

Perez v City of New York

2024 NY Slip Op 31492(U)

April 22, 2024

Supreme Court, Kings County

Docket Number: Index No. 503954/19

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No. ~~509954/2019~~
503954/19

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ANTHONY PEREZ,

Plaintiff,

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

Defendants.
-----x

During the trial of this action, the defendant, the City of New York (“the City”) moved for a directed verdict at the close of plaintiff’s case. The Court reserved decision. After the jury returned a verdict in plaintiff’s favor, the City moved to set aside the verdict. Both motions are granted for the reasons set forth below.

Background:

The plaintiff, Anthony Perez, commenced this action to recover damages for personal injuries that resulted from a trip and fall accident that occurred on August 26, 2018, on the roadway of 7th Street, between 2nd and 3rd Avenue, Brooklyn, New York. The plaintiff maintained that the cause of his accident was a pothole located approximately 20 feet from the intersection of 7th Street and 2nd Avenue. The City maintained that it did not have prior written notice of the existence of the pothole.

The issue of liability was tried before a jury from February 6, 2024 to February 9, 2024. During the trial, the plaintiff introduced evidence that the City obtained written notice of a roadway defect on August 21, 2017, when it received a citizen’s complaint from Barbara Kelly through its 311 App. The notice informed the City that there was a roadway defect located in front of a building located at 186 - 7th St. Brooklyn, New York, which is approximately 500 feet away from where the plaintiff claims the accident occurred.

The plaintiff called Ms. Kelly as a witness during the trial. Ms. Kelly testified that on August 21, 2017, using her i-phone, she emailed the citizen’s complaint to the City through the City’s 311 App. She further testified that she took photographs of the condition that was the subject matter of the complaint and emailed them to the City along with the complaint. Ms.

Kelly testified that she no longer had copies of these photographs. When Ms. Kelly was shown a photograph of the pothole that the plaintiff claims caused his accident that had been received in evidence, she testified that the photograph depicted the same defect shown in the photographs she sent to the City.

The City called Philip Wu as a witness, who is employed by the City in the Office of Technology and Intervention. Mr. Wu searched the City's electronic records and acknowledged that the City received several photographs from Ms. Kelly along with her citizen's complaint. Mr. Wu produced these photographs, and they were received in evidence. Parenthetically, these photographs depict a condition that is entirely different for the condition that the plaintiff claims caused his accident.

At the close of plaintiff's case, the attorney for the City moved for a directed verdict pursuant to CPLR 4401, arguing that the plaintiff failed to make out a prima facie case that the City had prior written notice of pothole that plaintiff claims caused his accident. The court reserved decision and put the question of prior written notice to the jury.

The jury returned a verdict unanimously finding that the City had prior written notice. The jury went on to find that the City's negligence was the sole proximate cause of the accident.

After the verdict, the City moved to set aside the verdict pursuant to CPLR 4404, arguing the evidence did not support a finding that the City had prior written notice of the pothole. The court reserved decision. On February 20, 2024, the matter appeared before the undersigned for final oral argument.

Discussion:

Pursuant to the New York City Administrative Code § 7-201(c)(2), the City's prior written notice law, the City may not be subjected to liability for injuries arising from a defective roadway condition unless it has received prior written notice of the defect, or an exception to the written notice requirement applies (*see Yarborough v. City of New York*, 10 N.Y.3d 726, 728, 853 N.Y.S.2d 261, 882 N.E.2d 873; *Bartels v. City of New York*, 125 A.D.3d 583, 585, 6 N.Y.S.3d 60). The only recognized exceptions to the prior written notice requirement are where the defect or hazard results from an "affirmative act of negligence" by the municipality, or a

special use by the municipality that conferred a special benefit upon it (*Methal v. City of New York*, 116 A.D.3d 743, 743, 984 N.Y.S.2d 71; see *Carlucci v. Village of Scarsdale*, 104 A.D.3d 797, 798, 961 N.Y.S.2d 318). The affirmative negligence exception is limited to acts by the municipality that immediately result in a dangerous condition (see *Oboler v. City of New York*, 8 N.Y.3d 888, 889–890, 832 N.Y.S.2d 871, 864 N.E.2d 1270). Since the plaintiff failed to introduce any evidence that the City caused or created the alleged defect through an affirmative act of negligence, or that the defect that caused the accident resulted from a special use by the City, these exceptions do not apply.

