

Calabrese v City of Albany

2022 NY Slip Op 34899(U)

July 20, 2022

Supreme Court, Albany County

Docket Number: Index No. 900844-20

Judge: Christina L. Ryba

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

HENRY E. CALABRESE,
 Plaintiff,

-against-

THE CITY OF ALBANY,
 Defendant.

DECISION/ORDER
Index No. 900844-20
RJI No. 01-20-134905

APPEARANCES:

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RYBA, J.,

On July 6, 2019, plaintiff was operating his motorcycle on Lark Street in the City of Albany when he struck a section of uneven pavement and lost control of the steering, at which point the motorcycle tipped over and pinned plaintiff's leg underneath as it slid down the roadway. The alleged defect consisted of a large depression and cracked pavement in the roadway surface that spanned across both lanes of travel and measured approximately 17 feet wide and 9 feet long. Seeking to recover damages for the personal injuries that he sustained in the accident, plaintiff commenced this action alleging that defendant The City of Albany ("the City") affirmatively created the defective condition, was negligent in its repair, maintenance and inspection of the roadway, failed to adequately warn motorists of the defect in the roadway, and

had actual, constructive and prior written notice of the defective condition. Following joinder of issue and discovery, plaintiff filed the present motion for an order granting summary judgment in his favor on the issue of liability, arguing that the prior written notice requirement set forth in Albany City Code § 24-1 was waived by the City, fulfilled by notifications made by the public on the City's SeeClickFix website, and/or inapplicable by virtue of the fact that the City affirmatively created or exacerbated the dangerous condition. The City opposes the motion and cross-moves for an order of summary judgment dismissing the complaint, arguing that it lacked prior written notice of the defective condition as required by Albany City Code § 24-1 and that no exception to the prior written notice rule applied. Plaintiff opposes the cross motion.¹ A jury trial in this matter is scheduled to commence on December 12, 2022.

In deciding the respective motions for summary judgment, the Court must be mindful that “summary judgment is a drastic remedy and should only be granted when no material facts exist and the movant is entitled to judgment as a matter of law” (see, Gadani v Dormitory Auth. of State of NY, 43 AD3d 1218, 1219 [2007]; Matter of La Bier v La Bier, 291 AD2d 730, 732 [2002], lv dismissed 98 NY2d 671 [2002]). Moreover, the Court must view the evidence in a light most favorable to the nonmoving party, who should be afforded the benefit of every reasonable inference (see, Tenkate v Tops Mkts., LLC, 38 AD3d 987, 989 [2007]; Albany Comm. Dev. Agency, 279 AD2d 93, 95 [2001]). The proponent of the motion bears the initial burden of coming forward with prima facie evidence in admissible form to eliminate all material

¹ The procedural background of this case also includes a third-party action commenced by the City against the motorcycle owner, which was dismissed by decision and order of this Court dated July 2, 2020, and a subsequent third-party action commenced by the City against National Grid USA and its affiliates, which was discontinued on or about May 19, 2021.

issues of fact from the case (see, Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Berkeley v Rensselaer Polytechnic Institute, 289 AD2d 690, 691 [2001]). If this initial burden is satisfied, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form to establish the existence of material issues of fact which require a trial of the action (see, Zuckerman v City of N.Y., 49 NY2d 557, 562 [1980]; Spiratos v County of Chenango, 28 AD3d 863, 863 [2006]). However, if the initial burden is not satisfied, the requested relief must be denied without reference to the sufficiency of the opposing papers (see, Winegrad v New York Univ. Med. Ctr., 64 NY2d at 853 [1985]; Mountain Candy & Cigar Co. Inc. v Dairy Mart Convenience Stores, 267 AD2d 570 [1999]).

The first issue presented by the parties' respective summary judgment motions is whether the City possessed the requisite degree of notice required to impose liability for the alleged defective condition of roadway. It is well established that where a municipality has enacted a local law requiring prior written notice of defective conditions, compliance with the written notice requirement is a mandatory condition precedent to a tort action against that municipality (see, Amabile v City of Buffalo, 93 NY2d 471, 473-474 [1999]; Demaoribus v Town of Cheektowaga, 188 AD3d 1643 [2020]; Beagle v City of Buffalo, 178 AD3d 1363, 1365 [2019]). In such a case, traditional forms of actual or constructive notice are insufficient to create liability (see, Palo v Town of Fallsburg, 101 AD3d 1400, 1401 [2012], lv denied 20 NY3d 862, [2013]; Boice v City of Kingston, 60 AD3d 1140, 1142 [2009]). A municipality moving for summary judgment dismissing an action based upon a defective condition in a roadway may meet its initial burden on the motion by establishing that it did not receive prior written notice of the allegedly dangerous condition (see, Horan v Town of Tonawanda, 83 AD3d 1565, 1567 [2011]). In

