Galluzzo v Town & Vil. of Harrison
2019 NY Slip Op 34480(U)
December 23, 2019
Supreme Court, Westchester County
Docket Number: Index No. 64964/2016
Judge: Terry Jane Ruderman

To commence the statutory time 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

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LORRAINE GALLUZZO,

Plaintiff,

-against-

TOWN AND VILLAGE OF HARRISON and BILOTTA CONSTRUCTION CORP.,

Defendants.

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DECISION AND ORDER
Motion Sequence Nos. 1- 3

Index No. 64964/2016

RUDERMAN, J.

The following papers were considered in connection with the motion by defendant Bilotta Construction Corp. ("Bilotta") for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against it (sequence 1); the motion by plaintiff Lorraine Galluzzo for an order pursuant to CPLR 3212 granting summary judgment in her favor and against both defendants on the issue of liability (sequence 2); and the motion by defendant Town and Village of Harrison ("Harrison") for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against it (sequence 3):

Papers - Sequence 1	Numbered
Notice of Motion, Affirmation, Exhibits A - AA	1
Affirmation in Opposition, Affidavits, Exhibits A - CC	2
Reply Affirmation	3
- Sequence 2	
Notice of Motion, Affirmation, Affidavits, Exhibits A - TT	4
Bilotta Affirmation in Opposition, Exhibits B, K - O, R - U, W - AA	5
Harrison Affirmation in Opposition	6
Reply Affirmation, Exhibit A	7

- Sequence 3

Notice of Motion, Affirmation, Exhibits - M	8
Affirmation in Opposition, Affidavits, Exhibits A - GG	9

This is a personal injury action arising from the plaintiff's alleged trip and fall on October 7, 2015 at approximately 7:20 p.m., on the public sidewalk outside of the property located at 211 Underhill Avenue, in Harrison, New York. That property is situated at the corner of Underhill Avenue and Harrison Street; plaintiff's accident took place on the Harrison Street side of the property. Plaintiff contends that she tripped due to a height differential between two adjacent concrete slabs of the sidewalk. The claim against Bilotta is based on its replacement of sidewalks in the area pursuant to a 2003 contract it entered into with the Town and Village of Harrison. As against Harrison, the claim is based on its ownership of the sidewalks and its supervisory obligation under the 2003 contract.

In moving for summary judgment, Bilotta asserts that it did not construct the portion of the sidewalk at issue here. It contends that all the evidence demonstrates that the only work that Bilotta performed on the sidewalks adjacent to 211 Underhill Avenue, was done on the Underhill Avenue side of the property, not on the Harrison Street side. This contention relies on the deposition testimony of its President, Joseph Bilotta, whose assertions regarding where the company performed sidewalk work in 2003 were based on his memory.

Harrison's summary judgment motion relies on the applicable prior written notice law, and the inapplicability of the exceptions to the law. With regard to the affirmative negligence exception to the prior written notice law, it argues that the exception is limited to affirmative actions of the municipality that *immediately* result in the existence of a dangerous condition (citing *Oboler v City of New York*, 8 NY3d 888, 889 [2007]). Since plaintiff's underlying theory

is that the lower concrete slab sank slowly over time, Harrison reasons, any such affirmative negligence could not have immediately resulted in the existence of a dangerous condition.

In opposing defendants' motions and in support of her own motion for summary judgment on the issue of liability, plaintiff cites the Site Location List that was part of the contract, which identified the property addresses where sidewalks were to be replaced, including 211 Underhill Avenue. Plaintiff further submits the affidavit of a professional engineer, Robert Fuchs, who concludes, based upon his examination, that it was Bilotta that replaced those particular portions of sidewalk. Fuchs maintains that the height differential between the two concrete slabs on which plaintiff fell developed over time, due to the contractor's failure to provide a suitable and well-compacted subgrade before installing the slab of sidewalk at issue.

As to plaintiff's claim against Harrison, she contends that Harrison failed to satisfy its contractual obligation to supervise, inspect and approve the contractor's work for compliance with both the contract's requirements and industry standards.

