

Hegeman v City of Newburgh
2021 NY Slip Op 33730(U)
February 5, 2021
Supreme Court, Orange County
Docket Number: Index No. EF002518-2019
Judge: Sandra B. Sciortino
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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 ORANGE

-----X
MICHAEL HEGEMAN,

DECISION AND ORDER

Plaintiff,

Index No.: EF002518-2019

-against-

Motion Date: 12/15/2020

Sequence Nos. 1 - 2

CITY OF NEWBURGH,

Defendant.

-----X
SCIORTINO, J.

The following papers numbered 1 to 10 were read on the defendant’s motion for summary judgment dismissing the complaint and plaintiff’s cross-motion to file an amended Notice of Claim:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Jacobs)/Exhibits A-K	1 - 3
Notice of Cross-Motion/Affirmation (Rusk)/Plaintiff Affidavit/ Exhibits A-G/Memorandum of Law	4 - 8
Reply Affirmation (Jacobs)/Exhibits A-B	9 - 10

Plaintiff alleges that he was injured on June 17, 2018, at approximately 11:45 A.M., when he was picking up broken glass littering the “sidewalk area at the field/bleacher area of the Delano Hitch Stadium which is located in the City of Newburgh at 401 Washington Street, New York 12550.” His son’s soccer team was going to be sitting and walking in and around the area so plaintiff was attempting to clean it up when he stepped backward onto a large, broken Corona bottle. The bottle pierced his shoe and sliced open his foot.

Plaintiff served a Notice of Claim pursuant to General Municipal Law §50-e on or about September 11, 2018. (Exhibit A) Defendant’s counsel rejected the Notice of Claim by letter dated

September 21, 2018 on the basis that it did not adequately describe the location of the plaintiff's accident. (Exhibit B) On October 10, 2018, plaintiff's former counsel sent a letter to defendant's counsel (Exhibit C) in which plaintiff's counsel attempted to give more detailed information as to where the accident occurred. Counsel attached photographs that were barely legible and did not specifically indicate where the alleged glass was that plaintiff cut his foot on.

Plaintiff commenced this action by filing a Summons and Complaint on April 4, 2019. (Exhibit D) The City appeared in this matter by filing an Answer and Affirmative Defenses on or about April 15, 2019. (Exhibit E) The plaintiff filed his Verified Bill of Particulars on or about January 30 2020. (Exhibit F)

In his complaint, plaintiff alleges that defendant (a) negligently maintained the area where the accident happened; (b) caused and maintained the sidewalk and adjacent areas to become and remain in a dangerous condition; and (c) created the hazardous condition on the sidewalk and area adjacent to the bleachers by improperly cleaning the area and maintaining the area, producing and creating a dangerous condition, causing the plaintiff to step on a broken bottle and sustain injuries. It is also claimed that the defendant created the dangerous condition by permitting third parties to enter the premises with alcoholic beverages, failing to provide a receptacle for garbage including empty bottles of alcohol and permitting people to enter this athletic field which was used by young children for athletic and recreational activities and preventing the repeated littering and breaking of bottles in areas that were used for children's recreational and athletic activities.

The City now moves for summary judgment dismissing the complaint, asserting it did not have prior written notice of the condition as required by City Code of Newburgh §C6.45, that the City did not have actual or constructive notice of the condition and that the condition was open and

obvious. Defendant also moves to dismiss plaintiff's claim for failure to adequately describe the location of his accident in the Notice of Claim, as required under N.Y. General Municipal Law §50-e(1)(a). The inadequacy made it impossible for the City to investigate the accident. (Plaintiff's 50-h examination was not taken as the City rejected the Notice of Claim.)

In support of the motion, the City proffered the affidavit of Lorene Vitek, City Clerk of the City of Newburgh. Vitek stated that the office never received, prior to the accident, any complaints about the presence of broken glass on the south side of the bleachers and adjacent to the steps leading up to the bleachers at the Delano Hitch fields.

The City also proffered the affidavit of Nicholas Wells, a City employee assigned to the Recreation Department. Wells' duties often included cleaning and maintenance of the Delano Hitch Recreation Park, including the Delano Hitch Stadium. Mr. Wells was assigned to Delano Hitch on June 17, 2018 and arrived there at 5:30 am to prepare the fields and clean the area, including the south side of the bleachers and the area adjacent to the steps leading up to the bleachers. He would remove any and all debris, including broken glass, if present.

Mr. Wells remained at the park until all activities for the day ended. If he saw debris of any kind on the ground throughout the day he would clean it up; and, if an accident occurred, he would make sure that an accident report was prepared. Mr. Wells stated that, on the day of the alleged accident, he was not advised of any broken glass near the south side of the bleachers adjacent to the steps leading up to the bleachers.

Plaintiff moves to file an amended Notice of Claim which more specifically describes the location of the accident. The Court finds that defendant has satisfied its burden of establishing that the plaintiff's notice of claim did not substantially comply with the requirements of General

Municipal Law § 50–e(2) in that it failed to describe the location of the occurrence with any specificity. (see *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 358 [1981]; *Streletskaya v New York City T. Auth.*, 27 AD3d 640 [2d Dept 2006]). However, plaintiff did describe the cause of his fall with sufficient particularity and upon receipt of defendant's rejection, provided a more detailed description of the location of the accident.

