 9, 2020
Supreme Court, Westchester County
Docket Number: Index No. 52779/2019
Judge: Lawrence H. Ecker
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To commence the statutory time 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

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EDWARD WARREN,

Plaintiff,

- against -

THE CITY OF PEEKSKILL, MORGAN HUDSON VIEW, LLC, HUDSON FEE I LLC and EAGLE ROCK MANAGEMENT, LLC,

Defendants.

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Index No. 52779/2019

DECISION/ORDER

Mot. Seqs. 1 & 2
Return Date: 11/18/2020

Ecker, J.

In accordance with CPLR 2219 (a), the decision herein is made upon considering all papers filed in NYSCEF as submitted relative to the following two motions: (1) by codefendants HUDSON FEE I LLC and EAGLE ROCK MANAGEMENT, LLC (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and cross claim as asserted against them; and (2) by defendant THE CITY OF PEEKSKILL (Mot. Seq. 2), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as asserted against it.

Plaintiff alleges he sustained serious injuries as a result of a trip and fall in a pothole that was in the City of Peekskill on May 9, 2018. The pothole is within the roadway of Lakeview Drive, a public highway, and is adjacent to the driveway leading from Lakeview Drive to an apartment complex with an address of 2 Lakeview Drive, which is owned by Hudson Fee I LLC (hereinafter “Hudson”) and managed by Eagle Rock Management, LLC (hereinafter “Eagle”).

As a result, plaintiff commenced this personal injury action against defendants. Hudson and Eagle interposed an answer, asserting affirmative defenses and a cross claim of negligence or indemnification against the City of Peekskill (hereinafter “the City”) and Morgan Hudson View LLC.[1] The City answered asserting similar defenses and a cross claim against Hudson and Eagle.

[1] In July 2019, a stipulation of partial discontinuance was filed as to Morgan Hudson View LLC dismissing the complaint and all cross claim(s) with prejudice against it.

Following discovery, Hudson and Eagle collectively move for summary judgment to dismiss the complaint and cross claim against them. The City separately moves for summary judgment to dismiss the complaint as against it. They contend on different grounds that they are not liable for plaintiff's injuries. Plaintiff filed the note of issue in September 2020.

It is well settled that the proponent of the summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]; *De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 606 [2d Dept 2017]). Importantly, "[o]nce this showing has been made, the burden then 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" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see De Souza v Empire Tr. Mix*, *Inc.*, 155 AD3d at 606). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to create a material issue of fact" (*Zuckerman v City of New York,* 49 NY2d at 562; *see Hammond v Smith*, 151 AD3d 1896, 1898 [4th Dept 2017], *lv denied* 153 AD3d 1677 [2017]).

On a summary judgment motion, a court is obligated to determine whether there are issues of fact that militate against granting that relief to the parties. Moreover, "[i]t is not the court's function on a motion for summary judgment to assess [issues of] credibility" (*Chimbo v Bolivar*, 142 AD3d 944, 945 [2d Dept 2016]; *Garcia v Stewart*, 120 AD3d 1298, 1299 [2d Dept 2014]), nor to "engage in the weighing of evidence" (*Chimbo v Bolivar*, 142 AD3d at 945; *Scott v Long Is. Power Auth*., 294 AD2d 348, 348 [2d Dept 2002]). "Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact" (*Bykov v Brody*, 150 AD3d 808, 809 [2d Dept 2017]; *accord Kahan v Spira*, 88 AD3d 964, 966 [2d Dept 2011]). Thus, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]).

I. HUDSON AND EAGLE'S MOTION (SEQ. 1)

Hudson and Eagle argue that the record clearly demonstrates that plaintiff tripped and fell on a pothole located in a public roadway that is owned by the City, not on any property owned or maintained by them and, thus, they owed no duty to plaintiff to maintain the public roadway. They further contend that the special use exception does not apply to this case (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Politis v Town of Islip*, 82 AD3d 1191, 1192 [2d Dept 2011]; *Jason v Town of N. Hempstead*, 61 AD3d 936, 937 [2d Dept 2009]).

