Licari v State of New York
2013 NY Slip Op 33968(U)
September 30, 2013
Court of Claims
Docket Number: 119105
Judge: James H. Ferreira
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[* 1]

STATE OF NEW YORK COURT OF CLAIMS

CAROL ANN LICARI,

Claimant, DECISION

-v-

STATE OF NEW YORK, **Claim No. 119105**

Defendant.

BEFORE: **HON. JAMES H. FERREIRA**
Judge of the Court of Claims

APPEARANCES: **For Claimant:**
Cassisi & Cassisi, P.C.
By: Richard Schirmer, Esq.

For Defendant:
Hon. Eric T. Schneiderman
Attorney General of the State of New York
By: Faisal H. Sheikh
Assistant Attorney General

Claimant Carol Ann Licari filed this claim with the Chief Clerk of the Court of Claims on October 29, 2010. In it, claimant seeks damages arising from injuries she alleges that she suffered on March 24, 2010 when she tripped and fell while walking on a "sidewalk/walkway" along the Hempstead Turnpike, between Gardiners Avenue and Southberry Lane, in the Town of Hempstead, Nassau County, New York. Claimant alleges in this claim that the sidewalk/walkway was in a defective, dangerous and/or hazardous condition and that defendant State of New York was negligent with respect to its ownership, inspection, operation, maintenance, management and/or control of the sidewalk/walkway.

A trial on the issue of liability was held on February 5, 2013 at the New York State Court of Claims in Hauppauge, New York. Claimant testified and called three other witnesses: her husband, Joseph Licari, and New York State Department of Transportation (hereinafter NYSDOT) employees Guillermo Rodriguez and James Paul Cona.[1] Claimant also offered documentary evidence, which was received into evidence.[2] Defendant called no witnesses and offered no documentary evidence. The parties also submitted post-trial memoranda. The relevant evidence presented at trial is summarized as follows.

Claimant testified that, on March 24, 2010, she went for a walk from her home, located at 33 Farm Lane in Levittown, New York, to the Rite Aid on Hempstead Turnpike. She intended to attend mass at St. Bernard's Church after visiting the Rite Aid. She was early so she walked a "huge circle" to get to the Rite Aid.[3] She took this route about three times per week. Claimant testified that there are two sidewalks along the Hempstead Turnpike where she had her accident. One sidewalk is adjacent to a dealership and a store, "then there is a service road, and then there's an outside . . . sidewalk which is closer to Hempstead Turnpike." She took the "outside sidewalk" on the day of her accident because she was going to cross the street at the intersection of Southberry Lane and Hempstead Turnpike. The Hempstead Turnpike was on her right and the service road was on her left. Traffic on the Hempstead Turnpike was heading East and she was walking against the

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[1] Defendant objected to claimant's calling Cona as a witness because, although he was listed on defendant's witness list, he was not listed on claimant's witness list. The Court overruled the objection and permitted claimant to call Cona.

[2] The Court admitted Claimant's Exhibits 7 and 8, two photographs, over defendant's objection. The Court sustained defendant's objection to the admission of three photographs, marked for identification as Claimant's Exhibits 4, 5 and 6, on the ground that they had not been disclosed to defendant prior to trial.

[3] Unless otherwise indicated, all quotations are from the electronic audio recording of the trial.

traffic. With respect to her accident, claimant testified: "I encountered this piece that was sticking up from the sidewalk which I did not see and I fell over." She testified that the object that caused her to fall was "a steel . . . metal piece sticking up out of the ground." The metal "looked like it was cut off. It was ragged on top" and was sticking up out of the concrete. Claimant further testified that it "looked like a sign was taken off of it because it was up like so high and it had like little round holes in it that looks like something was bolted to it."

Claimant was shown a series of photographs, admitted into evidence as Claimant's Exhibits 9, 10 and 11. She testified that the photographs depict what she fell on and affirmed that they were a fair and accurate depiction of the way the site looked on the date of the incident. She identified the object in the photographs using a red arrow (Claimant's Exhibits 9A, 10A, 11A). Claimant was shown another photograph – Claimant's Exhibit 8 – and identified it as depicting the "bolt" that caused her to fall. She testified that the photograph fairly and accurately depicted the object as it appeared on the date of her fall. The Court notes that Claimant's Exhibits 9, 10 and 11 depict what appears to be a metal object sticking out of a concrete walkway. There are trees, lightpoles and signs on the walkway. Claimant's Exhibits 7 and 8 depict what appears to be a metal object sitting on a gravel or rocky surface. The object has a nut and bolt through it and a ruler held next to it indicates that the object is approximately 2 to 2½ inches off the ground.

