Smith v County of Westchester
2021 NY Slip Op 32929(U)
October 15, 2021
Supreme Court, Westchester County
Docket Number: Index No. 50193/2017
Judge: James W. Hubert
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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

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CHYNA SMITH,

Plaintiff,

-against-

COUNTY OF WESTCHESTER,

Defendant.

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Index No.: 50193/2017

DECISION & ORDER

Motion Seq. No. 1

Hubert, J.S.C.

The e-filed documents listed as NYSCEF document numbers 18-29 and 36-39 were read on this motion by Defendant County of Westchester for summary judgment pursuant to CPLR 3212, and for such other and further relief as this Court may deem just and proper.

Plaintiff commenced the present action seeking to recover damages for personal injuries which she allegedly sustained on January 29, 2016 at 8:00 p.m., when she tripped and fell due to a "pothole" in a parking lot on the campus of Westchester Community College located in Valhalla, New York. At the time of the fall, Plaintiff was working the 3:00 p.m. to 11:00 p.m. shift as a security officer employed by Securitas Security Inc. Plaintiff was assigned to patrol the Academic Arts Building, the Classroom Building, and between the buildings on an hourly basis, which was her regular assignment at the Valhalla campus.

Defendant County now moves for summary judgment dismissing the complaint on the grounds that there is no evidence that it had actual or constructive notice of the alleged defect at issue. Defendant asserts that there is no evidence that the defect existed for such a period of time that it should have rectified it. Defendant County also contends that it is entitled to summary

judgment since Plaintiff failed to provide it with prior written notice as required by § 708.01 of the Laws of Westchester County.

To prevail on a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law by submitting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Upon a prima facie showing by the moving party, the burden shifts to the opposing party to come forward with evidentiary proof sufficient to establish the existence of material issues of fact which require trial of the action (*Id.* at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that defendant either created the condition or had actual or constructive notice of it" (*Dennehy-Murphy v Nor-Topia Ser. Ctr., Inc.*, 61 AD3d 629, 629 [2d Dept 2009]), and failed to remedy the condition (*Piacqyadio v Recine Realty Corp.*, 84 NY2d 967 [1994]). To establish constructive notice, plaintiff must establish that the "defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected" (*Id.*; *see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Moreover, § 708.01 of the Laws of Westchester County requires written notice to the County prior to a civil action arising for injuries arising from, inter alia, the defective, unsafe, dangerous or obstructed condition of any road, street, highway, bridge, culvert, sidewalk or crosswalk, unless such defective condition "existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence."
In support of the motion for summary judgment, Defendant County relies upon Plaintiff's

testimony that she had not noticed the pothole before her fall, had patrolled the area prior to her fall, and was not aware of anyone who had noticed the pot hole or reported it. Plaintiff also testified that the pothole that she tripped on, or into, was "a foot long and an inch and a quarter deep," "had little clips of concrete … [and] was not all the way deep inside" (Defendant's exhibit B at 15). Plaintiff further testified that it was dark in the parking lot when she fell (*Id.* at 16). Defendant also relies upon the testimony of the Deputy Superintendent of Buildings and Grounds for the campus, who testified that he and his crew, separately, inspect the parking lots and access roads to the parking lots every morning. He further testified that if they notice a pothole or if security provides a written report advising as to the location of a pothole, the pothole is filled.

The Deputy Superintendent also testified that, after receiving the report about Plaintiff's fall, he observed the area where Plaintiff fell and had the "divot" filled with cold patch (Defendant's exhibit F at 35). When asked, based on his observations of the area where Plaintiff fell, how long the condition existed, he testified:

> The minor cracks, the hairline cracks, they could have been there for a year, two years, the little divot that popped could have blown out overnight from a plow going back, the expanding and contracting of the winter, the cold. The conditions change every single night during the winter (*Id.* at 37).

