SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3288-21

NAKIA CLOWERS,

Plaintiff-Appellant,

v.

CITY OF NEWARK,

Defendant-Respondent.

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Argued May 10, 2023 – Decided June 7, 2023

Before Judges Currier and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-0274-20.

James Bayard Smith, Jr., argued the cause for appellant (John J. Pisano, on the brief).

Tiara J. Samuel argued the cause for respondent (Kenyatta K. Stewart, Corporation Counsel, attorney; Tiara J. Samuel, Assistant Corporation Counsel, on the brief).

PER CURIAM

Plaintiff Nakia Clowers appeals from a June 28, 2022 order granting summary judgment to defendant City of Newark (City). We affirm.

We recite the facts from the motion record. On July 11, 2019, plaintiff lost control of her car after driving over an open manhole on Verona Avenue in Newark. After hitting the uncovered manhole, plaintiff's car struck several parked cars. She suffered injuries as a result.

On the day of the accident, it rained heavily. This particular manhole was located near the Passaic River. According to plaintiff, the rising water from the Passaic River coupled with the heavy rain created "immense pressure" in the City's water utility system, causing the manhole cover to dislodge. Plaintiff filed a notice of tort claim and complaint against the City. The City filed an answer and affirmative defenses, including plaintiff's failure to satisfy the requirements of the Tort Claims Act (TCA), N.J.S.A. 59-1.1 to -14.4.

After discovery, the City moved for summary judgment, contending it was not on notice of the uncovered manhole for plaintiff to prevail under the TCA. The parties agreed the uncovered manhole constituted a dangerous condition. The parties also agreed the City had no actual notice of the uncovered manhole. The issue presented to the motion judge was whether the City had constructive

notice of the dislodged manhole cover consistent with the TCA or whether there were genuine issues of material fact requiring a jury to resolve that question.

The judge found plaintiff failed to meet her burden of proving the City had constructive notice of the uncovered manhole. In a written statement of reasons, the judge stated, "[p]laintiff . . . provided the [c]ourt with no evidence to demonstrate, or create a genuine issue of material fact, as to whether the [City] had constructive notice of the uncovered manhole." The judge further found "[t]he record [did] not indicate that there were any complaints to [the City] or an employee of [the City] regarding this uncovered manhole or any similar 'dangerous conditions' in the area where the accident occurred." Additionally, the judge stated plaintiff "submitted no evidence to show how long this manhole was uncovered" or that the City "had a reasonable time to cure the dangerous condition, assuming [the City] had notice of the uncovered manhole."

The judge also rejected the hearsay statement in plaintiff's certification in opposition to the City's summary judgment motion. According to plaintiff, "[m]ore than one person [at the accident scene] stated[,] 'it was only a matter of time before someone got seriously injured, as this happens all the time.'" Because plaintiff's certification relied on hearsay evidence, the judge did not consider the information.

The judge also found that the City's answer to Uniform "C" Interrogatory No. 2 did not support plaintiff's argument that the City had constructive notice of the dangerous condition. The City's engineer for the Department of Water provided the following response in describing the occurrence:

> Although there was no City of Newark (the "City") fact witnesses during the time [of] [p]laintiff's actual vehicular accident (the subject of this lawsuit), this answering witness attests that there was "heavy rain" immediately preceding [p]laintiff's car accident. Upon information, belief and experience, when there is a heavy rain, the Passaic River is caused to have a "high tide." When there is a high tide in the Passaic River, the City's underground water utility system gets a massive influx of water that causes immense pressure in its water utility system. As a result of this pressure, manhole covers sometimes "blow off" the manhole. There were no complaints of this particular manhole cover being dislodged from the manhole prior to [p]laintiff's subject car accident.

The judge noted the City's engineer who provided the interrogatory response was not deposed and plaintiff never filed a motion to compel more specific answers to the City's interrogatories.

The judge also rejected plaintiff's argument that the City was on constructive notice of the dangerous condition because the uncovered manhole was located near a police station and, presumably, City employees driving to and from the station would have seen the condition. The judge found "[p]laintiff

put forth no evidence in the record that any employee of the [City] had driven by the manhole in question on the day of the accident and saw it was uncovered." The judge wrote, "[e]vidence of general knowledge by [the City] that when it rains (and it appears this is only when it is high tide on the Passaic River), sometimes manholes become uncovered, is insufficient to defeat [the City's] motion for summary judgment." The judge concluded "while an uncovered manhole in the street is a dangerous condition to the cars driving on that street, there is nothing in the record to establish that [the City] had constructive or actual notice of the dangerous condition, or sufficient time to correct the dangerous condition . . . ."

On appeal, plaintiff contends the judge erred in granting the City's motion for summary judgment "because the inferences of fact weighed in [] plaintiff's favor would allow a jury to find that the [City] had constructive notice of the dangerous condition created by the uncovered manhole." We disagree.

We review a motion for summary judgment de novo, applying the same standard as the motion judge. Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019). Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with 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). In reviewing a summary judgment order, we consider the evidence in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The issue before this court, as it was before the trial court, is whether the City had constructive notice of the uncovered manhole to satisfy the requirements of the TCA. To establish liability against a public entity under the TCA, a plaintiff must prove the "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. A "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).

Under N.J.S.A. 59:4-3(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 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."

On this record, we agree with the motion judge that plaintiff failed to meet her burden under the TCA. Plaintiff never established how long the manhole cover had been dislodged. Nor did she submit competent and admissible evidence that the City knew or should have known about the open manhole in the street. There also was no evidence that this particular manhole had ever been dislodged on a prior occasion. The fact that the Passaic River at times of heavy rain and high tide may "sometimes" cause manhole covers to dislodge is insufficient to prove the City had notice this particular manhole cover dislodged. See DeBonis v. Orange Quarry Co., 233 N.J. Super. 156, 170-71 (App. Div. 1989) (holding general knowledge of a dangerous condition insufficient to impute constructive knowledge of the condition on the date of the plaintiff's accident). Further, plaintiff's reliance on hearsay statements from bystanders at the accident scene was not admissible to demonstrate the City had constructive knowledge of the dislodged manhole cover. See Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 457 (App. Div. 2009) (holding inadmissible hearsay "cannot be considered evidence in the summary judgment record.").

Additionally, plaintiff proffered no evidence of any complaints made to the City regarding dislodged manhole covers at this location or any other location.

On this record, we are satisfied there were no genuine issues of material fact precluding the judge's conclusion, as a matter of law, that the City lacked constructive notice of the dislodged manhole cover prior to plaintiff's accident. Therefore, plaintiff was unable to prevail on her TCA claim and the judge properly granted summary judgment to the City.

Affirmed.