Plaintiff did not file opposition to Hudson and Eagle's motion. As was marked by plaintiff and unrefuted by him, it is clear from the photographs that the pothole in question was well away from the curb line and within the roadway of Lakeview Drive. Hudson and Eagle thus demonstrated that they did not have a duty to maintain the subject area of the roadway in which plaintiff tripped and fell (*see Cimino v City of White Plains*, 65 AD3d 1069, 1071 [2d

Dept 2009]; *see also Wood v City of New York*, 98 AD3d 845, 845 [1st Dept 2012]). Accordingly, Hudson and Eagle's motion for summary judgment dismissing the complaint insofar as asserted against them, is granted.

II. THE CITY'S MOTION (SEQ. 2)

Turning next to the City's motion, it argues that it is entitled to summary judgment because, as a municipality, it had not received prior written notice of the alleged dangerous condition pursuant to section C199 of the Charter of the City of Peekskill. In support of the motion, it submits, among other things, the pleadings, the transcript of the examination before trial of Gregory Rich, a lead maintenance mechanic employed by the City for 18 years, and the affidavit of David Rambo, the Director of City Services for the City.

Plaintiff opposes the City's motion, contending that Rich only checked the City's records dating back to January 1, 2018, but that when he receives a complaint about a pothole, then depending upon the dimensions and the time of the year, it is either temporarily repaired within a day, or if a permanent repair is required, then it may be scheduled for a later date, with the placement of a traffic cone for safety purposes. Plaintiff submits only a single photograph depicting the pothole on the road. He sums up his argument by stating that "[t]he failure to maintain records, cannot be used as a sword against [him]."

"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 street or sidewalk unless it has received prior written notice of the dangerous condition" (*Tallerico v City of Peekskill*, 114 AD3d 932, 932-933 [2d Dept 2014] [internal quotation marks and citations omitted]; *see Bryan v City of Peekskill*, 74 AD3d 1115, 1116 [2d Dept 2010], *lv denied* 15 NY3d 713 [2010]). Here, it is undisputed that § C199 of the City Charter contains a prior written notice requirement which states, in relevant part, that "[n]o civil action shall be maintained against the city for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk, crosswalk . . . being defective, out of repair, unsafe, dangerous or obstructed *unless it appears that written notice* of the defective, unsafe, dangerous, obstructed condition of such street, highway, bridge, culvert, sidewalk, crosswalk . . . was actually given to the Director or Acting Director of Public Works and that there was a failure or neglect *within a reasonable time after the giving of such written notice to repair or to remove the defect, danger or obstruction complained of*" (emphasis added).

Rich testified that his job duties include road maintenance work, such as repairing potholes on streets and roadways. He stated that he is made aware of potholes through the Office of the Department of Public Works ("DPW"), which require repairs through general observation by receiving a complaint from DPW. Rich explained that citizen complaints with respect to potholes are reported to the DPW, including a verbal complaint and the DPW generally notates as much in a memo. He stated that there is no requirement that the complaint must be written as opposed to oral. Rich testified that during his 18-year employment, he has seen about "three or four" written complaints reported, stating that it is "not very common." According to Rich, when he receives notification of a reported pothole in the City, he visits the location to perform a visual inspection and schedules a repair. Rich

testified that he visited the site of accident location in June 2018 after he was notified of it and made a repair either that same day or the next day. Rich stated that the pothole in question would have been temporarily repaired if written notice of it was received in advance. He further testified that he performed a search of DPW's records after he learned of the accident to assess whether the City received any prior written notice of the pothole. Rich stated that there was no record in DPW's office regarding a pothole in the vicinity of 2 Lakeview Drive, which included a search of a small binder/folder in DPW's office.

In his affidavit, Rambo states that the City's office maintains an official file/logbook of any written notices received by the City regarding defective, obstructive, hazardous, or any other dangerous conditions of any street or sidewalk. According to Rambo, he reviewed the file/logbook in connection with this action and searched for any written notice(s) of defective, obstructive, hazardous, or dangerous conditions. Upon doing so, he did not discover such and concluded that the City did not receive any written notice regarding a defective condition at the location where the plaintiff fell prior to the date of the accident (May 9, 2018).