Analysis

Motion Sequence 1

When a defendant moves for summary judgment, it has the initial burden to make a showing that, if unrebutted, establishes that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In Bilotta's motion for summary judgment, it acknowledges that it performed sidewalk work in the area in 2003, but emphasizes the absence of any evidence that it performed any work at the particular location where plaintiff fell, then or at any other time. It submits transcripts of depositions of Michael Amodeo, Harrison's current Town Engineer, and Hugh Greechan, who

was the Town Engineer in 2003, as well as that of Joseph Bilotta. Amodeo conducted the search of Harrison's records which initially disclosed that Bilotta Construction had performed sidewalk replacement work in the vicinity of 211 Underhill Avenue under the 2003 contract. Greechan confirmed that the work performed by Bilotta was completed, that its workmanship was approved, and that it was not recalled to the work locations thereafter. Submitted documents also establish that Bilotta's work under the contract was completed to the satisfaction of the Town.

Bilotta primarily relies on the deposition testimony of Joseph Bilotta, who explained that the contract was a "point of repair" contract, meaning that it called for doing "spot" repairs at identified sections of sidewalks, rather than re-constructing entire sidewalks. Mr. Bilotta elaborated that the Site Location List, which was included with the bidding documents, identified the general locations and approximate sidewalk quantities (in linear feet) that were expected for the job under the 2003 Contract, but that the contractor performing the work had to rely upon the physical markings that were later made by Harrison's Engineering Department to indicate the specific sections of sidewalk that were to be replaced. Therefore, the inclusion in the Site Location List of the address 211 Underhill Avenue did not mean that all the sidewalks adjacent to that address were replaced. Mr. Bilotta explained that while the Site Location List indicated that 90 linear feet of sidewalk were to be replaced at that address, based on his personal knowledge and memory of the job, those specified linear feet of sidewalk were all located on the Underhill Avenue side of the property. While Mr. Bilotta acknowledged that his company performed some sidewalk replacement work farther down Harrison Street, including in front of 37 Harrison Street, he insisted that it did no work on the portion of sidewalk adjacent to 211 Underhill Avenue.

The foregoing satisfied Bilotta's burden of making a prima facie showing of entitlement to judgment. The burden therefore shifted to plaintiff to "produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In opposition, plaintiff points out that the contract documents show that sidewalks adjacent to 211 Underhill Avenue were covered by the contract, and that neither Harrison nor Bilotta have records affirmatively establishing which part of the sidewalks adjacent to 211 Underhill Avenue were replaced by Bilotta. In effect, Bilotta relies entirely on Mr. Bilotta's memory for the central factual claim.

The affidavit by plaintiff's engineer supports plaintiff's claim that Bilotta replaced the portion of the sidewalk where she fell. Fuchs disputes Joseph Bilotta's claims that his company did not replace any sidewalk on the Harrison Street side at 211 Underhill, only replacing sidewalks on the Underhill Avenue side, and that the first sidewalks he replaced on Harrison Street began at 37 Harrison Street, to the west of 211 Underhill. Fuchs' conclusion was based on his observation of the sidewalks. The Fuchs affidavit states that he inspected the sidewalks at and around 211 Underhill Avenue on October 22, 2018 and March 21, 2019, and found two distinct groups of sidewalk, one older, evidencing more wear and weathering; the second newer, with a fresher appearance, smoother texture, and less wear. The newer parts of the sidewalk adjacent to 211 Underhill totaled approximately 240 square feet, with 112 square feet (7 flags) on the side adjacent to Underhill Avenue and 128 square feet (8 flags) on the side adjacent to Harrison Street. Fuchs observed that the newer sections of sidewalk on the Underhill Avenue side at 211 Underhill, that Mr. Bilotta admitted to replacing, have the same overall appearance,

including age, texture, design, and condition, as newer sections of sidewalk that exist in front of 37 and 38 Harrison Street which Mr. Bilotta confirmed he replaced as part of the contract work. In view of the testimony of Michael Amodeo that no sidewalks had been replaced in front of 211 Underhill Avenue after the work performed under the Bilotta contract, Fuchs concludes that Bilotta must have replaced the portion of the sidewalk at issue here.

While the foregoing observations by plaintiff's expert does not "conclusively refute" Bilotta's assertion, as plaintiff argues, so as to warrant summary judgment in plaintiff's favor, it does create a factual dispute as to the truth or accuracy of Mr. Bilotta's assertion that the work performed by his company did not include the sidewalk slabs at issue here.