On cross-examination, claimant affirmed that she had walked this route about three times per week and had never noticed the condition before. She acknowledged that, shortly before her accident, she did not see anyone walking in front of her or towards her. She affirmed that she was looking straight ahead, and not down, at the time of the accident. On redirect, claimant explained that she usually used the other sidewalk, the one on the other side of the service road. She was

walking on the median on the date of her accident because she was going to the Rite Aid. She testified that "people walk on that sidewalk all the time." On recross, she affirmed that there was a crosswalk at the corner of the other sidewalk across the service road at Southberry Lane. She also affirmed that she had walked on the median prior to the accident and had not noticed the condition.

Next, Joseph Licari, claimant's husband, testified that he accompanied claimant to emergency room on March 24, 2010. On the way there, claimant showed him where she fell. The next day, Mr. Licari returned to the location. He saw "a piece of metal sticking out of the concrete." "It was like where a sign used to be . . . that came down." The metal was "all rusted." He took photographs of the piece of metal that claimant said that she tripped over. Mr. Licari testified that the object depicted in Claimant's Exhibit 8 "looks like" the piece of metal that he was referring to. He affirmed that the photograph depicts the condition of the metal on the day after the accident. He was shown Claimant's Exhibit 7 and testified that he was holding the ruler in that photograph while someone else took the picture. Mr. Licari affirmed that the photograph fairly and accurately depicted the condition of the bolt as it appeared on that day. He recalled that the metal object was two inches high. He testified that the concrete around the "bolt" was "all broken up." On cross-examination, Mr. Licari acknowledged that he did not witness the accident.

Next, Guillermo Rodriguez testified that he has been employed by NYSDOT as an Assistant Resident Engineer for about eight years. In this position, he serves as the second-in-charge to the Resident Engineer in the Nassau Central Residency in Region 10. His responsibilities include supervising several employees, including Highway Maintenance Supervisors I and II and a Sign Crew Supervisor. Rodriguez testified that a Highway Supervisor I is responsible for such tasks as guiderail and pothole repairs and supervising mowing operations. The Sign Crew Supervisor is

responsible for maintenance and placement of signs on State roadways in the Residency. On a daily basis, Rodriguez visits each NYSDOT job site and drives on each road in the Residency, "looking for work," including any missing signs. If he finds something that needs to be done, he makes a record of the location and give it to the supervisor. Rodriguez does not keep records of his daily inspections. NYSDOT uses a database called MAMIS to keep track of jobs done on its roadways. Highway Maintenance Supervisors and Sign Crew Supervisors also submit daily work reports to the Resident Engineer. Rodriguez testified that he identifies missing signs through police reports, which the Residency obtains "through claims," or if he notices "a post with no sign" while he is driving. Rodriguez testified that he does not walk the roadways, and that he did not know of anyone that he supervised who would walk the roadways. If he sees a missing sign, he flags it by putting a cone or barrel next to it. If it is something that is deemed an emergency, it will be taken care of right away; otherwise, it will be added to the next day's work. Rodriguez testified that the Resident Engineer also inspects the State roadways in the Residency and that the Highway Maintenance Supervisors II have inspection responsibilities in the areas in which they are assigned. No records are kept of these inspections. Rodriguez affirmed that NYSDOT is responsible for all signs on State roadways. This responsibility extends to repairing, replacing, reinstalling and removing signs.

Rodriguez testified that New York State Route 24 – also known as the Hempstead Turnpike – between Gardiners Avenue and Southberry Lane is contained within Nassau Central Residency. He is familiar with the layout of that area. Hempstead Turnpike has six lanes of traffic – three heading eastbound and three heading westbound – with a center median. The westbound side of the highway has a sidewalk. The eastbound side has a "marginal median," then a town road, and then a sidewalk. Rodriguez was shown Claimant's Exhibit 9 and identified it as depicting the eastbound

section of the Hempstead Turnpike with the marginal median and the town road. Rodriguez testified that the State is responsible for the maintenance of the Hempstead Turnpike, and the Town of Hempstead is responsible for the maintenance of the town road. The town is also responsible for the maintenance of the sidewalk adjacent to the westbound portion of the Hempstead Turnpike and for the sidewalk adjacent to the town road. The State is responsible for the maintenance of the signs on the sidewalks and the center median. With respect to the marginal median, Rodriguez testified: "we don't maintain anything on there except State signs." It was his understanding that the State had never been responsible for maintaining the marginal median except for the State signs. He testified: "It's not really a sidewalk. It's a median." There are also town signs on the median; the town is responsible for maintaining those. Town signs are identified as such by the letters "TOH" on the bottom, and State signs are identified as such by a sticker on the back. Town signs also would face the town road. If a sign faced Hempstead Turnpike, it would be a State sign.

