SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0595-16T4

CYNTHIA DEVLIN,

Plaintiff-Appellant,

v.

JUNIOR LEAGUE OF ELIZABETH-PLAINFIELD,

Defendant/Third-Party Plaintiff-Respondent,

v.

TOWNSHIP OF CRANFORD SHADE TREE COMMISSION,

Third-Party Defendant-Respondent.

Argued April 16, 2018 – Decided May 7, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-0026-15.

Daniel J. Williams argued the cause for appellant (John J. Pisano, on the brief).

Eric A. Befeler argued the cause for Junior League of Elizabeth-Plainfield (Juengling & Urciuoli, attorneys; Eric A. Befeler, on the brief).

PER CURIAM

Plaintiff Cynthia Devlin appeals from an order granting summary judgment to defendant Junior League of Elizabeth & Cranford[1] and dismissing her complaint alleging that as a result of defendant's negligent failure to maintain the brick paver sidewalk abutting its commercial property, she tripped, fell and suffered personal injuries. We reverse and remand for further proceedings.

I.

The relevant facts are not disputed.[2] On December 30, 2014, defendant owned commercial property on Walnut Avenue in Cranford. The property is located within Cranford's Special Improvement District (SID), which is operated pursuant to Chapter 199 of

[1] Defendant is identified in the complaint as the Junior League of Elizabeth & Cranford. In the answer and third-party complaint, it identifies itself as the Junior League of Elizabeth-Plainfield.

[2] We rely on the facts set forth in defendant's statement of material facts submitted in support of its summary judgment motion pursuant to Rule 4:46-2(a). In her opposition to the motion, plaintiff admitted certain of defendant's factual assertions were true. We therefore accept those facts as undisputed. See R. 4:46-2(b). Plaintiff disputed defendant's other factual assertions, but failed to cite to competent evidence as required by Rule 4:46-2(b). Thus, we accept those facts as undisputed for purposes of defendant's motion for summary judgment. See Sullivan v. Port Auth. of N.Y. and N.J., 449 N.J. Super. 276, 279-80 (App. Div. 2017) certif. denied, __ N.J. __ (2018) (slip op. at 1) (finding opposition to summary judgment motion must be based on competent evidence establishing there are genuine issues of material fact).

Cranford's municipal code. The public sidewalks within the SID are maintained by Cranford's Department of Public Works. Cranford imposes special assessments upon property owners in the SID to pay maintenance costs, including the costs of repairing the brick paver sidewalks within the district.

On December 30, 2014, plaintiff tripped and fell on the public sidewalk abutting defendant's property, and suffered personal injuries. Plaintiff alleged she tripped due to a defective condition of the sidewalk - uneven brick pavers caused by the root of a tree.

Three to six months prior to the December 30, 2014 accident, Cranford hired an independent contractor to repair the uneven pavers on the sidewalk abutting defendant's property and similar conditions at other locations within the SID. Prior to the accident, however, the independent contractor stopped its work within the SID while Cranford sought additional funds to complete the work. As a result, the uneven pavers on the sidewalk abutting defendant's property were not repaired prior to plaintiff's accident. In the month following the accident, the Cranford Department of Public Works repaired the sidewalk abutting defendant's property, removing the brick pavers and the tree, and re-installing the pavers.

Plaintiff filed a one-count complaint alleging defendant's negligent maintenance of the sidewalk abutting its property created a hazardous condition that proximately caused her fall and resulting injuries. Defendant filed an answer denying the allegations, and a third-party complaint against Cranford[3] seeking contribution under the New Jersey Joint Tortfeasor's Contribution Law, N.J.S.A. 2A:53A-1 to -5, and indemnification.

Following discovery, defendant and Cranford separately moved for summary judgment. The court granted Cranford's motion, finding there was insufficient evidence showing plaintiff sustained injuries permitting recovery against a public entity under N.J.S.A. 59:9-2(d).

