Vnuk v City of Albany
2019 NY Slip Op 33050(U)
April 19, 2019
Supreme Court, Albany County
Docket Number: 5249-16
Judge: Richard M. Platkin

[* 1]

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

DONNA M. VNUK and STEPHEN J. VNUK,

Plaintiffs,

-against-

DECISION & ORDER

CITY OF ALBANY and COUNTY OF ALBANY,

Defendants.

Index No. 5249-16

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Plaintiff Donna M. Vnuk and her husband, Stephen J. Vnuk, commenced this action against defendants City of Albany ("City") and County of Albany ("County") seeking to recover for personal injuries allegedly sustained when Donna Vnuk ("plaintiff")[1] tripped and fell over the remnants of a traffic control device that had been improperly removed. Following joinder of issue and discovery, defendants separately moved for summary judgment dismissing the complaint.

By Decision & Order dated January 31, 2019 ("Prior Decision"), the Court granted the County's motion but denied the City's motion. As is relevant here, the Court found that a triable issue of fact exists as to "whether the City created the dangerous condition through the actions of the developer that it tasked with performing the removal of the City's traffic signal device from City property," so as to render inapplicable the requirement of prior written notice (Prior Decision, pp. 8-11). The case is set for a jury trial on May 6, 2019.

The City now moves pursuant to CPLR 2221 (d) for leave to reargue its summary judgment motion.[2] Plaintiff opposes the motion.

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[1] The claim alleged by Stephen Vnuk is purely derivative.

[2] The City's motion is procedurally defective. Pursuant to CPLR 2214 (c), the movant must furnish the Court with all papers "necessary to the consideration of the questions involved" (*see Loeb v Tanenbaum*, 124 AD2d 941, 942 [3d Dept 1986]). Here, the City's reargument motion relies extensively on the prior motion record, including the deposition testimony of William E. Trudeau, Jr., the City's chief supervisor of traffic engineering, but the City has not submitted the papers considered on the prior motion practice. Accordingly, the City's motion for reargument is subject to denial on this ground alone (*see Biscone v JetBlue Airways Corp.*, 103 AD3d 158, 177-180 [2d Dept 2012], *appeal dismissed* 20 NY3d 1084 [2013]; *see also Sheedy v Pataki*, 236 AD2d 92, 97-98 [3d Dept 1997], *lv denied* 91 NY2d 805 [1998]; Siegel & Connors, NY Prac § 254 at 496-497 [6th ed 2018]).

A motion for leave to reargue "is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision" (*Loris v S & W Realty Corp.*, 16 AD3d 729, 730 [3d Dept 2005] [internal quotation marks and citation omitted]; *see* CPLR 2221 [d] [2]; *Cascade Bldrs. Corp. v Rugar*, 154 AD3d 1152, 1154 [3d Dept 2017]).

The City asserts that "[t]he Court's misunderstanding in this case relates to [its] determination that 'the City directed the project developer, Columbia Development Company ("Columbia Development"), to remove the traffic control signal" in question (Magee Aff., ¶ 3, quoting Prior Decision, p. 8).[3] To this end, the City stresses that "[s]imple 'direction' *absent a contractual or supervisory relationship* is insufficient to impute the negligent roadway maintenance of a private party to a municipality, particularly where the private party was working for a third party" (*id.*, ¶ 4 [emphasis added]; *see also id.*, ¶¶ 8-16). The City further asserts that Columbia Development's decision to remove the traffic signal "was made at Mr. Trudeau's suggestion," and "neither Mr. Trudeau nor the City . . . contracted with, hired, or oversaw the work of Columbia Development or any of its agents or employees in the actual removal of the traffic signal" (*id.*, ¶ 6).

In concluding that there is a triable issue of fact as to whether the City "created the defect or hazard through an affirmative act of negligence" (*Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]), the Court relied upon authorities holding that a municipality "cannot avoid liability

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[3] According to the City, the parties agree that the subject traffic device was removed by Columbia Development, an independent contractor that also is known as BBL (*see* Magee Aff., ¶ 5 & n 1). The City recently commenced a third-party action against Columbia Development, BBL and Creighton Manning Engineering, LLP, the entities involved in the Wellington DeWitt project. The third-party action was severed by letter order dated April 11, 2019 (Hartman, J.) pursuant to CPLR 603.

for the allegedly dangerous condition of the sidewalk on the ground that it was caused by an independent contractor. The [municipality] has a non-delegable duty to maintain its highways, of which sidewalks are a part, in a reasonably safe condition" (*Combs v Incorporated Vil. of Freeport*, 139 AD2d 688, 689 [2d Dept 1988] [citations omitted]; *see Tumminia v Cruz Const. Corp.*, 41 AD3d 585, 586 [2d Dept 2007]; *Cabrera v City of New York*, 21 AD3d 1047, 1048 [2d Dept 2005]; *Ricciuti v Village of Tuckahoe*, 202 AD2d 488, 488-489 [2d Dept 1994]). "Because the duty is nondelegable, even if the dangerous condition of the [sidewalk], which caused the injury, is created by an independent contractor, the obligation imposed on the governmental body nevertheless remains fixed" (*Lopes v Rostad*, 45 NY2d 617, 623 [1978]).