Rodriguez was shown Claimant's Exhibit 9 and testified that there "appears to be a sign stump" or "U-channel" on the marginal median. He explained that a 3½ foot "breakaway" is put into the soil, asphalt or concrete. A portion of the breakaway – about 2 feet of the 3½ feet – is embedded in the concrete, and approximately 1½ feet is left exposed. Then a sign post is attached to the breakaway and the sign is attached to the post. The sign post sits inside the U-channel and is attached with nuts and bolts. Rodriguez explained that "[t]he open part of the U-channel is where the sign sits." Rodriguez was shown Claimant's Exhibit 7. He affirmed that the object depicted is a portion of a breakaway. According to Rodriguez, when a sign is taken down, the breakaway is cut flush with the pavement if it is embedded in concrete. If it is embedded in soil or asphalt, the breakaway is removed. Rodriguez testified that the breakaway in the photograph "looks like it's

sheared" as a result of a motor vehicle accident. Rodriguez had seen NYSDOT employees replace signs; he had never seen a metal stump that looked like the stump in the photograph. Rodriguez was shown Claimant's Exhibit 9B; he testified that the sign that was placed in that U-channel would be facing the Hempstead Turnpike and affirmed that NYSDOT would be responsible for maintenance of that sign.

On cross-examination, Rodriguez testified that the Nassau Central Residency is comprised of 541 lane miles. His inspections/patrols consist of driving the roadways and visually inspecting them. In 2010, he would personally patrol the Hempstead Turnpike approximately once or twice a week, and the sign crew would patrol "a couple times" per week. Rodriguez affirmed that the location where claimant fell is a median and not a sidewalk, that it does not have handicapped ramp access, and that there are breaks in the median and no crosswalks that connect the breaks. In his patrols of this area prior to the accident, he had never noticed the condition and was not told by anyone about the condition. He first became aware of the condition after claimant's accident. In response to claimant's Freedom of Information Law (hereinafter FOIL) request, he searched for complaints that had been made in the year prior to the accident regarding downed or damaged signs along that portion of the Hempstead Turnpike. He found no such complaints and no documentation, including police reports, indicating that this condition was present prior to the accident. He testified that his office does not have a map or document showing all of the State signs that are contained within the Residency.

Claimant's final witness was James Paul Cona. He testified that he is employed by NYSDOT as a Sign Crew Supervisor, and was so employed in March 2010. Previously, he had worked as a member of the sign crew for seven years. His job responsibilities in these positions

included going out on State roadways and "check[ing] for anything broken, loose, [or] leaning," as well as fulfilling work orders and investigating complaints. If he noticed that a sign was missing, he would "check it out" and fix it. He knew that a sign was a State sign if it had a State logo on the bottom or if it was facing a State road. He did not know of a written policy regarding how often he was required to patrol certain roadways; Cona testified that it was left up to his discretion and that he tried to patrol the major roadways, such as the Hempstead Turnpike, at least two times per week. He testified that he is familiar with the Hempstead Turnpike between Gardiners Avenue and Southberry Lane. He was shown Claimant's Exhibit 9. When asked what was depicted in the photograph, Cona testified that it "looks like a little piece of metal . . . on the sidewalk." He testified that the State was responsible for some, but not all, of the signs on that median. Cona was shown Claimant's Exhibit 7 and testified: "it looks like a U-channel base. . . . It's a breakaway for the street sign. . . . It looks like it got cut in half." Cona testified that he had seen pieces like that; if he came across such a piece and confirmed it was a State sign, he would "try and pull it out completely and put a new one in or if we couldn't pull it out, we would pull up as much as we can, cut it, and then put it back in the ground flush."

On cross-examination, Cona testified that, in a given week, he tried to cover all of the approximately 540 lane miles in the Residency. He acknowledged that the location where claimant fell is a median and not a sidewalk. He testified that "INFORM" is a NYSDOT complaint system through which a citizen can call in and report a complaint about a sign or a pothole. Cona did not recall receiving any INFORM calls or work orders with regard to this specific accident location. He first became aware of this condition through claimant's filing of this lawsuit. On redirect, Cona

stated that he was not aware of any signs, laws or regulations prohibiting pedestrians from walking on the median at issue in this case.