opposition, a plaintiff may defeat the motion by raising a triable issue of fact whether one of the exceptions to the prior written notice requirement applies (see, Demaioribus v Town of Cheektowaga, 188 AD3d at 1643 [2020]; Chance v County of Ulster, 144 AD3d 1257, 1258–59 [2016]; Village of Keeseville, 113 AD3d 895, 896 [2014]). The only two exceptions that will excuse prior written notice are where 1) the locality created or exacerbated the defect through an affirmative act of negligence, or 2) a ‘special use’ confers a special benefit upon the locality (see, Amabile v City of Buffalo, 93 NY2d at 474 [1999]).

Here, the version of the prior written notice rule that was in effect at the time of plaintiff’s July 2019 accident was set forth in City of Albany Code §24-1 and provided as follows:

A. No 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 or crosswalk being defective, out of repair, unsafe, dangerous or obstructed unless, previous to the occurrence resulting in damages or injury, written notice of the defective, unsafe, dangerous or obstructed condition of said street, highway, bridge, culvert, sidewalk or crosswalk was actually given to the *Commissioner of Public Works* and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of. [emphasis supplied]

In support of his motion for summary judgment on the issue of liability, plaintiff first notes that the position of “Commissioner of Public Works” ceased to exist in 1998 when the City eliminated the Department of Public Works and replaced it with the Department of General Services. Nonetheless, the City failed to revise its prior written notice statute to reflect this change until September 2019 - - after plaintiff’s accident - - when it was amended to require that written notice be given to the “Commissioner of General Services.” Plaintiff argues that, because City of Albany Code §24-1 required that notice be given to a statutory designee that did

not exist, compliance with the rule was impossible. Therefore, plaintiff argues, he should be relieved from compliance with the prior written notice rule and/or the City should be estopped from asserting it as a defense. Alternatively, plaintiff argues that prior written notice of the depression in the roadway was furnished to the Commissioner of General Services through electronic written complaints submitted to the SeeClickFix website, a platform designed for the public to report written complaints to the City. In response, the City contends that the SeeClickFix communications do not satisfy the prior written notice because they were not directed to the Commissioner of Public Works as required by Albany City Code §24-1, were electronic rather than written, and did not reasonably report and identify the roadway depression at issue herein.

Initially, laws requiring prior written notice of a defect as a condition precedent to legal action are in derogation of common law and must be strictly construed against the municipality (see, Katz v City of New York, 87 NY2d 241, 243 [1995]; Harrison v City of New York, 184 AD3d 742, 743 [2020]). When construing the language of a prior written notice law, courts will ordinarily give effect to its plain meaning unless that construction would yield “absurd or futile results”, and even “unreasonable results” that are at variance with the purpose and policy underlying of the statute as a whole (Drs. Council v New York City Employees' Ret. Sys., 71 NY2d 669, 675 [1988] [internal quotations omitted]; see, Matter of Jose R., 83 NY2d 388 [1994]; Schmidt v Roberts, 74 NY2d 513 [1989]; Morris Builders v Empire Zone Designation Board, 95 AD3d 1381 [2012]). Likewise, courts should avoid an interpretation that is contrary to reason or would require an impossibility (see, McKinney's Cons Laws of New York Statutes §

141; Matter of Marian T., 36 NY3d 44, 56 [2020]; Long v State, 7 NY3d 269, 273 [2006]; People v Santi, 3 NY3d 234, 242 [2004]).

