

Holmes v City of White Plains
2024 NY Slip Op 35501(U)
November 15, 2024
Supreme Court, Westchester County
Docket Number: Index No. 60953/2022
Judge: William J. Giacomo
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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
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- X
DEBORAH HOLMES,

Plaintiff,

Index No.: 60953/2022

– against –

Motion Seq. No. 001

THE CITY OF WHITE PLAINS,

DECISION & ORDER

Defendant.
----- X

In an action to recover damages for personal injuries, defendant The City of White Plains moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint.

Papers Considered Mot. Seq. 001

NYSCEF DOC NO. 17-41

1. Notice of Motion/Affirmation in Support of Elizabeth Mirisola, Esq./Statement of Material Facts/Exhibits A-I
2. Affirmation of Michael G. Del Vecchio, Esq. in Opposition/Exhibits 1-3/Affirmation of Plaintiff/Response to Statement of Material Facts/Memorandum of Law
3. Reply Affirmation of Elizabeth Mirisola, Esq.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff served a notice of claim upon the City of White Plains on or about July 12, 2021, and commenced the instant action with the filing of a summons and complaint on May 20, 2022. Plaintiff alleges that she sustained injuries on March 25, 2021, as a result of a trip and fall that occurred in the Waller Maple Parking Lot, located at 25 Waller Avenue, Lot 11, White Plains, New York. The City of White Plains joined issued with service of its answer on June 27, 2022.

Specifically the accident occurred in the area near the parking pay station closest to the entrance/exit to the parking lot located at Waller Avenue near its intersection with Lyon Place. Plaintiff testified that she was walking towards the pay station when the heel of her shoe got stuck

in a hole in the pavement that she did not see, causing her to fall and sustain injuries. The pictures submitted show a depression in the gravel. Plaintiff testified that the hole was approximately four to six inches in diameter and an inch to an inch and half in depth. Plaintiff has indicated that the defect was located near a parking pay station, on between two parking bollards protecting the station. Plaintiff alleges that the City of White Plains was negligent in failing to properly maintain and repair the paved parking lot.

The City of White Plains moves for summary judgment dismissing the complaint on the basis that it did not receive written notice of the alleged defective condition before the plaintiff had her fall. According to Section 277 of the White Plains City Charter, in effect on the date of plaintiff's accident, the City of White Plains will not be liable for personal injuries sustained as a result of a defective condition or snow or ice on a public sidewalk unless the Commissioner of the White Plains Department of Public Works had actually received written notification of such a condition prior to an occurrence and there had been a failure to remedy the condition within a reasonable time after its receipt. It also alleges that the White Plains Parking Department did not have any records demonstrating that they performed maintenance in that area or removed any bollards. Nor does plaintiff present any evidence of how a bollard could have been removed at the location of the accident. Finally, the City of White Plains argues that the alleged defective condition is trivial in nature.

In support of these contentions, the City of White Plains submits the affidavits of Tracey Muhlfeld and Robert Mendoza. Muhlfeld is employed by the City of White Plains Department of Public Works as Secretary to the Commissioner. Muhlfeld affirms that the White Plains Department of Public Works maintains a record of written notifications which the Commissioner of the Department of Public Works receives with respect to the existence of defective conditions on sidewalks, streets and other public areas. These written notifications and related information are entered in a record known as the Department of Public Works' Prior Written Notice Logbook (Logbook). Muhlfeld reviewed the location and exact condition of the alleged defective condition, as depicted in the photographs supplied by plaintiff's counsel. Muhlfeld affirmed that she has personally reviewed the Logbook, which confirmed that the Commissioner of the Department of Public Works had not received written notice of any defective condition near the pay station closest to the entrance/exit to the lot located at Waller Avenue near its intersection with Lyons Place.

Mendoza is employed by the City of White Plains Department of Parking as Parking Ramp Attendant Maintenance Supervisor. He is responsible for supervising the maintenance of the public parking lots owned by the City of White Plains. Mendoza affirmed that in the past six years that he has been responsible for the maintenance of this lot, he has not requested for the crew to remove any bollard in the exact area that plaintiff claims to have fallen. Further, “the Department of Parking has no records to show a bollard was removed in the area where plaintiff had her accident.” Mendoza personally made no changes to the exact area where plaintiff fell or ordered his crew to make any changes. He was unaware of a bollard being knocked down by any person or vehicle in the area of plaintiff's accident. Mendoza stated that he did not see this condition until a few months prior to his deposition. However, even if he had seen it, the depression in the parking lot would not be significant enough for him to request a repair.

In opposition, plaintiff argues that Muhlfeld's affidavit is insufficient to establish the absence of prior written notice, as the City of White Plains did not produce the relevant pages of the prior written notice log. Plaintiff continues that, in the event the Court finds a lack of prior written notice, the motion should still be denied as questions of fact remain as to whether the City of White Plains created the dangerous condition through an affirmative act of negligence.

According to plaintiff, through circumstantial evidence, she has established that the City of White Plains removed the parking bollard from the location where plaintiff's incident occurred, without restoring the asphalt to the appropriate grade, resulting in a dangerous condition in the pavement. Plaintiff states that the parking bollards in the lot were installed by the City of White Plains. If a bollard was removed, resulting in a hole that needed to be repaired, this work would have been done by the City of White Plains. Plaintiff states that the images from Google street in September 2016 view show four bollards. However, a Google street view image captured in September 2019 depicts three parking bollards in that same area, which were colored both yellow and gray. On the date of plaintiff's accident, photos established that there were the three parking bollards along the side of the parking meter where the accident occurred. According to plaintiff, there is no evidence that a vehicle struck the bollard and caused it to go missing. As a result, the bollards must have been removed or changed in September 2019, which would have been done by the City of White Plains, and then the pavement was not restored. However, Mendoza was not aware of the existence of any records which showed any bollard removal work or any pavement repair in the area of the parking pay station prior to March 25, 2021.