He further testified that no records are kept of snow. Additionally, he testified that if the condition had been observed during one of his inspections, he probably would not have taken any action since the divot was "minor" (*Id.* at 38), and he "couldn't believe someone actually tripped in the small hole like that" (*Id.* at 39). Finally, he testified that the "spider cracks" would be monitored to make sure that "they don't blow out in the course of the night" (*Id.* at 40).

Defendant County also submitted an affidavit of the Clerk of the Westchester County

Board of Legislators, wherein she averred that neither the Board of Legislators nor the Commissioner of the Westchester County Department of Public Works received written notice of the allegedly defective condition in the subject parking lot of Westchester Community College.

Based upon the foregoing evidence, Defendant County established that it did not receive prior written notice or have actual notice of the allegedly defective condition. Additionally, the evidence submitted by Defendant County establishes that it did not have constructive notice of the "divot," but had constructive notice of the "spider cracking" around the divot. However, the evidence submitted by Defendant County established that the "spider cracking" was minor.

In opposition to the motion, Plaintiff submitted evidence, including photographs of the pavement where Plaintiff fell, that raises an issue of fact as to whether the condition of the pavement where Plaintiff allegedly tripped and fell was a defective and dangerous condition that existed for a lengthy period of time, and should have been remedied by Defendant County. Plaintiff submitted the affidavit of an engineering expert, who avers that the area of pavement where Plaintiff tripped and fell was several inches wide, several inches long and more than one-half inch deep. Plaintiff's expert opines that the pavement was uneven and depressed, creating a tripping hazard for pedestrians. Further, Plaintiff's expert opined that the condition was defective and dangerous, and had existed for many months, if not years. Plaintiff's expert further avers that the interconnected fatigue cracks, which existed where Plaintiff tripped and fell, "create small and/or large chunks of pavement, which can be dislodged as vehicles drive over them," and "[o]nce one piece dislodges, subsequent pieces will dislodge unless the pavement is repaired in a timely manner" (Affidavit of Scott M. Silberman, P.E., ¶ 13). Plaintiff's expert also opines that if that condition, which is commonly referred to as a pothole, is left alone, it will develop into the type of defect that Plaintiff tripped over. The photographs

submitted by Plaintiff show uneven pavement with depressions and large cracks in and around the area where Plaintiff fell.

The facts in the present action are similar to those in *Haseley v Abels* (84 AD3d 480 [1st Dept 2011]), where the Court determined that an issue of fact existed as to whether defendants had constructive notice. In Haseley, the plaintiff tripped over a dislodged portion of a tree fence which obstructed a walkway. The Court in Haseley, relying on evidence that the inside panel of the tree fence had been dislodged for months prior to plaintiff's accident, held that the question of whether the fence, in its condition of disrepair, would obstruct the walkway was a question of foreseeability, which was "for the jury's consideration, mindful of the fact that '[t]he precise manner of the event not be anticipated' and '[a]n intervening act may not serve as a superceding cause … where the risk of the intervening act occurring is the very same risk which renders [defendant] negligent'" (*Id.* at 483, *quoting Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 316 [1980], rearg denied 52 NY2d 784 [1980]).

Plaintiff also correctly contends that an issue of fact exists as to whether Defendant County created the defective condition. Notably, the Deputy Superintendent testified that pavement with "spider cracks," such as those that existed in the area where Plaintiff allegedly tripped and fell, can "blow out" and the subject divot could have "blown out overnight from a plow" or due to the weather conditions. In view of the testimony and in the absence of any evidence that Defendant County did not plow the subject parking lot the night before the accident date, an issue of fact exists as to whether Defendant County created the "pothole" and/or "divot" upon which Plaintiff allegedly tripped and fell.

Accordingly, it is hereby:

ORDERED, that Defendant's motion seeking summary judgment in its favor and

dismissing the complaint is denied; and it is further

ORDERED, that the matter is referred to the Settlement Conference Part, Courtroom 1600, for a settlement conference, by the method designated by that Part, on a date and time to be scheduled by that Part.

Dated: White Plains, New York
October 15, 2021

Hon. James W. Hubert
Supreme Court Justice

TO: Counsel of Record via NYSCEF