

Kuchmeister v City of Long Beach
2021 NY Slip Op 33764(U)
October 12, 2021
Supreme Court, Nassau County
Docket Number: Index No. 601056/2020
Judge: Leonard D. Steinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
LINDA KUCHMEISTER,

Plaintiff,

-against-

THE CITY OF LONG BEACH

Defendant.
-----X

IAS Part 8
Index No. 601056/2020
Mot. Seq. 001

DECISION AND ORDER

The following papers, in addition to any memoranda of law and/or statement of material facts submitted by the parties, were reviewed in preparing this Decision and Order:

Defendant's Notice of Motion, Affirmation & Exhibits.....	1
Plaintiffs' Affirmation in Opposition & Exhibits.....	2
Defendant's Reply Affirmation.....	3

In this action plaintiff, Linda Kuchmeister, seeks damages for injuries she sustained while attempting to avoid pedestrians who entered her bicycle "lane" as she was riding on the boardwalk in Long Beach, New York. Kuchmeister struck a movable sign located in the middle of the boardwalk and fell, breaking her shoulder, after she was forced to swerve to avoid crashing into the pedestrians. The boardwalk bicycle "lane" is not physically segregated from the throngs of beachgoers and visitors utilizing the boardwalk and is not demarcated by painted lines. The City of Long Beach ("City") concedes that it received "a great deal of complaints," including in writing, that the bike "lane" constituted a dangerous condition for those on the boardwalk. Notwithstanding that this known dangerous condition allegedly has resulted in injury, the City seeks summary judgment dismissing the complaint as against it pursuant to CPLR 3212. For the reasons set forth below, the motion is denied.

BACKGROUND

Kuchmeister's accident occurred in the morning on July 30, 2019, while she was riding her bicycle on the boardwalk. The boardwalk runs along the City's public beach for 2.2 miles and its average width is 52 feet. Prior to October 2012, there was an obvious bike lane on the boardwalk demarcated by painted white lines. After the boardwalk was destroyed by Superstorm Sandy, the boardwalk was rebuilt in 2013 using a different type of wood.¹ A representative of the City testified that testing of the new wood revealed that paint and thermal markings would not successfully adhere to it. As a result, there is no obvious, distinct bike lane on the newly constructed boardwalk. The only demarcation of a bike "lane" is a different direction of the wooden planks from the remainder of the boardwalk in a 12 foot section in the center of the boardwalk.

It is undisputed that movable bike lane signs were placed on the boardwalk by the City in 2017, at street entrances to the boardwalk, in an attempt to give notice of the existence of a bike "lane." Thomas Canner—a witness produced for deposition by the City—was at the time the City's superintendent of the beach, parks and the central maintenance department overseeing the daily operations of the boardwalk and the beach, but he was not consulted concerning the purchase or placement of the signs prior to their appearance. The decision to order and place the signs on the boardwalk was purportedly made by two City officials. No evidence has been submitted by the City reflecting that any study was conducted prior to the placement of the signs or that their use resulted from a reasoned policy determination.

The signs consist of a black, heavy base; a pole; and a green, rectangular sign mounted to the top of the pole that read "Bike Lane," with a picture of a bicycle. The bike lane signs were not permanently affixed to the boardwalk and the City had problems with people moving them. In addition, some of the signs were damaged from storms and people throwing them off the boardwalk. Eventually, the City had "less and less" signs, for a total of 14 (the number counted by Kuchmeister according to her testimony; Canner believes there were originally 20 signs, but from purchase orders produced by the City it appears that 30

¹ According to news reports, the City spent \$44 million in federal and state funds rebuilding the boardwalk.

signs were purchased). There are no other lines, markings or signs which signify the bike "lane" or place pedestrians on notice of its existence on the boardwalk.

Joseph Febrezio, the Commissioner of Public Works for Long Beach, attests that the City did not receive any written notice of the signs being moved to the center of the bike path or of anyone riding into the signs. But Febrizio concedes that "[t]he City received a great deal of complaints, including written notice, that the lack of lines resulted in a dangerous condition inasmuch as the bicycle lanes were insufficiently demarked." Those complaints continued after the signs were utilized.

Kuchmeister's accident occurred when, without warning, a group of pedestrians entered the boardwalk from the beach and crossed into the bike "lane" in front of her. According to Kuchmeister, she swerved around the pedestrians to avoid crashing into them and in the process struck a sign located in the middle of the lane. Kuchmeister struck the rectangular portion of the sign. Upon contact, Kuchmeister flew off her bicycle onto the ground, fracturing her shoulder.

CLAIMS & LEGAL ARGUMENTS

Kuchmeister alleges that the City failed to safely design the use of the boardwalk to ensure that pedestrians did not interfere with the safe riding of bicycles (and vice versa). Further, Kuchmeister asserts that the City created a dangerous condition by placing movable bike lane signs in or around cyclists' course of travel on the bike path and utilizing signs without "flexible breakaway bases," as recommended by the manufacturer.

The City contends that it cannot be held liable for this accident because: (i) the City is shielded by immunity from liability for its design of the boardwalk and decision to use the subject bike lane signs to demarcate the bike lane; (ii) the sign that plaintiff rode into was open and obvious and not inherently dangerous; and (iii) even this condition was dangerous, the City did not receive prior written notice of it, a condition precedent to maintaining a cause of action against the City pursuant to section 256A(1) of the City's Charter.