Here, at the time of plaintiff's accident, City of Albany Code §24-1 required that prior written notice of defects be furnished to the "Commissioner of Public Works". Giving effect to the plain meaning of the code would lead to the absurd, impossible and futile requirement that written notice be provided to the Commissioner of a governmental unit that was no longer in existence. Applying such a literal interpretation would result in a scenario wherein prior written notice to the correct statutory designee could never be achieved, thus absolutely shielding the City from liability and undermining the purpose of its prior written notice law. Inasmuch as the City of Albany Code § 42-104 abolished the Department of Public Works in 1998 and transferred all of its functions and personnel to the Department of General Services, the Court accordingly interprets City of Albany Code §24-1 to require that prior written be furnished to the Commissioner of General Services rather than to the Commissioner of Public Works. Thus, while the City is estopped from arguing that notice must be given to the Commissioner of Public Works, it may still assert that prior written notice was not properly furnished to the Commissioner of General Services.

The Court will next address the City's contention that reports of roadway defects made through the SeeClickFix program do not satisfy the prior written notice requirement because they are not "written", were not communicated to the Commissioner of General Services, and do not pertain to the roadway depression that allegedly caused plaintiff's injury. The undisputed evidence demonstrates that SeeClickFix is a web-based computer program utilized by the City as

a means for the public to electronically report in writing any issues or concerns to the appropriate City department. It is further undisputed that the Department of General Services promoted the use of SeeClickFix to the public as a means to submit electronic written notice of roadway defects, and that while the Commissioner of General Services had access to these electronic notifications received through SeeClickFix, he elected not to personally review them. Written entries on the SeeClickFix database are also recorded by Department of General Services employees as a way to document and respond to notifications of roadway defects made by telephone calls, inter-departmental communications, and other sources.

The record reveals that written complaints of a “deep hole” in the roadway near 67 Lark Street were reported to the Department of General Services via SeeClickFix on October 25, 2018 and November 1, 2018, with the latter report elaborating that “This is the 2nd time I’ve reported this and its just getting worse. Cars swerve into oncoming traffic to go around it. Please fix it now.” Although an entry made by a Department of General Services employee on the November 1, 2018 complaint states that “the potholes have been filled”, the same SeeClickFix user again reported on January 1, 2019 that there was still a “deep hole” in the road at 67 Lark Street. Moreover, a December 17, 2018 complaint submitted via SeeClickFix reported a “very deep pothole” at the corner of Lark Street and First Street, a December 14, 2018 entry reported a “Deep Pothole in the intersection”, a December 21, 2018 report noted a “Large pothole getting bigger at the intersection of First Street and Lark Street”, and a January 8, 2019 entry reported “Potholes at the corner of First Street and Lark”. Finally, a SeeClickFix notification on May 24, 2019 reported a complaint of a “very large pothole in front of residence” located at 65 Lark Street which “shakes the house when vehicles hit it”.

Initially, the Court rejects the City's contention that the roadway defect notifications made via SeeClickFix cannot establish prior written notice because they were not directly communicated to the Commissioner of General Services. The undisputed evidence demonstrates that notifications made by SeeClickFix are communicated directly to the Department of General Services, that the Commissioner had access to the SeeClickFix database and could have reviewed the complaints but elected not to do so, and that the Commissioner instead assigned various staff members to review the notifications. As for the City's argument that certain of the SeeClickFix complaints don't qualify as *written* notice because they were merely entries made by Department of General Services employees documenting *verbal* complaints made via telephone, the Court agrees that verbal or telephonic notice of a defect that is later reduced to writing does not satisfy the prior written notice requirement (see, Gorman v Town of Huntington, 12 NY3d 275, 280 [2009]; Dalton v City of Saratoga Springs, 12 AD3d 899, 901 [2004]). However, upon review of the voluminous record before the Court, it cannot be determined as a matter of law which of the aforementioned SeeClickFix notifications were based upon verbal rather than written communications.

In addition, the Court finds that the record contains a factual dispute as to whether the defects described in the SeeClickFix notifications were the same as, or were otherwise related to, the roadway depression that caused plaintiff's accident. Whether the reports of "deep holes" and "deep potholes" in the vicinity of plaintiff's accident sufficiently correspond to the alleged defect that caused plaintiff's accident is a question of fact for a jury to resolve. Moreover, while the City contends that the "potholes" and "deep holes" reported via SeeClickFix were filled prior to plaintiff's accident and therefore cannot reasonably refer to the same defect that allegedly caused

his accident, the record does not conclusively establish that the “potholes” and “deep holes” were indeed properly filled prior to plaintiff’s accident. Thus, whether the SeeClickFix notifications at issue were sufficient to provide the City with prior written notice of the alleged defect in the present case is an issue of fact for the jury’s resolution (see, Harrison v City of New York, 184 AD3d 742, 744 [2020]; Patane v City of New York, 284 AD2d 513, 514 [2001]).

