SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1264-16T3

ROSA PEREZ,

Plaintiff-Appellant,

v.

JOSEPH BATOR, JANE BATOR, JOSE PARRAGUEZ and ROSALYNE (ROCIO) PARRAGUEZ,

Defendants-Respondents.

Argued December 4, 2017 – Decided December 19, 2017

Before Judges Sabatino, Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1710-15.

Kelly M. Stoll argued the cause for appellant (The Donnelly Law Firm, LLC, attorneys; Kelly M. Stoll and Abraham N. Milgraum, on the brief).

Monique D. Moreira argued the cause for respondents Joseph and Jane Bator (Moreira & Moreira, PC, attorneys; Monique D. Moreira, on the brief).

William Pfister, Jr., argued the cause for respondents Jose and Rosalyne Parraguez.

PER CURIAM

In this slip-and-fall case brought against two neighboring homeowners, plaintiff Rosa Perez appeals the trial court's grant of summary judgment to both defendants. We affirm, albeit for slightly different reasons than those expressed by the motion judge.

We summarize and consider the factual record in a light most favorable to plaintiff. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). On the cold morning of February 6, 2014, at about 8:15 a.m., plaintiff was walking with her grandchild on a public sidewalk in the Town of Harrison. The sidewalk was in front of the row-house residences of defendants Joseph and Jane Bator, the owners of 314 North 5th Street, and Jose and Rosalyne Parraguez, the owners of 312 North 5th Street. Both the Bators and the Parraguezes have rooftop gutters and downspouts. The downspouts channel rain water and snowmelt into the common alleyway between defendants' two buildings, and also spill water directly onto the public sidewalk. The sidewalk itself is slanted slightly towards the street.[1]

[1] As counsel acknowledged at oral argument, the expert reports are inconclusive as to whether the sidewalk has a transverse slope from north to south (i.e., towards 312 N. 5th Street), from south to north (i.e., towards 314 N. 5th Street), or whether the transverse slope varies in both directions.

Weather reports reflect that it had snowed and rained at various times over the previous days. As of the time of plaintiff's fall the temperature was below freezing. Apparently, melted snow and accumulated water had frozen, or refrozen, on the sidewalk. One witness described the area of the sidewalk where plaintiff fell as "an ice rink." Reportedly, several children had played on the sidewalk that morning, pretending they were skating, and several of them had fallen down.

At the moment plaintiff and her grandchild were walking down the sidewalk, Rosalyne Parraguez was outside, attempting to remove snow and ice from the sidewalk in front of the Bators' residence. According to Parraguez's deposition testimony, she yelled out to plaintiff to warn her that the sidewalk was icy and slippery. However, plaintiff apparently did not hear that warning. She slipped on the ice and injured herself. The location at which she fell was near the alleyway, and apparently in front of or slightly closer to the Bators' residence.

Plaintiff brought this personal injury case in the Law Division against the Bators and the Parraguezes, alleging that both defendants had negligently breached an alleged duty of care to her with respect to the dangerous and slippery condition of the sidewalk. In support of her claims, plaintiff retained a licensed professional engineer as a liability expert. The expert examined

the location, photographs of the scene, the parties' discovery responses, and other materials.

Among other things, plaintiff's expert concluded "[t]he roof downspouts' direct discharge onto the concrete [sidewalk] . . . and the slope of the concrete sidewalk toward the curbline was conducive to transport stormwater or snowmelt toward, to and[/]or through the incident location and be subject to refreezing at lower temperatures at the time of [plaintiff's] accident." The expert further opined that the slope of the sidewalk "caused stormwater or snowmelt that was discharged from the downspouts to be conveyed onto and over the incident location, and be subject to freezing, which was a foreseeable hazardous and dangerous condition that [defendants] knew before the time of [plaintiff's] accident."

Plaintiff's expert further stated that "[t]he downspouts' discharge of stormwater or snowmelt onto the concrete sidewalk was an inherent defect of both houses." He added that "[u]ltimately, this inherent defect, in conjunction with the slope of the sidewalk and freezing temperatures, caused a hazardous and dangerous sidewalk and was a substantial factor in the occurrence of [plaintiff's] accident."

The Bators retained an engineering expert to counter plaintiff's liability expert. After performing his own inspection

of the site and review of the photographs and other materials, that defense expert stated, "[i]t is simply not clear whether any refreeze snowmelt came from the downspouts." He acknowledged that "[t]he water might have come from the downspouts, but it [alternatively] could have come from any snow uphill of the fall site[.]" Given the various slopes involved, the defense expert did opine that it was "improbable" that the precipitation that refroze came out of either residence's downspout.

The defense expert further opined that the homeowners had been "vigilant in their snow and ice mitigation measures." He noted the record indicated the homeowners "[took] care of the snow" before they left for work, and that Mrs. Parraguez was actually treating the ice on the sidewalk at the time of plaintiff's mishap.[2]

In moving for summary judgment, defendants principally relied upon Foley v. Ulrich, 50 N.J. 426 (1967). In that case, the Supreme Court adopted a dissenting opinion of a judge of this court in finding no liability of residential homeowners for the slippery condition of a public sidewalk created by the melting and refreezing of snow and ice the homeowners had cleared away, but

[2] The motion judge found that the reports of plaintiff's expert and the defense expert were not inadmissible net opinion, a finding that we endorse. Hence, we consider the substance of those expert reports in the course of our own analysis.

which had thereafter melted back onto the sidewalk due to the slope of the surrounding lawn. Foley, 94 N.J. Super. 410, 419-26 (App. Div. 1967) (Kolovsky, J.A.D., dissenting). The dissent in Foley reasoned that the defendants in that case, as residential property-owners, had no duty in tort to take affirmative steps to remove snow and ice from the public sidewalk, and that the record failed to show their conduct in removing snow and ice from the sidewalk and piling it onto the adjacent lawn created no new element of danger beyond natural forces. Id. at 425-46.

