Third District Court of Appeal

State of Florida

Opinion filed July 10, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-2636
Lower Tribunal No. 15-23014

Antonio Bejarano,
Appellant,

vs.

City of Coral Gables,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Antonio Marin, Judge.

Ellen Novoseletsky, for appellant.

Angones, McClure & Garcia, P.A., and Luis F. Estrada, for appellee.

Before SALTER, FERNANDEZ and LINDSEY, JJ.

FERNANDEZ, J.

Antonio Bejarano ("Bejarano") appeals the final summary judgment entered by the trial court in favor of the City of Coral Gables. Concluding that there are genuine issues of material fact that preclude the entry of summary judgment, we reverse.

This case concerns a vehicular accident that occurred on April 26, 2012 at the intersection of Ponce de Leon Boulevard and Navarre Avenue in Coral Gables, between motorcyclist, Bejarano, and the driver of a sports utility vehicle ("SUV"), Ricky Vento ("Vento"). Prior to the accident, Bejarano was traveling northbound on Ponce de Leon in the left lane. As Bejarano approached Navarre Ave., Bejarano testified that he saw an SUV slowly traveling southbound on Ponce de Leon. The accident occurred when Vento was in the process of making a left turn onto Navarre Ave when Bejarano, on the approaching motorcycle, crashed into the right front fender of the SUV resulting in Bejarano incurring serious injury. Bejarano testified that he was unable to stop in time to avoid the crash. Vento testified that his view of oncoming traffic was obstructed by recently planted palm trees with wooden supports at their base located at the end of the median. Bejarano brought suit against multiple defendants, including Vento and the City of Coral Gables ("City"). This appeal concerns the suit against the City only.

Bejarano sued the City claiming, among other things, that the City was negligent in the design and placement of the palm trees with their wooden supports

because the placement of the trees at the end of the center medians, together with the wooden supports, created a dangerous condition by obstructing a driver's view of oncoming traffic when making a turn from Ponce de Leon Boulevard onto a side street. Bejarano further claimed that the placement of the trees and of the wooden supports on the trees is an operational decision not subject to the protection of sovereign immunity. The City argued that it was a planning decision and that it did not create a dangerous condition that it knew or should have known. On this basis, the City filed a motion for summary judgment on the grounds of sovereign immunity.

On November 2, 2017, the trial court granted the motion for summary judgment finding that there are no genuine issues of material fact because the City of Coral Gables did not know, nor should it have known, that the planting of the palm trees with the wooden supports created a dangerous condition and that the City of Coral Gables enjoyed absolute sovereign immunity from suit based on Bejarano's claim. This appeal followed.

The standard of review on orders granting final summary judgment is *de novo*. Siegel v. Tower Hill Signature Ins. Co., 225 So. 3d 974, 976 (Fla. 3d DCA 2017). "[W]e must view the record and reasonable inferences therefrom in a light most favorable to the nonmoving party, and any doubt concerning the existence of a

disputed issue of material fact must be resolved against the moving party." Davis v. Baez, 208 So. 3d 747, 750-51 (Fla. 3d DCA 2016).

Upon review of the record, we find there are genuine issues of material fact as to whether the City created a dangerous condition that it knew or should have known, given the conflicting evidence submitted by the parties. According to the Florida Supreme Court in Bailey Drainage Dist. v. Stark, 526 So. 2d 678 (Fla. 1988), even if this was a planning decision, if the City created a dangerous condition that the City knew or should have known, the City is liable and sovereign immunity does not apply. Id. at 681 ("[S]overeign immunity does not bar an action against a governmental entity for rendering an intersection dangerous by reason of obstructions to visibility if the danger is hidden or presents a trap and the governmental entity has knowledge of the danger but fails to warn motorists.").

Bejarano submitted the affidavit of Miles Moss, a traffic engineer and accident reconstructionist. After reviewing photos of the site and visiting the site himself, Moss found that the palm trees violated applicable line-of-sight visibility standards and the conditions restricted Vento's view of Bejarano's motorcycle as he was attempting to make the left turn. On this basis, he concluded that the palm trees and supports created a dangerous condition obstructing the view of drivers making left turns at the intersection and the City knew or should have known of the danger.

In support of its position that no dangerous condition existed, the City submitted an unsworn, one page email by Jeff Cohen, Assistant Chief of the Miami-Dade County Traffic Engineering Division, generally stating that there were no "clear zone" violations in the area. The City further submitted thirteen accident reports, of which the City claimed that no one involved in the accidents stated that the palm trees contributed to their accidents. Upon review of the accident reports, Bajarano found that the accident reports actually established the contrary. Bajarano was able to obtain and submit to the trial court affidavits from three of the motorists listed in the accident reports who claimed that the palm trees in the median obstructed their view and caused their accidents on Ponce de Leon.

We find that there are clear conflicts of evidence in this case, and therefore, genuine issues of material fact exist as to whether the city created a dangerous condition. Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985) ("If the evidence raises any issue of material fact, *if it is conflicting*, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it.") (emphasis added). The outcome of the Bailey decision is directly on point:

> Material questions of fact exist in the present case in regard to whether the intersection at issue presented a hidden danger or trap, created by either of the governmental entities, of which the responsible governmental entity had knowledge and yet failed to provide a warning, and whether such trap or hidden danger, if any, was the cause of the accident which resulted in the death of [the decedent]. It therefore may

> not be said that petitioners are entitled to a judgment as a matter of law. See Fla.R.Civ.P. 1.510(c).

Bailey, 526 So. 2d at 682.

Thus, summary judgment for the City was prematurely entered, as genuine issues of material fact exist as to whether the City created a dangerous condition that it knew or should have known. Accordingly, we reverse the trial court's Final Summary Judgment and remand for further proceedings.

Reversed and remanded.