Further, General Municipal Law § 50–e(6) provides that a “mistake, omission, irregularity or defect” in the notice of claim may be “corrected, supplied or disregarded” in the court's discretion, provided that such mistake, omission, irregularity, or defect was made in good faith, and in the absence of prejudice to the municipal defendant (see *D'Alessandro v. New York City Tr. Auth.*, 83 N.Y.2d 891, 893 [1994]; *Oschepkova v. New York City Tr. Auth.*, 24 A.D.3d 523 [2d Dept 2005]). There is no allegation that the error in the Notice of Claim was made in bad faith. Additionally, the specific location of the accident was described in counsel's letter in response to the rejection, as well as the Verified Complaint. (see *Oschepkova v. New York City Tr. Auth.*, *supra*; *Butler v. Town of Smithtown*, 293 A.D.2d 696, 697 [2d Dept 2002]; *Cruz v. New York City Hous. Auth.*, 261 A.D.2d 296, 691[1st Dept 1999])

Defendant could have received a more specific description of the location of the accident at the §50–h hearing but elected not to conduct one. Moreover, contrary to the defendant's contention, the proposed amended notice of claim does not substantially alter the plaintiff's theories of liability (*cf. Mahase v. Manhattan & Bronx Surface Tr. Operating Auth.*, 3 A.D.3d 410, 410–411 [1st Dept 2004]; *Barksdale v. New York City Tr. Auth.*, 294 A.D.2d 210, 211 [1st Dept 2002]; *Rodriguez v. New York City Tr. Auth.*, 286 A.D.2d 681 [2d Dept 2001]).

In opposition to defendant's motion to dismiss, plaintiff concedes that the City lacked prior

written notice of the alleged dangerous condition. He asserts, however, that such notice was not required under the City Code §C6.45 which states:

No civil action shall be maintained against the City for damages or injury to person...sustained in consequence of any street,...sidewalk,...public building, parking area...being out of repair, unsafe, dangerous,...unless written notice of the defective, dangerous, unsafe...condition..., relating to the particular place and specifying the alleged condition, was actually given to the City Clerk and there was neglect or failure within a reasonable time after the giving of such notice to remedy, repair or remove the defect, danger or obstruction complained of ...or the place otherwise made reasonably safe.

Here, plaintiff was injured in the bleacher area of the soccer field at defendant's Delano Hitch Park. Soccer fields, bleachers, bleacher landings, stadiums and recreational parks are places not subject to a prior written notice requirement under either General Municipal Law §50-e(4) or the City Code of the City of Newburgh, §C6.45. Plaintiff was within the gated stadium at the time he was injured and, given the terms of the City Code, the area around the bleachers does not constitute a sidewalk and no prior written notice of the dangerous condition (broken glass and debris) is required for the plaintiff to maintain this action. (*See, Iannuzzi v. Town of Wallkill*, 54 AD3d 812 (2d Dept. 2008); *Davis v County of Nassau*, 166 AD2d 498 [2d Dept 1990]).

There being no prior written notice requirement to hold the City liable for the dangerous or defective condition at the park, plaintiff must establish that the City created the condition or had actual or constructive notice of it" (*Dulgov v City of New York*, 33 AD3d 584, 584 [1st Dept 2006]; *see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Here, defendant established its *prima facie* entitlement to judgment as a matter of law by submitting affidavits of its employees demonstrating that it neither created nor had actual or constructive notice of the alleged dangerous condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Dulgov v City of New York*, 33 AD3d at 585).

The City argues that the plaintiff failed to prove that the defect existed long enough to establish that the City had constructive notice of it. Specifically, the City contends the broken glass was a transitory condition that could have been dropped by an individual just moments before his alleged accident occurred which did not give the City enough time or notice to clean it up. Defendant cites *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986), in which the Court of Appeals overturned a verdict that found in favor of the plaintiff on the basis there was no evidence that the defendant had actual notice of the condition on which the plaintiff allegedly fell.

In *Gordon*, the plaintiff allegedly slipped and fell on the museum steps due to a piece of wax paper. The plaintiff's basis of the claim was that defendant had neither actual nor constructive notice of the dangerous condition presented by the paper on the steps. The Court stated that, to constitute constructive notice, a defect must be visible and apparent, and, in addition, must exist for a sufficient length of time prior to the accident to permit a defendant's employee to discover and remedy it. The Court of Appeals held that the piece of paper could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation.

Here, given the fact that the activities at the park began at 8:00am and the accident occurred nearly 12:00 pm, Plaintiff alleges that the City had constructive notice of the dangerous condition as the broken glass and debris most likely had been left on the ground for days. Plaintiff's allegation is pure speculation. The broken glass and debris was obviously visible and apparent as the plaintiff attempted to clean it up but, similar to the wax paper in *Gordon*, there is no evidence in the record to indicate it existed for a sufficient length of time prior to the accident to permit a defendant's employee to discover and remedy it.

In opposition, the plaintiffs have failed to raise a triable issue of fact.

In light of the above, it is hereby

ORDERED that the summary judgment motion of defendant is granted; and it is further

ORDERED that plaintiff's cross-motion i to serve an amended Notice of Claim, *nunc pro tunc*, is granted but rendered moot.

Dated: February 5, 2021
Goshen, New York

ENTER



HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*