Among the documentary evidence submitted by claimant is a MAMIS report, dated March 1, 2010 through March 31, 2011, pertaining to reference markers 03031-.1 through 03031-15.8 on State Route 24 (Claimant's Exhibit 2). Rodriguez testified that the reference markers in that report encompass State Route 24 (Hempstead Turnpike) from the New York City line to the Suffolk County line, a total of 15.8 miles. According to Rodriguez, the report indicates that an inspection of signs (code 4X29) occurred on March 2, 2010 and March 23, 2010. Each inspection involved a patrol by the sign crew of the entire 15.8 miles of the Hempstead Turnpike in the Residency.

Claimant also submitted a 60-page document consisting of Daily Reports of the Sign Crew Supervisor (Claimant's Exhibit 1). Rodriguez testified that each Daily Report indicates which roads were patrolled and what vehicles were used on that day. Cona testified that he would fill out a Daily Report before he went on the road for the day. He explained that 4X29 is the code for sign inspection and 4X11 is the code for sign maintenance. He testified that, according to the Daily Reports, he performed sign inspection on Route 24 on March 2 and March 23, 2010.

Claimant also submitted an 11-page document entitled Record Plans (Claimant's Exhibit 3). The plans pertain to the reconstruction of a portion of the Hempstead Turnpike, a project which was completed in 2002. The plans include a Table of Maintenance Jurisdiction, which indicates that, with respect to State Route 24, the State is responsible for the maintenance of "pavement, median, drainage system, guide railing, traffic signs, signals, pavement markings, snow and ice control, and overhead and ground mounted sign structures" (Claimant's Exhibit 3, at sheet 30).

DISCUSSION

In order to establish a prima facie case of negligence, " 'a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff' " (Comack v VBK Realty Assoc., Ltd., 48 AD3d 611, 612 [2d Dept 2008], quoting Nappi v Incorporated Vil. of Lynbrook, 19 AD3d 565, 566 [2d Dept 2005]; see Akins v Glens Falls City School Dist., 53 NY2d 325, 333 [1981]). The State has a duty to maintain its " 'property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk' " (Miller v State of New York, 62 NY2d 506, 513 [1984], quoting Preston v State of New York, 59 NY2d 997, 998 [1983] [internal quotation marks omitted]; see Covington v State of New York, 54 AD3d 1137, 1137-1138 [3d Dept 2008]). The State, however, "is not an insurer against every injury that might occur on its property" (Covington v State of New York, 54 AD3d at 1137-1138), and "[n]egligence cannot be presumed from the mere happening of an accident" (Mochen v State of New York, 57 AD2d 719, 720 [4th Dept 1977]; see Melendez v State of New York, 283 AD2d 729, 729 [3d Dept 2001], appeal dismissed 97 NY2d 649 [2001]).

"In order to establish that the State is liable for a claimant's injuries, there must be proof that the State created a dangerous condition or had actual or constructive notice of a dangerous condition, that it failed to properly act to correct the problem or warn of the danger, and that such failure was a proximate cause of the claimant's injuries" (Dispenza v State of New York, 28 Misc 3d 1205[A] [Ct Cl 2010]). "[W]hether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the [factfinder]' " (Trincere v County of Suffolk, 90 NY2d 976, 977 [1997],

quoting Guerrieri v Summa, 193 AD2d 647, 647 [2d Dept 1993] [internal quotation marks omitted]; accord Grosskopf v 8320 Parkway Towers Corp., 88 AD3d 765, 765 [2d Dept 2011]). In addition, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]; see Rendon v Broadway Plaza Assoc. Ltd. Partnership, __ AD3d __, __, 2013 NY Slip Op 05994, *2 [2d Dept 2013]).

Upon application of these principles to the facts presented here, and after weighing the evidence proffered at trial, including the exhibits received into evidence and considering the testimony and demeanor of the witnesses, the Court finds that claimant has failed to establish, by a preponderance of the credible evidence, her claim of negligence against defendant.

