SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5182-14T3

ALBANIA PEREZ,

Plaintiff-Appellant,

v.

UNITED WATER NEW JERSEY, INC.,

Defendant-Respondent.

Submitted November 16, 2016 – Decided February 6, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5053-13.

Stern & Stern, LLP, attorneys for appellant (Dwight D. de Stefan, on the brief).

Rivkin Radler, LLP, attorneys for respondent (Brian R. Ade and Alexander G. Pappas, on the brief).

PER CURIAM

Plaintiff Albania Perez appeals from a summary judgment dismissing her sidewalk liability complaint against defendant United Water New Jersey, Inc. Because we agree with the motion

judge that plaintiff failed to establish a prima facie case of negligence, we affirm.

Plaintiff went to her daughter's house in North Bergen on a February morning to take her three-year-old grandson to daycare. As she was walking the little boy to her car, she claimed she stepped into a hole on the sidewalk and fell, injuring her leg. Police and EMS records reflect plaintiff told those first responders she fell on ice. The police report notes the sidewalk "was extremely icy."

Although plaintiff was not precise about where she fell in relation to her daughter's house, she produced two photographs at her deposition identifying the location. The two black and white photographs depict two curb stops, one without a cap, in a curb cut near some broken sidewalk. Although plaintiff took the pictures more than a week and less than a year after the accident, she could not narrow that timeframe, even as to the season.

After the end of discovery, defendant moved for summary judgment claiming plaintiff had not established defendant owned the curb stop in which plaintiff tripped, and, even assuming she could prove it was defendant's curb stop, had not established actual or constructive notice of the missing cap and did not

have an expert to opine on the standard for reasonable inspections.

Plaintiff opposed the motion claiming the curb stop obviously belonged to defendant, as it was the water company serving North Bergen, and that "[n]otice . . . is a requirement of the New Jersey Tort Claims Act, which does not apply here." She also contended defendant had notice because its employees or agents had "worked in the very area" ten years before, and that she did not need an expert as case law established defendant's obligation to make "reasonable inspection," and defendant's tariff created an additional "contractual duty" to maintain the curb stop.

In an unauthorized sur-reply, plaintiff presented colorized versions of the photographs she took of the curb stops. Plaintiff argued the photographs "show the 'curb-stop' as painted blue, meaning water-line and one of the photographs even shows the route of the water-line marked [in spray paint on the street] with a 'W' leading straight to the 'curb-stop.' The adjacent gas line is marked in brown with a large 'G.'" Plaintiff noted that the "capped gas-line value is 'flush' with the sidewalk while the defendant's defective 'curb-stop' is a hole, at least three inches deep, constituting a clear danger to the public."

The Law Division judge agreed with defendant that plaintiff had not established elements of her cause of action and granted summary judgment. Acknowledging that defendant's tariff provided that "[t]he service pipe from the distribution mains to the curb line, including the curb stop, will be furnished, installed, and maintained by the defendant," the judge, nevertheless, found nothing in the record establishing "that defendant actually owned or installed this particular curb stop." Because plaintiff had "not provided any documentation which would allow a jury to identify [the curb stops] as the defendant's property," the judge concluded plaintiff failed to establish defendant's duty of care.

The judge rejected plaintiff's argument that notice of the defective condition was confined to Tort Claims Act cases. Instead, the judge found plaintiff, in addition to establishing defendant's duty of care, needed to "establish that defendant had actual or constructive notice of the dangerous condition that caused the accident" in order to recover. Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558, 570-71 (App. Div. 2014), aff'd as modified, 223 N.J. 245 (2015).

The judge found nothing in the record to establish defendant had actual notice "that there was an issue with a curb stop or sidewalk at that location." Turning to constructive

notice, the judge rejected plaintiff's contention that the tariff imposed any contractual duty on defendant "to maintain and inspect its curb stops." The judge found "the Tariff does not state that defendant is required to conduct regular inspections of its curb stops."

Noting defendant's averment that it owned more than 196,000 curb stops in Hudson and Bergen Counties, the judge found plaintiff had not "cited to authority to support her argument that defendant is obligated to conduct periodic inspections of its curb stops" and that a general statement of duty is not meaningful without identifying "some generally accepted standard to which defendant" is to be held. Fanning v. Montclair, 81 N.J. Super. 481, 486-87 (App. Div. 1963). The judge denied plaintiff's motion for reconsideration.

On appeal, plaintiff argues the judge erred in barring the colorized photographs, when the black and white versions had been produced in discovery, as they "were evidential relative to the issue of ownership of the subject curb-stop." She also maintains the judge erred in relying on Prioleau, a "mode of operation" case for the duty to prove actual or constructive notice of the defective curb stop in this sidewalk case. Finally, she contends "[t]he standard to be applied relative to a public utility's duty to inspect its above-ground facilities

is to perform periodic, 'watchful' inspections from 'time-to-time' on a reasonable basis." None of those arguments requires extended discussion in a written opinion. See R. 2:11-3(e)(1)(E).

We review summary judgment using the same standard that governs the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). Thus, we consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)).

Plaintiff's response to the charge that she has failed to present proof that defendant owns the curb stop is to argue "that nowhere does anyone affirmatively deny that the 'hole' was a curb-stop and that the curb-stop belonged to this [d]efendant."

It is, of course, not defendant's burden to prove it does not own the curb stop. Plaintiff did not take depositions of defendant and its filed tariff makes no reference to the curb stop where plaintiff fell. We fail to see how a "W" spray-painted on the street by persons unknown, whether depicted in

black and white, or plaintiff's colorized blue, is proof that the curb stop is part of a water line owned by defendant.

We reject plaintiff's argument that proof of a defendant's actual or constructive notice of the defective condition that caused the accident is limited to Tort Claims Act cases. The cases on which plaintiff relies relating to injuries caused by defective sidewalk conditions, Fay v. Trenton, 126 N.J.L. 52 (E. & A. 1941), Young v. Nat'l Bank of N.J., 118 N.J.L. 171 (E. & A. 1937), and Taverna v. City of Hoboken, 43 N.J. Super. 160 (App. Div. 1956), certif. denied, 23 N.J. 474 (1957), which well pre-date the Tort Claims Act, all refer to the need for plaintiff to prove actual or constructive knowledge in order to recover.

Plaintiff provided no evidence of how the curb stop was constructed, whether the cap could be removed without specialized tools and how long it had been in the condition depicted in the photos. Nor did she offer expert testimony to establish any generally accepted standard of what constitutes a reasonable inspection and repair program for a water utility to maintain its curb stops. Without proof of duty or breach, summary judgment was appropriately entered.

Accordingly, we affirm substantially for the reasons expressed by Judge Espinales-Maloney in her opinions from the bench on May 8 and June 17, 2015.

Affirmed.