SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0890-21

GREGORY GOOTEE,

Plaintiff-Respondent,

v.

CITY OF JERSEY CITY,

Defendant-Appellant.

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Submitted October 24, 2022 – Decided February 3, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3603-17.

Peter J. Baker, Corporation Counsel, attorney for appellant (Maura E. Connelly, Assistant Corporation Counsel, on the briefs).

Lowenthal & Abrams, PC, attorneys for respondent (Dennis M. Abrams, on the brief).

PER CURIAM

This is a trip and fall personal injury action under the New Jersey Tort Claims Act (TCA), N.J.S.A. §§ 59:1-1 to 59:12-3. Defendant, City of Jersey City, appeals the denial of its motion for summary judgment. We affirm.

I.

We take the facts from the summary judgment record, viewing them in the light most favorable to plaintiff. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

At approximately 9:00 p.m. on November 12, 2016, plaintiff left a restaurant in Jersey City and was walking to his parked car near the Jersey Avenue light rail station. Plaintiff testified as he neared his car, he stepped off the sidewalk onto the street, and tripped and fell on a "lip" from a "pavement repair," with resulting injury. Plaintiff described the "lip" as a "cutout in the roadway" repaired with asphalt, which had "sunk."

Plaintiff did not immediately seek medical treatment. The next day, he was examined by his dentist and told two front bilateral incisors were "knocked out" and two front central incisors were broken because of his fall. Plaintiff was referred to an oral surgeon and the next day, the two central incisors were

extracted. Thereafter, plaintiff was fitted with four temporary crowns which were ultimately replaced with permanent crowns.

It is undisputed from the record defendant owned and maintained the street. At the time, Jersey Avenue was designed with parallel parking on the west, north and south-bound bike lanes, north and south-bound car lanes, and diagonal parking spaces on the east. Plaintiff testified his car was parked in a diagonal parking space.

At deposition, Andrew Lim, a Senior Engineer employed with defendant, testified defendant issued a street opening permit to a private contractor in January 2009 for the excavation and installation of six-inch and eight-inch sewer pipes in a healthcare building next to Jersey City Medical Center. He further testified although it was the contractor's responsibility to ensure the excavation and installation was complete, a Jersey City Street Inspector was responsible for inspection of the permitted area to determine whether the job was properly completed. After reviewing the photographs, Lim testified if any part of the excavation area was at a different elevation than the rest of the street, it was considered "unacceptable."

Paul Russo, Director of Engineering, Traffic, and Transportation, testified his department was responsible for issuing the traffic and road opening permit

in 2009. Russo identified the street opening permit issued by defendant for excavation of a 939 square foot area. When shown the photographs of the area at deposition, he testified the uneven area appeared to be a "utility cutout" where the street was excavated. Russo acknowledged the "utility cutout" would be considered utilities running to the healthcare facility. However, he found it "hard to conclude from the photograph there was 'lip'" in the street because of the deviation. Russo stated he was not aware of the permit since he was hired by defendant in April 2016. He also did not know if the work was completed and did not personally inspect the area.

Plaintiff submitted photographs of the elevated area but did not produce an expert report. Neither party took the deposition of any expert witness.

Plaintiff filed this action pursuant to the TCA.[1] At the close of discovery, defendant moved for summary judgment. Defendant argued plaintiff failed to prove his fall was caused by a dangerous condition on a public property and even if a dangerous condition existed, plaintiff did not show defendant had actual or constructive notice of the alleged dangerous condition or that its actions in addressing conditions on its property were palpably unreasonable.

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[1] We found plaintiff substantially complied with the requirements of the TCA and reversed the dismissal order entered on December 4, 2017. Gootee v. City of Jersey City, No. A-2529-17 (App. Div. Apr. 2, 2019) (slip op. at 10).

On December 28, 2020, in an oral opinion accompanied by an order, the motion judge denied defendant's summary judgment motion. The judge concluded there was a genuine issue of material fact regarding liability to be determined by a jury after "evaluating the parties' testimony." He determined the photographs indicate the road was opened and "show a deviation of the height of the asphalt." The judge further found "the lip that is there [didn't] really require an expert. It [was] visible and it [was] up to a jury to see if that [was] reasonable or not reasonable." The judge also stated it was unclear from the motion record whether an inspection was performed after the work was completed. This appeal ensued.

II.

Defendant challenges the order contending the trial court erred in finding there was a genuine issue of material fact whether there was a dangerous condition; actual or constructive notice; and defendant engaged in palpably unreasonable conduct.

We review de novo the grant of summary judgment to defendant applying the same standard as the motion judge. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (first citing Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 611 (2020) and then Townsend v. Pierre, 221 N.J. 36, 59 (2015)). That

standard requires us to "determine whether 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Ibid. (quoting R. 4:46-2(c)).

Generally, "a public entity is 'immune from tort liability unless there is a specific statutory provision' that makes it answerable for a negligent act or omission." Polzo v. Cnty. of Essex (Polzo II), 209 N.J. 51, 65 (2012) (quoting Kahrar v. Borough of Wallington, 171 N.J. 3, 10 (2002)).

> [I]n order to impose liability on a public entity pursuant to [N.J.S.A. 59:4-2], a plaintiff must establish the existence of a "dangerous condition," that the condition proximately caused the injury, that it "created a reasonably foreseeable risk of the kind of injury which was incurred," that either the dangerous condition was caused by a negligent employee or the entity knew about the condition, and that the entity's conduct was "palpably unreasonable."
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> [Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 125 (2001) (quoting N.J.S.A. 59:4-2); accord Polzo v. Cnty. of Essex (Polzo I), 196 N.J. 569, 578-79, (2008).]

"Th[e]se requirements are accretive; if one or more of the elements is not satisfied, a plaintiff's claim against a public entity alleging that such entity is

liable due to the condition of public property must fail." Polzo I, 196 N.J. at 585.

"The [TCA] defines a 'dangerous condition' as 'a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used.'" Garrison v. Twp. of Middletown, 154 N.J. 282, 286-87 (1998) (quoting N.J.S.A. 59:4-1(a)). Defendant's employees testified they were unable to determine whether there was a deviation, and if so, the exact location. However, Lim testified in deposition if the deviation existed it was "unacceptable."

In considering defendant's motion, the judge reviewed the record including photographs of the street. The judge concluded the photos showed a deviation in elevation of the asphalt. Our de novo review of the photographs presents no reason to disturb the judge's finding.

However, plaintiff must still demonstrate defendant had actual or constructive knowledge of the dangerous condition. They allege defendant had constructive notice of the defect.

"[T]he mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'" Polzo I, 196 N.J. at 581 (alteration in original) (quoting Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990)). To

demonstrate a public entity was on constructive notice, a plaintiff must raise a material factual dispute "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). Plaintiff alleged defendant had constructive notice of the excavation because the street opening permit was issued in January 2009. Plaintiff further alleged defendant required an inspection by the City Inspector to determine whether the contractor properly completed the excavation. There was no evidence presented whether the required inspection occurred following the construction or in the seven years prior to plaintiff's trip and fall. There remained then an issue of fact regarding defendant's constructive knowledge as the defect may have existed since 2009.

The judge also found plaintiff raised an issue of fact regarding the reasonableness of defendant's actions in leaving the deviation in the road. We discern no reason to disturb the judge's order denying summary judgment. Plaintiff raised sufficient disputed facts to submit the issue for a jury's consideration.

Affirmed.