After concluding that the condition, which Fuchs characterized as an "abrupt 2 to 3 inch difference in elevation along the sidewalk," constituted a tripping hazard, Fuchs' affidavit goes on to explain the reason for his conclusion that the defect was caused by negligence on the part of Bilotta Construction:

> "the uneven condition of the sidewalk on which Ms. Galluzzo fell on October 7, 2015, had occurred as a result of differential settlement of that sidewalk into the underlying supporting soil. The settlement is characteristic of unsuitable or inadequately compacted subgrade material, thereby causing voids to form in the soil below the sidewalk slab. The presence of voids below the sidewalk was confirmed at the time of my inspection, whereby a probe could be and was inserted by Mr. Angelides underneath the slab. As a result, the overbearing sidewalk was not adequately supported, causing it to subside downward as the disturbed soil naturally consolidated over time. The failure to provide a suitable, stable, and well compacted subgrade prior to the installation of the sidewalk does not conform to generally accepted industry standards and is a defect on behalf of Bilotta. The specifications in the contract documents also explicitly state: [¶] "The concrete sidewalk shall be placed on a well prepared subgrade. The subgrade shall be undisturbed or machine tamped and properly graded...The compacted material shall have a density of ninety five percent (95%) as measured by Standard Proctor Test."

This claim suffices to create an issue of fact as to whether Bilotta Construction performed the work negligently, despite the evidence that Harrison officials approved the work as satisfactorily completed.

As to whether Bilotta Construction has any duty toward plaintiff, while "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]), "under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract" (*id.* at 139). One of those situations is "where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm (*id.* at 140 [internal quotation makrs and citation omitted]). Based on Fuchs' theory of the contractor's negligence, if it is found to be correct, Bilotta actions in 2003 may be said to have launched a force of harm that subsequently resulted in creating a defective condition. Accordingly, Bilotta's status as contractor does not justify summary judgment dismissing the complaint against it.

Finally, Bilotta contends that the claim against it must be dismissed because the causal connection between its alleged negligence in the 2003 sidewalk repairs is too attenuated. It cites case law that "there must be a reasonable temporal proximity between the performance of the contractual obligation and the resulting injury" (*Church v Callanan Indus. Inc.*, 285 AD2d 16, 21 [3d Dept 2001]; *see also Williams v State of New York*, 18 NY3d 981 [2012]). However, under the present circumstances, dismissal as a matter of law is not warranted on this theory. This is particularly so since, according to Fuchs, it is due to Bilotta's actions that a significant amount of

time passed before the basis for a claim of negligence became apparent. Nor is plaintiff's claim of causation too speculative to support liability.

Motion Sequence 3

The essence of plaintiff's claim against Harrison is that while Bilotta was negligent in using an unsuitable subgrade and failing to properly tamp down the soil before pouring the concrete for the sidewalk slabs, Harrison was negligent in failing to properly supervise and inspect Bilotta's work in that regard. Defendant Harrison argues that plaintiff's claims against it are barred by the prior written notice requirements of the Town and Village; copies of those provisions are appended as exhibit L to motion sequence 3 (*see* NYSCEF Doc. No. 138). To prove that it lacked the required prior written notice, Harrison submits the affidavit of Jacqueline Greer, Clerk of the Town and Village of Harrison, who asserts that a search was performed for any written complaint relating to dangerous conditions at the location in question, and that no prior written notice of the existence of the claimed dangerous condition was provided to Harrison prior to the date of the accident, October 7, 2015.

Plaintiff does not dispute that prior written notice provisions have been enacted by Harrison, or contend that the municipality received prior written notice. Rather, she contends that the defect in question does not fall within the scope of the law.

Plaintiff submits photographic evidence and affidavits to show that the uneven slabs at issue were present as far back as June 2007, and relies on the affidavit of plaintiff's mother, Mary Ann Fiorelli, to establish that in June 2015, approximately four months before plaintiff's accident, the uneven condition of the sidewalk was observed by Harrison's Mayor, Ron Belmont. Citing this evidence, she relies on case law holding that "prior written notice statutes, read

strictly, as [they] should be read, [refer] to physical conditions in the streets or sidewalks * * * which do not immediately come to the attention of the village officers unless they are given actual notice thereof" (*Hughes v Jahoda*, 75 NY2d 881, 882 [1990] [internal quotation marks and citations omitted]), to argue that the actual notice of Belmont's personal observation renders the prior written notice requirement inapplicable.