Plaintiff next argues that prior written notice requirement is inapplicable to his claim that the City failed to post adequate warning signs to warn motorists of the dangerous condition of the roadway. The Court disagrees. The failure to warn of roadway defects such as potholes or cracks is not a recognized exception to the prior written notice requirement. Although plaintiff relies upon a line of cases wherein courts have found that the prior notice requirement does not apply to a municipality’s failure to maintain or erect traffic signs, these cases all involved the failure to erect permanent traffic signs to warn of conditions inherent in the planning and design of the roadway, such as signs to warn of approaching sharp curves in the roadway (see, O’Buckley v County of Chemung, 88 AD3d 1140 [2011]; Ramundo v Town of Guilderland, 142 AD2d 50, 53 [1988]), stop signs at dangerous intersections (see, Alexander v Eldred, 63 NY2d 460, 467 [1984]; Read v Bell, ___ AD3d ___ [June 2, 2022]), and signs to slow down or otherwise warn motorists of approaching blind hills (see, Ackley v Clemons, 237 AD3d 780 [1997]). This line of cases all involved the allegation that the absence of an appropriate traffic or warning sign was *in itself* the dangerous condition. The Court of Appeals’ has specifically held that “nonexistent” traffic or warning signs do not constitute defective conditions within the meaning of prior written notice statutes (see, Alexander v Eldred, 63 NY2d at 467 [1984]). Where, as here, the plaintiff alleges that a physical defect in the roadway such as a pothole or other irregularity caused the

injury, the prior written notice requirement applies (see, Alexander v Eldred, 63 NY2d at 467 [1984]; Doremus v Incorporated Vil. of Lynbrook, 18 NY2d 362 [1966]).

Plaintiff next contends that the City affirmatively created and/or exacerbated the defective condition of the pavement by negligently performing extensive excavation and repair work on the roadway at 67 Lark Street prior to plaintiff's accident. The affirmative negligence exception to the prior written notice requirement applies to "work by the City that immediately results in the existence of a dangerous condition" (Yarborough v City of New York, 10 NY3d 726, 728 [2008] [internal quotations omitted]; see, Guss v City of New York, 147 AD3d 731, 733 [2017]). Methal v City of New York, 116 AD3d 743, 743-744 [2014]; Laracuenta v City of New York, 104 AD3d 822, 822-823 [2013]). In support of this contention, plaintiff offers photographic, documentary and expert opinion evidence that details extensive excavation work of the roadway at 67 Lark Street performed on April 3, 2019 by the City's Water Department in response to an apparent water main break. According to plaintiff, the evidence demonstrates that the depression in the roadway existed for several months without being properly or permanently repaired, and that this defective area was further enlarged and affirmatively worsened by the City when its Water Department excavated the area on April 3, 2019 and subsequently failed to completely repair and restore the excavation site prior to plaintiff's July 2019 accident.

Plaintiff offers affidavits of Ronald A. Bova, a licensed civil engineer who reviewed all of the relevant testimony, photographs, and documents in this matter. Bova opines in relevant part that the subject roadway depression developed due to the City's improper excavation, improper compaction of the backfill materials, and the improper use of temporary unstable cold

patch to repair and restore the excavated area. Bova avers that, based upon the appearance of depression in front of 67 Lark Street as depicted in photographs, it is apparent that the excavation hole was improperly backfilled thus providing an insufficient foundation for the roadway pavement, which would have immediately begun to sag following the April 3, 2019 repair. According to Bova, if a road is not backfilled and/or compacted properly, or if an insufficient amount of foundational material is used, it will cause the pavement to sink and dip causing depressions in the pavement. Bova also notes that an internal email from the City's Water Department already documented an issue with the roadway depression "sinking" in the area of 67 Lark Street on June 3, 2019, only two months following the April 3, 2019 repair. Bova opines that, inasmuch as the roadway was already sinking so soon after the dig, it demonstrates that there was severe insufficient subbase and asphalt concrete material used to restore the roadway.