Claimant's evidence establishes that the object that claimant tripped over was part of a metal sign "breakaway" that had been embedded in the concrete and, at some point, was shorn or cut off so that approximately 2 to 2½ inches of the breakaway were sticking up out of the concrete. The Court finds, contrary to defendant's argument, that claimant has submitted sufficient evidence establishing that the breakaway was owned and maintained by the State. It is undisputed that the State has a duty to maintain the State signs located on the marginal median where claimant fell, although it does not have a duty to maintain the marginal median itself. Moreover, Rodriguez testified credibly – from photographs of the breakaway – that a sign placed in the U-channel of that breakaway would have been facing the Hempstead Turnpike and thus the State would have been responsible for the maintenance of that sign. The Court also finds that claimant's evidence – in particular the photographs of the scene and claimant's uncontroverted testimony that people walk

on the marginal median "all the time" – demonstrated that it was reasonably foreseeable that pedestrians would use the marginal median, such that the State had a duty to maintain the sign in a reasonably safe condition for pedestrian traffic (compare Perez v State of New York, UID No. 2009-040–081 [Ct Cl, McCarthy, J., Oct. 28, 2009]). The Court further concludes that the evidence before it plainly establishes that the broken metal breakaway sticking up out of the concrete is a dangerous condition.

Nevertheless, this claim must be dismissed because there was insufficient evidence establishing that defendant either created the condition or had actual or constructive notice of the condition. There is no evidence before the Court that the State created the condition or had actual notice of the condition.[4] With respect to constructive notice, claimant proffered no evidence establishing how long the dangerous condition had been present on the marginal median before claimant's accident. Rodriguez surmised that the condition may have been caused by a motor vehicle accident, but claimant presented no other evidence as to how or when the breakaway was cut or sheared. Moreover, claimant testified that she was familiar with the location, had walked there prior to her accident and had never observed the condition before March 24, 2010. Similarly, Rodriguez and Cona testified that they had not observed the broken breakaway during their inspections for broken or missing signs along the Hempstead Turnpike prior to claimant's accident. The Court thus has no basis upon which to formulate a time frame as to how long the condition existed, and thereby assess whether it "exist[ed] for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (Gordon v American Museum of Natural

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[4] Indeed, claimant does not argue in her post-trial memorandum that the State created the dangerous condition or had actual notice of it.

History, 67 NY2d at 837; see Bubb v State of New York, UID No. 2009-039-124 [Ct Cl, Ferreira, J., June 17, 2009]).

Claimant argues that the photographs in evidence, depicting the sign stump in a "dirty, rusty condition," establish "that the sign stump was not freshly or newly created, but, rather, the metal had been exposed for a considerable period of time and had a long, continued existence at the subject location" (Claimant's Post-Trial Memorandum, at 20). The Court disagrees. The photographs that were admitted into evidence are black and white, and the close-up photographs of the breakaway are somewhat grainy. While there appears to be some textural and/or tonal variations on the surface of the breakaway piece, the Court simply cannot determine, based upon these photographs alone, how long the dangerous condition was present before claimant's accident (compare Gonzalez v New York City Tr. Auth., 87 AD3d 675, 677-678 [2d Dept 2011]). In other words, there is insufficient credible evidence to establish when the sign was broken or severed. Based upon the proof before the Court, it is equally likely that the dangerous condition arose a day, month, or year prior to claimant's accident. It would thus be speculative to find that the dangerous condition existed for a sufficient time for defendant to discover it.

Claimant also argues that the State should be charged with constructive notice of the dangerous condition because the condition would have been discovered if the State had performed a reasonable inspection of its property (see e.g. Degaetano v JP Morgan Chase Bank, NA, 39 Misc 3d 1211[A] [Sup Ct Orange County 2013] [" 'A person is chargeable with constructive notice of any fact which would have been disclosed by a reasonably diligent inquiry if circumstances are such as to indicate to a person of reasonable prudence and caution the necessity of making inquiry to ascertain the true facts and he or she avoids such inquiry' "]; Roberson v State of New York, UID

No. 2011-030-016 [Ct Cl, Scuccimarra, J., July 14, 2011] ["[C]onstructive notice may be based on the State's failure to reasonably inspect its property, provided such reasonable inspection would have revealed the dangerous condition"). This argument, however, presupposes that the dangerous condition existed for a sufficient period of time prior to claimant's accident. As discussed above, there is insufficient evidence before the Court for it to make a finding as to how long the dangerous condition existed prior to claimant's accident. Without more, the Court cannot ascribe negligence to the State with respect to the broken sign breakaway that caused claimant to trip and fall.

Therefore, based upon the foregoing, the Court concludes that claimant has failed to prove her claim by a preponderance of the credible evidence, and this claim is dismissed in its entirety. Any motions upon which the Court had previously reserved or which remain undecided are hereby denied.

The Clerk of the Court is directed to enter judgment accordingly.

Albany, New York
September 30, 2013

JAMES H. FERREIRA
Judge of the Court of Claims