The court also granted defendant's summary judgment motion, concluding there was no evidence showing defendant owed a duty of care to plaintiff. The court reasoned that because Cranford admitted its responsibility for the repair and maintenance of the sidewalks in the SID, and the SID ordinance vested responsibility for the sidewalks with Cranford, defendant did not breach any duty to plaintiff by failing to maintain and repair the sidewalk abutting its property. Plaintiff appeals the court's order

[3] In its answer, Cranford asserted the third-party complaint improperly identified it as the Township of Cranford Shade Tree Commission. There is no evidence Cranford created a shade tree commission as permitted by N.J.S.A. 40:64-1 to -14.

granting defendant's summary judgment motion and dismissing her complaint, presenting the following argument for our consideration:

> THE ORDER GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE THE COMMERCIAL LANDOWNER OWED THE PLAINTIFF A DUTY TO MAINTAIN THE PUBLIC SIDEWALK ABUTTING ITS COMMERCIAL PROPERTY IN A REASONABLY SAFE CONDITION.

II.

We review the grant of summary judgment de novo, applying the same standard as the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). We determine whether the moving party has demonstrated the absence of genuine issues of material fact, and whether the trial court has correctly determined the movant is entitled to judgment as a matter of law, owing no deference to the trial court's legal conclusions. N.J. Dep't of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 507 (App. Div. 2015).

"To sustain a cause of action for negligence, a plaintiff must establish four elements: (1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages." Townsend v. Pierre, 221 N.J. 36, 51 (2015) (internal quotation marks and citation omitted). Here, we focus on the elements of duty and breach of duty.

The issue of whether defendant had a duty to maintain the sidewalk where plaintiff fell is a question of law, Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572 (1996), which we review de novo, without deference to the motion judge's conclusions, Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009). "[A] landowner is [generally] 'not liable for off-premises injuries merely because those injuries are foreseeable.'" Desir, Estate of ex rel. Estiverne v. Vertus, 214 N.J. 303, 317 (2013) (quoting Kuzmicz v. Ivy Hill Park Apartments Inc., 147 N.J. 510, 518 (1997)). "That general rule protects an abutting property owner from liability for injuries that occur on a public way." Kuzmicz, 147 N.J. at 518.

Our Supreme Court, however, created "[a] narrow exception impos[ing] liability on commercial landowners for injuries to pedestrians on abutting [public] sidewalks. The duty to maintain the sidewalks flows from the economic benefit that a commercial landowner receives from the abutting sidewalk and from the landowner's ability to control the risk of injury." Ibid. (citing Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 158 (1981)).

Here, defendant, as the owner of commercial property, had a legal duty to "maintain[] in reasonably good condition the sidewalks abutting [its] property and [is] liable to pedestrians injured as a result of [its] negligent failure to do so." Stewart,

87 N.J. at 157; see also Qian v. Toll Bros. Inc., 223 N.J. 124, 136 (2015) (explaining that in Stewart it was "determined that imposing a duty on commercial property owners to take reasonable measures to maintain a sidewalk for the safety of pedestrians was consonant with public policy and notions of fairness"). Commercial property owners "ha[ve] a duty to exercise reasonable care" for the safety of pedestrians using public sidewalks abutting their property, "including making reasonable inspections of . . . the abutting sidewalk and taking such steps as were necessary to correct or give warning of a hazardous condition thereon." Monaco v. Hartz Moutain Corp., 178 N.J. 401, 418 (2004).

The motion court, however, determined defendant had no duty as a commercial property owner to maintain or repair the sidewalk or warn pedestrians of the hazard presented by the uneven pavers because Cranford admitted it was responsible for maintaining and repairing the sidewalks within the SID. The court reasoned it would be unfair to find defendant had a duty to maintain the sidewalk because the SID ordinance imposed the duty on Cranford. Plaintiff argues the court erroneously concluded that because Cranford assumed the duty to maintain the sidewalk in a safe condition, defendant did not share that duty.

Liability for unsafe conditions on public sidewalks abutting commercial properties is not determined solely on the basis of

ownership or control of a sidewalk. Id. at 417. In Bedell v. Saint Joseph's Carpenter Society, 367 N.J. Super. 515, 524 (App. Div. 2004), we determined a commercial property owner could be found liable for injuries resulting from a condition in a grassy area between the sidewalk and curb because the area was "an extension of the sidewalk and 'structurally an integral part' of it." Our determination the commercial landowner had a duty to maintain the grassy area in a safe condition was not founded on the landowner's ownership or control of the area. To the contrary, we found the landowner had the duty because the area provided the owner with the benefit of access to its property, and "it is only fair that [the abutting landowner] be burdened with the duty to maintain the grassy [area] in a reasonably safe condition so as not to present an unreasonable risk of harm." Id. at 525-26.