Nevertheless, plaintiff asserts that Rich's testimony confirming that a repair is not made without receipt of written notice, and Rich's search of the records from January 1, 2018 through May 9, 2018, was inadequate. Also, plaintiff posits that a failure to maintain repair records, when taken together, justifies an inference sufficient to create an issue of fact of whether there was prior written notice regarding the pothole. However, plaintiff cites no legal authority or case with respect to his argument.

The court finds that Rich's testimony reveals that there have been some instances when prior written notice was received and acted upon by the City. However, Rambo states unequivocally in his affidavit that the City "never received any written notice prior to May 9, 2018 regarding a defective condition at the location where plaintiff allegedly fell."

Hence, the City made a prima facie showing that the pothole where plaintiff allegedly fell was located on a street, sidewalk, or highway within the meaning of section C199 of the Peekskill City Charter (*see Bryan v City of Peekskill*, 74 AD3d at 1116; *Schneid v City of White Plains*, 150 AD2d 549, 549 [2d Dept 1989]). Further, through Rambo's affidavit, the City established its entitlement to judgment as a matter of law that it did not receive prior written notice of the allegedly defective condition of the subject area where plaintiff allegedly tripped and fell, as is required by section C199 (*see Tallerico v City of Peekskill*, 114 AD3d at 933; *Bryan v City of Peekskill*, 74 AD3d at 1116).

In opposition, plaintiff failed to raise a triable issue of fact as to whether the City received prior written notice of the allegedly dangerous condition, namely, the pothole (*see Tallerico v City of Peekskill*, 114 AD3d at 933; *Bryan v City of Peekskill*, 74 AD3d at 1116). Plaintiff did not adduce any proof rebutting Rambo's statement that the City did not receive prior written of the alleged defective condition. His sole reliance upon Rich's testimony as to the course of conduct undertaken relative to inspecting the site and the repair of the pothole, coupled with the limited number of times when Rich saw written complaints, is insufficient to raise an issue of fact.

Notwithstanding the foregoing, "[w]here such a municipality establishes that it lacked prior written notice of an alleged defect, the burden shifts to the plaintiff to demonstrate the applicability of one of the two recognized exceptions to the prior written notice requirement" *(Agard v City of White Plains*, 127 AD3d 894, 895 [2d Dept 2015]; *see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). "The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property" (*Agard v City of White Plains*, 127 AD3d at 895; *see Tallerico v City of Peekskill*, 114 AD3d at 933).

Here, though the burden shifted to plaintiff to come forward with an exception to the prior written notice requirement, he relied on neither exception. Instead, plaintiff presses that there are contradictions between Rich's testimony and Rambo's affidavit. Again, this was insufficient to meet his burden. Plaintiff thus failed to raise a triable issue of fact as to whether the City's record-keeping, as it concerned its prior written notice file/logbook, was reliable, or whether the City created the pothole through an affirmative act of negligence (*see Tallerico v City of Peekskill*, 114 AD3d at 933; *Agard v City of White Plains*, 127 AD3d 894, 895; *Denio v City of New Rochelle*, 71 AD3d 717, 718 [2d Dept 2010]). Accordingly, the City's motion for summary judgment dismissing the complaint insofar as asserted against it, is granted.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by the parties was not addressed by the court, it is hereby denied. Accordingly, it is hereby:

ORDERED that the motion of codefendants HUDSON FEE I LLC and EAGLE ROCK MANAGEMENT, LLC (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as asserted against them, is granted; and it is further

ORDERED that the motion of defendant THE CITY OF PEEKSKILL (Mot. Seq. 2), made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as asserted against it, is granted; and it is further

ORDERED that this action is dismissed.

The foregoing constitutes the Decision/Order of the court.

Dated: December 9, 2020
White Plains, New York

E N T E R:

/s/ Lawrence H. Ecker
HON. LAWRENCE H. ECKER, J.S.C.
December 9, 2020, 9:37 a.m.

Appearances:
Parties appearing via NYSCEF.