LEGAL ANALYSIS

It is the movant who has the burden to establish his/her entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). “CPLR 3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses.” *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d Dept. 1996). “In determining a motion for summary judgment, evidence must be viewed in a light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 A.D.3d 566 (2d Dept. 2015).

Where the movant fails to meet his initial burden, the motion for summary judgment should be denied. *US Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014). Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

The City initially argues that the sign into which Kuchmeister crashed was open and obvious and, therefore, her action should be dismissed. But this argument misses the point. Kuchmeister crashed into the sign not because she failed to observe it but because she was attempting to avoid striking pedestrians who likely were unaware that they had entered into a bike lane. This is the crux of her action—the City’s folly in believing that placing an occasional sign near the bike path would somehow protect from injury bicyclists and pedestrians sharing the boardwalk.

While it has long been held that a municipality owes a nondelegable duty to the public to keep its streets in a reasonably safe condition, this duty “[i]s measured by the courts with consideration given to the proper limits on intrusion into the municipality’s planning and decision-making functions.” *Kuhland v. City of New York*, 81 A.D.3d 786 (2d Dept. 2011). Here, the City’s design and oversight of the boardwalk—upon which bicycle riding was

invited—and its use of movable signs to reflect the existence of a bike “lane,” was a proprietary function analogous to roadway planning, design and maintenance. See *Perlov v. Port Authority of New York and New Jersey*, 189 A.D.3d 1624 (2d Dept. 2020); see also *Selca v. City of Peekskill*, 78 A.D.3d 1160 (2d Dept. 2010)(applying qualified immunity doctrine in action alleging injury on a floating dock); *Joyce v. State*, 152 A.D.2d 306 (3rd Dept. 1989)(injury at pedestrian plaza); *Olenick v. City of New York*, 56 Misc.3d 389 (Sup. Ct., Kings Co. 2017)(pedestrian accident in bike lane).

In the field of design engineering, a municipality is generally accorded qualified immunity from liability arising out of a planning decision. *Turturro v. City of New York*, 77 A.D.3d 732 (2d Dept. 2010). Nonetheless, a municipality may be found liable where it is demonstrated that its plan was based on an inadequate study or lacked a reasonable basis. *Alexander v. Eldred*, 63 N.Y.2d 460 (1984); *Heins v. Vanbourgondien*, 180 A.D.3d 1019 (2d Dept. 2020); *Bounauito v. William Floyd School Dist.*, 203 A.D.2d 225 (2d Dept. 1994). “To establish its entitlement to qualified immunity, the governmental body must demonstrate ‘that the relevant discretionary determination by the governmental body was the result of a deliberate decision-making process’.” *Ramirez v. State of New York*, 143 A.D.3d 880, 881 (2d Dept. 2016), quoting *Iacone v. Passanisi*, 133 A.D.3d 717, 718 (2d Dept. 2015). The qualified nature of the immunity is based on the principle that once a municipality is made aware of a dangerous condition it must undertake a reasonable study thereof with an eye toward alleviating the danger. *Turturro v. City of New York*, 28 N.Y.3d 469, 480 (2016).

Here, the City was cognizant of the danger to pedestrians and cyclists resulting from their shared use of the boardwalk. And there is nothing in the record to indicate that the City’s use of 14 movable signs in an attempt to create an observable bike lane on a boardwalk over 2 miles in length was the product of a reasoned plan or study. Putting aside hearsay issues related to their testimony, officials on behalf of the City merely attest that the subject signs were selected after the City discovered that paint and thermal striping would not adhere to the wood of the boardwalk. The City entertained the idea of installing overhead signs at each of fifteen entry points to the boardwalk from the street but found them to be cost-prohibitive. But these considerations do not amount to a study or investigation.

At best, they constitute an informal review, which is insufficient. See *Leon v. New York City Transit Auth.*, 96 A.D.3d 554, 555 (1st Dept. 2012).

Because the City concedes that it was aware of the hazard resulting from allowing bicycle riding on a busy boardwalk shared by pedestrians—who were required to cross the bike path at multiple locations to get to the beach and/or the surrounding streets—and since the City implemented the “safety” design present at the time of Kuchmeister’s accident without first conducting a study relating to the hazard, an issue of fact exists as to whether the City was negligent. Considering this finding, the court need not address the issue of whether the City received prior written notice of the dangerous condition that caused Kuchmeister’s fall. See *Alexander v. Eldred*, 63 N.Y.2d 460 (1984)(prior notice laws relate to physical defects such as holes and cracks).

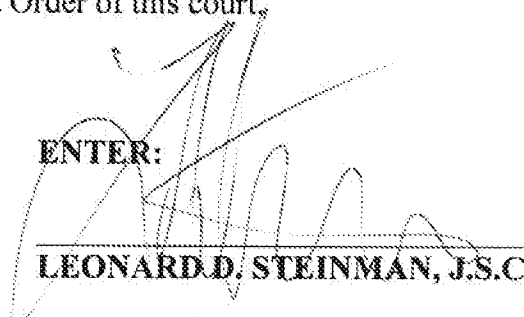
Accordingly, the City’s motion for summary judgment is denied.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: October 12, 2021
Mineola, New York

ENTERED
Oct 18 2021
NASSAU COUNTY
COUNTY CLERK’S OFFICE

ENTER:

LEONARD D. STEINMAN, J.S.C.