Plaintiff also argues that Mendoza's photographs of the condition, which were taken over three years after the accident, do not accurately reflect the condition. These differences raise a triable issue of fact as to whether the defect was trivial in nature.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

II. Prior Written Notice Law

A municipality that has adopted a "prior written notice law" cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies. *D. D. v Incorporated Vil. of Freeport*, 186 A.D.3d 795, 796 (2d Dept 2016). There are two exceptions to the prior written notice requirement: where an affirmative act of negligence by the municipality creates the defect; or where a special use of the property confers a special benefit upon the municipality. *Id.* Further, "the affirmative negligence exception ... [is] limited to work by the City that *immediately* results in the existence of a dangerous condition." *Oboler v City of New York*, 8 NY3d 888, 889 (2007) (emphasis in original, internal quotation marks omitted). It is well settled that "[e]ven if a municipality performs a negligent repair, where the defect develops over time with environmental wear and tear, the affirmative negligence exception is inapplicable." *Wilson v Incorporated Vil. of Freeport*, 212 AD3d 870, 871 (2d Dept 2023) (internal quotation marks omitted).

Here, the City of White Plains made a prima facie showing of entitlement to judgment as a matter of law by providing the affidavit of the Secretary to the Commissioner of Public Works who affirmed that she personally reviewed the Logbook and that the Commissioner of the Department of Public Works received no prior written notice of the alleged defective condition. *See e.g. Agard v City of White Plains*, 127 AD3d 894, 895 (2d Dept 2015) (“In support of its motion for summary judgment, the City established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not receive prior written notice of the alleged icy condition, as required by section 277 of the Charter of the City of White Plains”).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff’s argument that the Muhlfeld affidavit is insufficient, is without merit. It has long been held that an affidavit of an employee demonstrating that it did not receive the requisite prior written notice is sufficient for a prima facie showing of its entitlement to summary judgment. *See e.g. Kiszenik v Town of Huntington*, 70 AD3d 1007, 1007 (2d Dept 2010).

“Where such a municipality establishes that it lacked prior written notice of an alleged defect, the burden shifts to the plaintiff to demonstrate the applicability of one of the two recognized exceptions to the prior written notice requirement.” *Agard v City of White Plains*, 127 AD3d at 895. As set forth below, plaintiff similarly failed to raise a triable issue of fact in support of her claim that an exception to the prior written notice requirement applied based on the defendant’s affirmative creation of a dangerous condition.

Plaintiff submits pictures from Google street view of the accident site in 2016 showing four parking bollards and then pictures from 2019 showing three bollards in different colors.¹ There were three bollards on the date of plaintiff’s accident in March, 2021. The White Plains Parking Department does not have any records demonstrating that it performed maintenance in the area or removed any bollards. Nonetheless, plaintiff surmises that the hole her shoe got stuck in was the result of a bollard being removed and that the City of White Plains must have removed it and failed to properly repair it. As work must have been done by the City of White Plains when changing/removing the bollards at some point, the City of White Plains negligently failed to repair the area.

¹ In reply, the City of White Plains states that the pictures from 2019 show two bollards. The discrepancy in the number and/or color of bollards is irrelevant to the outcome of the Court’s decision.

At the outset, plaintiff's claim, by proffering google images, that the City of White Plains performed work on the bollards, is completely speculative. *See e.g. Goodman v City of New York*, 2024 NY App Div LEXIS 4576, *4 (2d Dept 2024) ("The plaintiff's assertion that the defendant performed asphalt repair work at the location of the alleged defect—based solely on Google Street View images depicting the area over time—was inherently speculative"); *see also Kiszenik v Town of Huntington*, 70 AD3d 1007, 1008 (2d Dept 2010) (plaintiff failed to raise a triable issue of fact to support the claim that defendant affirmatively created the condition, "since the plaintiff made no showing that any of the defendant's internal work records pertained to the defective condition upon which he allegedly fell . . .").

Even, assuming arguendo, the City of White Plains removed the bollard in 2019 corresponding to the hole in the gravel where plaintiff tripped, plaintiff failed to present any evidence that the hole she tripped in was present immediately after the completion of the alleged work to remove the bollard. *See e.g. Oboler v. City of New York*, 8 NY3d 888, 890 (2007) ("Here, plaintiff presented no evidence of who last repaved this section of the roadway before the accident, when any such work may have been carried out, or the condition of the asphalt abutting the manhole cover immediately after any such resurfacing"). Moreover, plaintiff's claims that the City of White Plains failed to repave the area where the bollard was allegedly removed is also without merit. *See Goodman v City of New York*, 2024 NY App Div LEXIS 4576 at *4-5 (internal quotation marks omitted) ("Further, the plaintiff's contention that the defendant affirmatively created the defect by failing to remedy it is without merit, since the mere failure to maintain or repair a roadway constitutes an act of omission rather than an affirmative act of negligence").

Plaintiff does not address a special use exception and the issue of whether the defect is trivial, is not one of the recognized exceptions.

Accordingly, The City of White Plains is granted summary judgment dismissing plaintiff's complaint.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant The City of White Plains' motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that plaintiff's complaint is dismissed in its entirety with costs and disbursements to said defendant, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of this defendant.

Dated: White Plains, New York
November 15, 2024



HON. WILLIAM J. GIACOMO, J.S.C.