SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4162-14T1

HAZEL CHERRY,

Plaintiff-Appellant,

v.

CITY OF NEWARK,

Defendant-Respondent,

and

J. FLETCHER CREAMER & SONS, and VERIZON,

Defendants.

Submitted November 15, 2016 – Decided May 17, 2017

Before Judges Rothstadt and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1165-13.

Vincent M. Russo, attorney for appellant.

Willie L. Parker, Corporation Counsel, attorney for respondent (Steven F. Olivo, Assistant Corporation Counsel, on the brief).

PER CURIAM

Plaintiff, Hazel Cherry, appeals from the Law Division's order granting defendant, City of Newark, summary judgment and dismissing her complaint with prejudice.[1] Plaintiff alleged in her complaint that she fell and injured her arm due to a defect in a crosswalk. The motion judge granted defendant's application because plaintiff could not establish defendant's liability under the Tort Claims Act (TCA), N.J.S.A. 59:-1 to 12-3, as plaintiff failed to present any evidence that defendant had notice of the alleged dangerous condition. On appeal, plaintiff contends that the evidence she submitted to the court, including photographs and proof that work had been performed in the area of the defect, was sufficient to withstand summary judgment. We disagree and affirm.

We derive the following material facts from the evidence submitted by the parties on defendant's summary judgment motion, viewed in a light most favorable to plaintiff, the non-moving party. Polzo v. Cty. of Essex, 209 N.J. 51, 56 n.1 (2012) (Polzo II) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)). Plaintiff fell in a crosswalk on a street in Newark on June 6, 2012, and injured her arm. In her complaint, plaintiff

[1] Plaintiff's claims against defendants J. Fletcher Creamer & Sons and Verizon were dismissed with prejudice pursuant to the Law Division's April 10, 2015 order, which is not the subject of this appeal.

alleged that her fall was caused by "cracked and uneven asphalt" in a crosswalk.[2] Plaintiff did not submit any expert's report regarding the cause of her fall or the nature of the street's defective condition or how long it existed. Rather, plaintiff relied upon certain photographs and work permits issued by defendant and other public information regarding the area near the defect to establish defendant's liability.

The photographs plaintiff relied upon that were taken of the area shortly after her fall depicted spray paint markings in the area typically used to identify the location of underground utilities. According to plaintiff, it was reasonable to infer that when the spray paint was used, the defect already existed, so defendant had notice of its existence. Moreover, the accumulation of dirt, plant life, and debris depicted in the photograph of the depression also supported the inference that the defect pre-existed her fall. In addition, plaintiff asserts a subsequent photograph, taken a year after the fall, shows another "pothole" in line with the one that caused plaintiff's fall, which plaintiff posits constitutes evidence that the original pothole stemmed from an underground cave-in.

[2] At oral argument before the motion judge, plaintiff's counsel referred to it as a pothole.

Plaintiff also relied upon permits issued by defendant in 2011. According to plaintiff, defendant had earlier issued construction permits that allowed a utility company and a construction entity to make borings in the general area of the accident eleven months earlier. In addition, she claims that defendant also performed work in the area at some point prior to her fall, and it had received complaints from other people about the condition of the street in general, but not about the particular defect.

At oral argument before Judge Stephen J. Taylor, plaintiff's counsel referred to submissions made to the court that evidently included "transcripts" of witnesses' testimony, municipal records, and photographs. Defense counsel also referred to plaintiff's and other witnesses' deposition testimony and the photographs relied upon by plaintiff in opposition to defendant's motion.

After considering counsels' oral arguments, Judge Taylor granted defendant's motion, placing his reasons on the record. The judge initially found "sufficient evidence of a permanent injury [and] the permanent loss of a bodily function" to present to a jury. Turning to the issue of notice, the judge found the facts presented to be similar to those considered by the Supreme Court in Polzo v. County of Essex, 196 N.J. 569 (2008) (Polzo I). He concluded that, while the photographs he considered established

the existence of "a depression in the crosswalk," which defendant did not argue was not a dangerous condition, there was no proof that defendant had any actual prior notice of the condition. The judge then considered the case law applicable to determining whether a public entity had constructive notice of a dangerous condition. Judge Taylor observed that it was plaintiff's obligation to establish that "the condition had existed for such a period of time and was of such an obvious nature that the public entity [through] the exercise of due care should have discovered the condition or its dangerous character." Although the judge found other deficiencies in plaintiff's proofs, he stated, however, that the "main reason" for granting summary judgment was the "lack of evidence regarding how long that pothole existed." The judge stated: "There's no expert report here indicating what caused the pothole or an opinion on how long that condition existed in the crosswalk." According to the judge, a jury would have to "engage in guess work and speculation in order to determine how long that [pothole] existed or the depression."