In Nielsen v. Lee, 355 N.J. Super. 373, 375 (App. Div. 2002), we considered a commercial landowner's duty to maintain a public sidewalk abutting its property where a defect in the sidewalk was caused by the root of a tree. We expressly rejected our prior holding in Tierney v. Gilde, 235 N.J. Super. 61 (App. Div. 1989), that commercial property owners had no liability for defects in a public sidewalk caused by a tree because the property owner had no right to take corrective action since the tree was under the exclusive jurisdiction of a municipal shade tree commission.

Nielsen, 355 N.J. Super. at 377. We determined that even where the cause of the sidewalk's defect was otherwise within the control of a shade tree commission, the abutting commercial landowner had a "duty, and hence potential liability . . . even if that duty is limited to . . . seeking a permit to make the repair or, on an even more limited basis, simply notifying the shade tree commission of the dangerous condition and requesting it to provide the corrective action." Id. at 378; accord Learn v. City of Perth Amboy, 245 N.J. Super. 577, 584 (App. Div. 1991) (finding that even where a shade tree commission's consent to repair a defect in a sidewalk caused by a tree was required, a commercial landowner has a duty to seek the consent if on notice of the defective condition).

We are therefore convinced the court erred in finding defendant did not owe a duty to maintain the sidewalk abutting its property in a safe condition or to take reasonable steps to warn of the condition. The SID ordinance does not prohibit commercial landowners from making repairs to the public sidewalks, requesting a permit to do so, or taking appropriate steps to warn pedestrians of a hazardous condition on abutting public sidewalks. Instead, the ordinance allows the imposition of an assessment of costs associated with public improvements within the SID, CRANFORD, N.J., SPECIAL IMPROVEMENT DISTRICT Ch. 199, §3 (2016), and

authorizes the SID's District Management Committee to undertake improvements within the SID, CRANFORD, N.J., SPECIAL IMPROVEMENT DISTRICT Ch. 199, § 6(K) (2016). There is no basis in the record to conclude defendant lacked the ability and authority to request a permit to make the repairs or otherwise take action to warn pedestrians of the sidewalk's unsafe condition. See Monaco, 178 N.J. at 419 (finding "[w]hat is important" in determining a commercial landowner's liability "is not attempting to hold [the landowner] responsible for something over which it had no control, but only for negligently failing to take such measures as were within its power and duty to protect its invitees from reasonably foreseeable danger"); cf. Pote v. City of Atl. City, 411 N.J. Super. 354, 368-69 (App. Div. 2010) (finding summary judgment in the property manager's favor was appropriate where, inter alia, there was no showing the commercial enterprise had the ability and authority to shovel, salt, or place warning signs on the boardwalk owned and controlled by the municipality).

Cranford's exercise of control over the sidewalk or assumption of responsibility for its repair did not define or limit defendant's duty. See Nielsen, 355 N.J. Super. at 376-78. Defendant's liability is dependent on facts we determined were relevant in Nielsen, including defendant's "actual or constructive knowledge of the allegedly defective condition; how long the

sidewalk was in that condition; [and] what steps, if any, were taken by defendant[.]" Id. at 380. It is also necessary to consider whether defendant could obtain a permit to repair the sidewalk; whether defendant could and did take reasonable steps to provide warnings about the unsafe condition; the length of time between Cranford's exhaustion of the available funding for the independent contractor and plaintiff's accident; and any other facts pertinent to whether defendant met its "duty to exercise reasonable care" for the safety of pedestrians using the abutting sidewalks. See Monaco, 178 N.J. at 418. As we noted in Nielsen, our decision "should not be understood as having here declared defendant's liability but only as having declared plaintiff's right to proceed to try to prove those facts on which liability is asserted." Nielsen, 355 N.J. Super at 380.

Reversed and remanded for further proceedings. We do not retain jurisdiction.