Plaintiff argues that Perez is distinguishable here. She asserts, among other things, that the "artificial" role of defendants' gutters and downspouts in channeling water onto the sidewalk created, or at least worsened, the natural conditions of the sidewalk.

The motion judge substantially relied on Foley in granting defendants' motion. As a preliminary matter, he found that the condition at issue here was natural rather than artificial. In addition, the judge stressed the general principles of tort immunity for residential homeowners with respect to clearing adjacent public sidewalks, as set forth by the Supreme Court in Stewart v. 104 Wallace Street, Inc., 87 N.J. 146, 159 (1981), and most recently reaffirmed by the Court in Luchejko v. City of Hoboken, 207 N.J. 191, 210 (2011). The judge also expressed public

policy concerns about the financial burden of imposing the costs of gutter renovation or accident prevention upon all homeowners in the county.

We agree that summary judgment was properly granted in defendants' favor. Preliminarily, we part company with the trial court and conclude that the presence of refrozen precipitation on the sidewalk in this case was not entirely the result of "natural" forces. As the Supreme Court recognized long ago in Gellenthin v. J. & D., Inc., 38 N.J. 341, 352-53 (1962), water discharged onto a public sidewalk from the rain gutters or other conduits of a defendant's building comprises an artificial, not a natural condition.[3] Such a drainage system is a "structure erected upon land," and, as such, "a non-natural or artificial condition . . . irrespective of whether [it is] harmful [itself] or become[s] so only because of the subsequent operation of natural forces." Restatement (Second) of Torts § 363 cmt. b (Am. Law Inst. 1965).[4]

[3] We reject defendants' contention that this portion of the Gellenthin opinion is inapplicable because the defendant in that case was a commercial landowner. The analytic concept of a artificial-versus-natural condition does not hinge on the status of the defendant property-owner.

[4] We note our Supreme Court has not adopted to date the revised liability tests for premises liability that are set forth in the superseding Restatement (Third) of Torts: Liability for Physical and Emotional Harm (Am. Law Inst. 2012), which arguably might call for a different result in this case. We neither endorse nor disapprove of those alternative tests.

See also Deberjeois v. Schneider, 254 N.J. Super. 694, 700 (Law Div. 1991) (quoting and applying these principles from the Restatement (Second) to recognize the potential tort liability of a landowner who plants a tree close to a public sidewalk, which thereafter becomes buckled due to the growth of the roots of that tree), aff'd, 260 N.J. Super. 518-19 (App. Div. 1992). The installation and maintenance of the drainage systems on defendants' homes in this case is an artificial condition, even though water naturally produced by rain or snow flows through those man-made devices.

Nevertheless, there are no facts contained in this record that could reasonably support plaintiff's theory that defendants are liable in the circumstances presented. As the Supreme Court reiterated in Luchejko, 207 N.J. at 210, residential homeowners in New Jersey generally have no duty under tort law to remove snow and ice from abutting public sidewalks. The exception to that sidewalk immunity for residential owners is where the owners "create or exacerbate a dangerous sidewalk condition." Ibid.

Here, there is no competent proof in the record that defendants "created" or "exacerbated" a dangerous condition. To the contrary, they endeavored to abate that hazard by shoveling and treating the sidewalk area after the recent storms. Although plaintiff's expert contends that the direct discharge of water

from defendants' gutters and downspouts was "conducive" to transport stormwater and snowmelt towards the public sidewalk, he does not opine that those drainage systems created or worsened the condition of the sidewalk — beyond the hazard that would have existed if defendants had simply done nothing. That is exactly the vital component of liability that is required under Foley and Luchejko, and which is notably missing here.

Plaintiff argues that the drainage systems here caused refrozen snowmelt and rain water to "concentrate" in a specific area of the sidewalk. However, that theory is not espoused within her expert's report or supported by competent, non-speculative evidence.

Further, plaintiff's expert fails to identify where else the gutters and downspouts could have safely directed rain water and snowmelt from the rooftops of these city row houses. Plaintiff's counsel acknowledged at oral argument that it would have been dangerous to remove the gutters and downspouts and allow water to fall indiscriminately from the edges of the roof to the whole perimeter of the houses, including by the doorways. There is no evidence of any nearby grass or some other safer place to channel the rooftop water. Nor is there evidence that the municipality had underground pipes that could have connected to defendants' downspouts.

Ultimately, regardless of whether principles of sidewalk immunity apply here, negligence is fundamentally based upon concepts of reasonable care. See, e.g., Aiello v. Muhlenberg Reg'l Med. Ctr., 159 N.J. 618, 632 (1999); Weinberg v. Dinger, 106 N.J. 469, 484 (1987); see also Model Jury Charges (Civil), 5.10A, "Negligence and Ordinary Care – General" (approved before 1984). Even viewing the record in a light most favorable to plaintiff, we fail to see how defendants could have more reasonably utilized their drainage systems, given the constraints of their city dwellings.

Affirmed.