After concluding his statement of reasons, Judge Taylor entered an order granting defendant's motion. This appeal followed.

Plaintiff argues on appeal that her opposition to defendant's motion established sufficient evidence to create "questions of

fact satisfying the requirements of N.J.S.A. 59:4-2" and that her injuries constituted a "permanent loss of a bodily function within the meaning of the TCA, N.J.S.A. 59:9-2(D) so as to justify the denial of summary judgment." We find no merit to the former contention and, therefore, no need to address the latter.

We begin our review by observing that plaintiff failed to satisfy her obligation to support her appeal with an appendix containing the submissions made to the motion judge as required by Rule 2:6-1(a)(1). "[T]he Rule was obviously intended to precisely identify for the reviewing court that which was presented to the trial court 'on the motion for summary judgment,' regardless of how the motion was decided." Noren v. Heartland Payment Sys., ____ N.J. Super. ____, ____ (App. Div. 2017) (slip op. at 2-3) (quoting Lombardi v. Masso, 207 N.J. 517, 542 (2011)). Plaintiff here only provided an appendix that included the pleadings, orders, transcript of the oral argument, the motion judge's decision, and copies of photographs without any certification. The Rule requires that the appendix contain a "statement of all items submitted to the [trial] court" and copies of those items. R. 2:6-1(a)(1). As noted, the transcript made reference to various items being considered by Judge Taylor which, along with the motions papers, were not included in the appendix.

Nevertheless, after considering the limited record that was provided, we conclude the motion judge correctly granted defendant's motion. We find plaintiff's arguments to the contrary to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons stated by Judge Taylor in his thorough oral decision. We add only the following comments.

We review the trial court's grant of summary judgment de novo and apply the same standard as the trial court. Cypress Point Condo. Ass'n v. Adria Towers, LLC, 226 N.J. 403, 414 (2016). Summary judgment must be granted if there is no genuine issue of material fact challenged and the moving party is entitled to judgment as a matter of law. R. 4:46-2. 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, supra, 142 N.J. at 536).

Applying that standard and the provisions of the TCA, we conclude defendant was entitled to summary judgment because plaintiff failed to establish defendant had notice of the condition in the crosswalk that allegedly caused her fall.

"Potholes and depressions are a common feature of our roadways. However, 'not every defect in a highway, even if caused by negligent maintenance, is actionable.'" Polzo II, supra, 209 N.J. at 64 (quoting Polyard v. Terry, 160 N.J. Super. 497, 508 (App. Div. 1978), aff'd o.b., 79 N.J. 547 (1979)). In order to recover for an injury caused by such defects, a plaintiff must prove all of the criteria of the TCA. See id. at 66.

Under the TCA, "immunity from tort liability is the general rule [for a public entity] and liability is the exception." Polzo I, supra, 196 N.J. at 578 (citations omitted). It states in relevant part that a public entity may be held liable for an injury sustained that was proximately caused by a dangerous condition on a public property. N.J.S.A. 59:4-2. Liability will be found if "a public entity had actual or constructive notice of the dangerous condition under [N.J.S.A.] 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." N.J.S.A. 59:4-2(b). "A public entity shall be deemed to have actual notice of a dangerous condition . . . if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." N.J.S.A. 59:4-3(a). "A public entity shall be deemed to have constructive notice of a dangerous condition . . . only if the plaintiff establishes that the condition had existed for such a period of time and was

of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." N.J.S.A. 59:4-3(b). "Whether a public entity is on actual or constructive notice of a dangerous condition is measured by the standards set forth in N.J.S.A. 59:4-3(a) and (b), not by whether [for example] 'a routine inspection program' by the [public entity] . . . would have discovered the condition." Polzo II, supra, 209 N.J. at 68.

"[P]laintiff [has not] show[n], even under the indulgent summary-judgment standard of review, that the . . . depression 'was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.'" Id. at 75 (quoting N.J.S.A. 59:4-3(b)). Plaintiff's reliance on photographs taken after the accident and an alleged history of work permits and complaints pertaining only to the surrounding area established neither actual nor constructive notice of the alleged dangerous condition. Plaintiff has presented no competent evidence - much less expert proof — as to the length of time the depression existed. Nothing in the summary judgment record suggests that any complaints or accidents concerning the depression were ever reported to defendant. Consequently, we conclude that no reasonable jury could have concluded that defendant had actual or constructive notice of the

condition in the crosswalk a sufficient time prior to the injury to have taken measures to protect against it. The grant of summary judgment in favor of defendant was proper.

Affirmed.