Furthermore, Bova avers that the City's failure to timely restore the surface of the excavation site by replacing the cold patch with a permanent material immediately lead to a defective condition. Bova explains that cold patch used by the City to seal the excavation site is a temporary material that is unstable and subject to fast deterioration of the road pavement area. Accordingly, Bova states, cold patch is a temporary patch that must be replaced using a permanent and stable hot material as soon as warmer weather permitted. Bova opines that the City's failure to properly and permanently restore the excavation site in this manner prior to plaintiff's July 6, 2019 accident further enlarged the depression in the roadway. Similarly, Gary Bohl, the Assistant Director of Operations of Department of General Services, testified at his deposition that the "significant depression" in the roadway at the time of plaintiff's accident

presented a safety concern and reflected temporary work that should have been fully and permanently restored by that time.

The evidence submitted by the City in response to this showing includes the affidavit of Francis Kindlon, the Water Maintenance Foreperson for the City's Water Department who was assigned to oversee the April 3, 2019 excavation and repair of the roadway in connection with the water main break at 67 Lark Street. In his affidavit, Kindlon describes the events surrounding the roadway excavation and details the manner in which the excavated hole was filled after the water main break was repaired. Specifically, Kindlon avers that his crew added clean fill to the excavated hole and compacted it every sixteen inches using a mechanical tamper, and repeated this process several times before topping the fill with two four-inch layers of crusher stone, which were also compacted between each layer. Kindlon avers that temporary cold patch was applied to pave over the top because it was too cold to apply permanent hot asphalt or concrete, and that upon completion the patch was even with the surrounding roadway and he was confident that it would remain in that condition until warmer weather allowed a permanent repair. The City contends that the roadway depression that caused plaintiff's accident appeared gradually over time and not as the immediate result of the April 3, 2019 excavation, and that the contrary opinion offered by plaintiff's expert should not be credited or given any weight.

Under the circumstances presented here, the Court finds that material questions of fact exist as to whether the manner in which the City excavated, repaired and/or restored the roadway created or exacerbated the defective condition which allegedly caused plaintiff's accident. To the extent that the City challenges the sufficiency of the reasoning and analysis underlying the

opinion of plaintiff's expert, it is well settled that alleged defects or inconsistencies in expert analyses raise questions of weight and credibility for factual determination for a jury to resolve (see, Madden v Town of Greene, 64 AD3d 1117, 121 [2009]). Accordingly, neither party is entitled to summary judgment on the issue of whether the City created the defective condition in question.

Finally, the Court is not persuaded by the City's argument that the doctrine of governmental immunity shields it from liability because the excavation and repair of the roadway was necessitated by an emergency situation created by the water main break, and that its response to that emergency involved the exercise of a discretionary governmental function. The doctrine of governmental immunity shields a municipality from liability for discretionary decisions taken during the performance of governmental functions (see, Valdez v City of New York, 18 NY3d 69, 75-76 [2011]; Murchison v State, 97 AD3d 1014, 1015 [2012]). However, where the alleged negligence arose out of the exercise of a proprietary function, rather than a discretionary governmental act, no immunity will attach (see, Billera v Merritt Const., Inc., 139 AD3d 52 [2016]). It is well settled that a municipality has a "proprietary duty to keep its roads and highways in a reasonably safe condition" (Wittorf v City of New York, 23 NY3d 473 480 [2014]; see, Friedman v State of New York, 67 NY2d 271, 283 [1986]), and thus "[m]aintenance of streets and sidewalks is a proprietary function for which a municipality is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties" (Gutkaiss v Delaware Ave. Merchants Grp., Inc., 173 AD3d 1327, 1329 [2019]; see, Turturro v City of New York, 28 NY3d 469, 479 [2016]). Here, inasmuch as the negligence alleged by plaintiff arises from the

City's claimed failure to properly maintain Lark Street in a reasonably safe condition, the doctrine of governmental immunity is inapplicable.

In view of the foregoing, the Court finds that neither party is entitled to summary judgment. Accordingly, plaintiff's motion and the City's cross motion are both denied. To the extent that the parties' remaining contentions have not been specifically addressed, they have been reviewed and determined to be either without merit or otherwise unnecessary to address.

For the foregoing reasons, it is

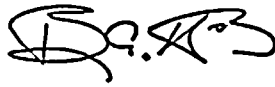
ORDERED that the motion is denied, and it is further

ORDERED that the cross motion is denied.

This shall constitute the Decision and Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, plaintiff's counsel shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: July 20 2022


HON. CHRISTINA L. RYBA
SUPREME COURT JUSTICE



07/21/2022