A motion pursuant to CPLR 4401, made at the close of the plaintiff's case, for judgment as a matter of law dismissing a complaint may be granted when the trial court determines that, upon the evidence presented, there is “no rational process by which the jury could find in favor of the nonmoving party” (*Tapia v. Dattco, Inc.*, 32 A.D.3d 842, 844, 821 N.Y.S.2d 124; see *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556, 664 N.Y.S.2d 252, 686 N.E.2d 1346). “In considering such a motion, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant” (*Tapia v. Dattco, Inc.*, 32 A.D.3d at 844, 821 N.Y.S.2d 124 [internal quotation marks omitted]; see *Szczerbiak v. Pilat*, 90 N.Y.2d at 556, 664 N.Y.S.2d 252, 686 N.E.2d 1346). In deciding such a motion, the evidence must be viewed in the light most favorable to the plaintiff *Szczerbiak*, supra.

To set aside a jury verdict and to be awarded judgment as a matter of law pursuant to CPLR 4404(a), a defendant has the burden of showing that, upon viewing the evidence in the light most favorable to the plaintiff, “there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial” (*Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145; see *Lang v. Newman*, 12 N.Y.3d 868, 870, 883 N.Y.S.2d 153, 910 N.E.2d 982).

Here, viewing the evidence in the light most favorable to the plaintiff and affording the plaintiff every inference which may properly be drawn from the facts presented, there is no

rational process by which the jury could have found in favor of the plaintiff on the issue prior written notice.

First, the only evidence introduced at trial on the issue of whether the City received prior written notice was Ms. Kelly's citizen complaint. The citizen complaint informed the City of a defective roadway condition that was located approximately 500 feet from the one that the plaintiff claims caused his accident. It is well settled that prior written notice of one defect in the general area of an accident is insufficient to constitute notice of an entirely different defect which caused the accident (see *Espinosa v JMG Realty Corp.*, 53 AD3d 408, 861 NYS2d 333). The law requires that notice must be fairly specific as to the nature and location of the defect (*Dalton v Saratoga Springs*, 12 AD3d 899, 784 NYS2d 702). Indeed, even notice of defects that are a short distance from the defect that caused a plaintiff's injuries is not sufficient where, as here, the noticed defect was isolated from and not a part of the allegedly defective condition complained of (*Brill v New York*, 305 AD2d 525, 759 NYS2d 346, *rev'd on other grounds*, 2 NY3d 648, 781 NYS2d 261, 814 NE2d 431 ("Big Apple" map indicating defects in sidewalk adjacent to area of accident not sufficient to provide notice of defect at accident location); *Curci v New York*, 209 AD2d 574, 619 NYS2d 98; see *Marotta v Massry*, 279 AD2d 877, 719 NYS2d 737; *Jones by Jones v Brookhaven*, 227 AD2d 530, 642 NYS2d 708). Thus, Ms. Kelly's citizen complaint was not only woefully insufficient to demonstrate that the City had prior written notice of the pothole the plaintiff caused his accident, it was also insufficient to create a triable issue of fact as to prior written notice (see *Pallotta v. City of New York*, 121 A.D.3d 656, 657, 993 N.Y.S.2d 726; *Marshall v. City of New York*, 52 A.D.3d 586, 587, 861 N.Y.S.2d 77; *cf. Bradley v. City of New York*, 38 A.D.3d 581, 582, 832 N.Y.S.2d 257).

Even if the jury credited Ms. Kelly's testimony that the photographs she sent to the City depicted the same condition that the plaintiff claims caused this accident, and that such photographs were different from the photographs produced by Mr. Wu, the plaintiff failed to introduce any evidence the photographs provided the City with written notice of the location of the defective condition. As stated above, Ms. Kelly's citizen's complaint informed the City of a defective roadway condition that was approximately 500 feet from where the plaintiff claims he fell. For this reason, were insufficient to demonstrate prior written notice.

For all the above reasons, it is hereby

ORDERED that the City's motion pursuant to CPLR 4401, which was made at the close of plaintiff's case, for a directed verdict in its favor and for judgment as a matter of law is **GRANTED**; and it is further

ORDERED, and the City's motion pursuant to CPLR 4404 to set aside the verdict and for judgment as a matter of law is also **GRANTED**, and the action is dismissed.

This constitutes the decision and order of the Court.

Dated: April 22, 2024

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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