SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1485-21

LINDA EMMANOULIDIS,

Plaintiff-Appellant,

v.

THE CITY OF JERSEY CITY,

Defendant-Respondent,

and

THE JERSEY CITY MUNICIPAL UTILITIES AUTHORITY,

Defendant.

Submitted February 1, 2023 – Decided March 30, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1102-20.

Miller, Meyerson & Corbo, attorneys for appellant (Alexander O. Bentsen, on the briefs).

Peter J. Baker, Jersey City Corporation Counsel, attorney for respondent (Itza G. Wilson, Assistant Corporation Counsel, on the brief).

PER CURIAM

Plaintiff appeals from the January 12, 2022 order granting defendant summary judgment. We affirm.

As she was walking her dog in Enos Park in Jersey City, plaintiff alleges she tripped and fell on uneven pavement and sustained injuries. Plaintiff had not walked in the area before and did not know how long the condition had existed.

Plaintiff served an expert report from a construction consultant who inspected the area. The proffered expert stated the elevation of the crack where plaintiff stated she fell was "1/2-3/4 inches." The report noted some of the concrete sidewalk slabs showed signs of repairs but not in the specific area where plaintiff fell. The report did not indicate when the repairs were done or who had performed the work.

Defendant denied knowledge of any dangerous condition in the area and was unaware of any complaints regarding that location.

Defendant moved for summary judgment, contending plaintiff had not established the existence of a dangerous condition of which defendant had actual

or constructive notice. Nor could plaintiff show defendant's conduct was palpably unreasonable under N.J.S.A. 59:4-2. Therefore, plaintiff could not demonstrate defendant breached its duty to her and could not support her claim of negligence.

In response to the motion, plaintiff presented a certification from her brother-in-law, Al Lopez, who was a retired Jersey City police officer. Plaintiff called him after she fell to come pick her up from the park. He certified that in the course of his job he had searched the park for evidence in the area where plaintiff fell and knew "the condition of the sidewalk where she fell was exactly as it was on the day that she fell for at least [four] years."

In an oral decision and accompanying order issued January 12, 2022, the judge granted defendant's motion. The court concluded plaintiff had not established the existence of a dangerous condition. Furthermore, the court stated that even if the "declivity . . . in the walkway . . . constituted . . . a dangerous condition," "the lack of actual or constructive notice of the dangerous condition to the public entity would constitute an independent basis to grant summary judgment . . . ." In reviewing the photographs, the court found "the condition was not so open and obvious . . . to provide the City with constructive notice of a dangerous condition." Furthermore, plaintiff could not establish how long the

defect existed. In addition, plaintiff had not presented any evidence that defendant's conduct was palpably unreasonable.

On appeal, plaintiff contends: the court erred in finding the condition of the sidewalk was not a dangerous condition; defendant was aware of the dangerous condition; and defendant's failure to fix the dangerous condition was palpably unreasonable. We are not convinced.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Green v. Monmouth Univ., 237 N.J. 516, 529 (2019). Thus, we consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

Summary judgment must be granted "if 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." R. 4:46-2(c). "If there is no genuine issue of material fact, we must then 'decide whether the trial court correctly interpreted the law.'" DepoLink Ct. Reporting

& Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citations omitted). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

Plaintiff must prove liability against defendant under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -12-3. A public entity is responsible for a dangerous condition of public property. To establish liability, plaintiff must prove:

> that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that . . .:
>
> . . .
>
> b. 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.
>
> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.
>
> [N.J.S.A. 59:4-2.]

The term "dangerous condition" is defined 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." N.J.S.A. 59:4-1(a). There must be a defect in the "physical condition of the property itself." Levin v. Cnty. of Salem, 133 N.J. 35, 44 (1993) (quoting Sharra v. City of Atlantic City, 199 N.J. Super. 535, 540 (App. Div. 1985)).

As required, the trial judge made a "preliminary determination as to whether the alleged condition [was] in fact a dangerous one" under the statute. Burroughs v. City of Atlantic City, 234 N.J. Super. 208, 213 (App. Div. 1989) (citation omitted). In reviewing the photographs taken after the incident and the evidence in the record, the court found the condition did not present a "substantial risk of injury when . . . used with due care." However, even if there were a factual dispute regarding the condition, the court stated defendant had no actual or constructive notice of the defect.

In viewing the evidence in the light most favorable to plaintiff, as we must, whether the defect in the sidewalk slab constituted a dangerous condition could be left to a jury for its determination. However, plaintiff has not demonstrated defendant had actual or constructive knowledge of the condition and therefore, she cannot sustain her claim under the TCA.

N.J.S.A. 59:4-3 provides:

> a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of

> subsection b. of [N.J.S.A.] 59:4-2 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.
>
> b. A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of [N.J.S.A.] 59:4-2 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.

Plaintiff could not establish how long the crack was present, whether defendant was or should have been aware of it or what was palpably unreasonable about defendant's conduct in this location. Neither Lopez nor plaintiff's expert presented any evidence that defendant had actual knowledge of the sidewalk crack. Lopez's statement that the sidewalk was in the same condition at the time of plaintiff's fall as it was four years earlier does not satisfy the notice to the public entity standard. Lopez does not state he notified defendant of any problem with the sidewalk at any time. To the contrary, defendant had no record of any complaints regarding the sidewalk crack.

Additionally, plaintiff cannot show that the sidewalk crack "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." Polzo v. Cnty. of Essex, 209 N.J. 51, 75 (2012) (quoting N.J.S.A. 59:4-3(b)).

Plaintiff has also not demonstrated that the failure to take action to protect against the condition was "palpably unreasonable." N.J.S.A. 59:4-2. Plaintiff did not show what behavior by the public entity was such that no prudent person would approve of its course of action or inaction. In sum, plaintiff did not establish liability by defendant under N.J.S.A. 59:4-2. The trial court properly granted defendant summary judgment.

Affirmed.