While a municipality's creation of a defective condition through a third party is most easily discerned in the context of a contractual relationship, the City does not cite any authority requiring the relationship to take the form of a contract. Thus, for example, in *Matteucci v County of Nassau* (274 AD2d 422 [2d Dept 2000]), the Second Department found a "question of fact as to whether the [municipality], or *an entity authorized by* the [municipality] to perform the work on the subject roadway, created the dangerous condition" (*id.* at 422 [emphasis added]; *see generally Kiernan v Thompson*, 73 NY2d 840, 842 [1988]). The City cites no authority to the contrary (*cf. Hill v Fence Man, Inc.*, 78 AD3d 1002, 1004 [2d Dept 2010] [issue of fact as to "whether Fence Man, as (municipality's) agent, caused or created the allegedly dangerous condition, for which the Town may be liable based upon its nondelegable duty to keep the street in a reasonably safe condition"]; *Levine v New York State Thruway Auth.*, 52 AD3d 975, 976-977 [3d Dept 2008]; *Kupfer v Village of Briarcliff Manor*, 288 AD2d 269, 270 [2d Dept 2001]; *Rothstein v State of New York*, 284 AD2d 130, 131 [1st Dept 2001]).

Here, the Court found sufficient evidence upon which a reasonable trier of fact could conclude that the City affirmatively created the dangerous condition through a direction to the developers of the Wellington DeWitt project to undertake the removal of the traffic device as the City's agent. Indeed, the City concedes in its reargument motion that there are at least "three instances" in Trudeau's testimony that imply that the City "ordered" the developers to remove the traffic device and was "responsible for said removal":

- "'It was [the City traffic engineering department's] instruction[] as part of the [Wellington DeWitt] project to remove the devices'";
- "'We gave direction to Creighton Manning [i.e., the project engineer] to include [the removal of the devices] as part of the [site] plans'"; and
- "'We install – we had – we gave a direction to Creighton Manning to remove those two devices'"

(Magee Aff., ¶¶ 24-27, quoting Trudeau EBT, pp. 25-26, 30).

As Trudeau further acknowledged, regardless of whether the City performs traffic signal work on its own or through an agent, the City "'still has responsibility over'" the "'constructi[on]'" and "'removal of traffic control devices'" (Magee Aff., ¶ 28, quoting Trudeau EBT, pp. 74-75). Thus, although Creighton Manning may have been responsible for inspecting the removal work and ensuring that it was properly performed (*see* Trudeau EBT, pp. 25, 33), it was the City's nondelegable duty "to determine whether Creighton Manning was doing its job" (*id.*, p. 33) and "to follow up to make sure that [it] got all appropriate reports and inspection documents . . . that would allow the City to know that the plans and particularly the things that the City wanted done within the plans had been carried out" (*id.*, p. 35; *see* Prior Decision, p. 9).

Thus, this is not a case where the municipality's role was limited to the mere approval of a private developer's site plan. Rather, viewing the foregoing evidence in a light most favorable to the non-movant plaintiff and giving her the benefit of all reasonable inferences, there is a triable issue of fact as to whether the City made the developer of the Wellington DeWitt project its agent for the removal of the traffic device through a relationship that was the functional equivalent of contractual privity, thereby implicating the affirmative negligence exception to the prior written notice rule.

Finally, while Trudeau also testified that the City's traffic engineering department "'did not make any direction, verbal or written, to BBL and/or any other agent that they may have had working the plans – or working on the project . . . to specifically remove [the traffic signals] at any time'" (Magee Aff., ¶ 30, quoting Trudeau EBT, p. 26), this testimony is not "unambiguous" or uncontroverted, and it therefore presents a question of fact (*see Monaco v Hodosky*, 127 AD3d 705, 707 [2d Dept 2015]; *Ricciuti*, 202 AD2d at 489).

For all of the foregoing reasons, it is

ORDERED that defendant City of Albany's motion for reargument is denied.

This constitutes the Decision & Order of the Court, the original of which is being transmitted to counsel for plaintiffs; all other papers are being delivered to the Albany County Clerk. The signing of this Decision & Order shall not constitute entry or filing under CPLR 2220, and counsel is not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

Dated: Albany, New York
April 19, 2019

RICHARD M. PLATKIN
A.J.S.C.

4/25/19

Papers Considered:

1. Notice of Motion for Reargument Per CPLR 2201 (d), dated March 7, 2019; Affirmation of Robert Magee, Esq., dated March 7, 2019; and

2. Affirmation of Nicole R. Rodgers, Esq. in Opposition to Motion for Reargument of the Defendant City of Albany, dated March 24, 2019.