However, the import of the cases on which plaintiff relies (*see Hughes v Jahoda, supra; Doremus v Incorporated Vill. of Lynbrook*, 18 NY 2d 362, 366 (1966), is not that prior written notice provisions are inapplicable if municipal officers have actual, if non-written, notice of the claimed defect. Rather, those cases hold that certain kinds of complained-of conditions do not fall within the prior written notice law at all, such as defective signage, whereas other kinds of conditions, such as "holes and breaks" in "streets or sidewalks," are covered by the prior written notice law (*see Doremus v Incorporated Vill. of Lynbrook*, 18 NY 2d at 366). The category into which a claimed defect falls does not depend on whether a municipal officer was told about, or even personally observed, a defect.

The sidewalk defect claimed here is exactly the type of defect that is intended to be covered by the prior written notice law. Accordingly, this matter is covered by the rule that "[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" *(Taustine v Incorporated Vil. of Lindenhurst*, 158 AD3d 785, 785 [2d Dept 2018]). Plaintiff does not dispute Harrison's assertion that it did not have prior written notice of the claimed sidewalk defect. Notably, even actual knowledge, like oral notice, fails to satisfy the

written notice requirement (*see Wilson v Incorporated Vil. Of Hempstead*, 120 AD3d 665 [2d Dept 2014]; *Mahler v Incorporated Vil. of Port Jefferson*, 18 AD3d 450 [2d Dept 2005]).

Plaintiff next argues that prior written notice provisions do not apply where it is claimed that the municipality affirmatively created the defect, citing *Poveromo v Town of Cortlandt* (127 AD3d 835 [2d Dept 2015]). A more complete expression of the applicable law is that "once the municipality establishes lack of written notice, 'the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule — that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality'" (*Wilson v Incorporated Vil. of Hempstead*, 120 AD3d at 666, quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Thus, is is plaintiff's burden to demonstrate that Harrison created the defect.

The Court of Appeals has explained that the affirmative creation exception "[is] limited to work by the [municipality] that immediately results in the existence of a dangerous condition" (*Oboler v City of New York*, 8 NY3d 888, 889 [2007]). Even assuming that the municipality arguably engaged in an affirmative act of negligence, by failing to properly supervise the work of forming the sublayer under the sidewalk, the affirmative creation exception only applies "where . . . the allegedly dangerous condition would have been immediately apparent" (*Laracuente v City of New York*, 104 AD3d 822, 823 [2d Dept 2013]). Thus, in *Laracuente* , since the danger posed by the claimed curved section of fence erected alongside the roadway would have been immediately apparent, the prior written notice law did not preclude the claim (*id.*), whereas in *Nieves v City of New York* (87 AD3d 684 [2d Dept 2011]), a verdict against the City was set aside due to a lack of prior written notice because the plaintiff did not provide any evidence

tending to show that the allegedly negligent repair work *immediately* resulted in a dangerous condition (*id.* at 684 [emphasis added]).

Here, the allegedly negligent repair work *did not* immediately result in a dangerous condition. On the contrary, the dangerous condition only became apparent years later. Accordingly, plaintiff has failed to demonstrate grounds for the affirmative causation exception to the prior written notice law, and Harrison is entitled to summary judgment dismissing this action as against the Town and Village.

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Bilotta Construction (sequence 1) for summary judgment is denied; and it is further

ORDERED that the motion by plaintiff (sequence 2) for summary judgment against the defendants on the issue of liability is denied; and it is further

ORDERED that the motion by defendant Town and Village of Harrison (sequence 3) for summary judgment dismissing the claim and cross-claim against it is granted; and it is further

ORDERED that the remaining parties are to appear on Tuesday, February 4, 2020 at 9:15 a.m. in the Settlement Conference Part, Courtroom 1600, Westchester County Supreme Court, 111 Dr. Martin Luther King Jr. Blvd, White Plains, New York, to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
December 23 2019

HON. TERRY JANE RUDERMAN, J.S.C.