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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5810-11T2

PAULA GIORDANO,

Plaintiff-Appellant,

v.

HILLSDALE PUBLIC LIBRARY,
TOWNSHIP OF HILLSDALE,

Defendant-Respondent.

Argued May 20, 2013 – Decided June 20, 2013

Before Judges Parrillo, Fasciale and Maven.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4612-10.

James P. Kimball argued the cause for appellant (Seigel Capozzi Law Firm, LLC, attorneys; Patrick M. Metz, on the brief).

David T. Pfund argued the cause for respondent (Pfund McDonnell, P.C., attorneys; Mr. Pfund, of counsel; Mary McDonnell, on the brief).

PER CURIAM

Plaintiff Paula Giordano appeals from the Law Division's summary judgment dismissal of her slip and fall negligence

complaint against defendants Township of Hillsdale and Hillsdale Public Library (collectively defendants). We affirm.

The facts, viewed most favorably to plaintiff, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), are as follows. In the early afternoon of May 10, 2009, plaintiff was walking in the parking lot of the Hillsdale Public Library. According to plaintiff, as she approached the building, she slipped and fell on a curb cut in the sidewalk in the rear of the library. The barrier-free curb cut is part of a walkway from the parking lot to provide pedestrians with access to the sidewalk and rear entrance to the library.

In her deposition, plaintiff explained that when she reached the curb cut in the sidewalk, she stepped up onto the curb with her left foot and then stepped with her right foot onto the decline in the curb cut. When she stepped onto the decline of the curb cut with her right foot, she lost her balance and fell. She attributes her loss of balance to dirt and debris covering the base of the curb cut, which her expert opined "washed down onto the curb cut obscur[ing] the patio and curb cut and created a tripping and slipping hazard." Photographs of the scene taken that same afternoon reveal a small amount of dirt and pebbles at the base of the curb cut.

Prior to the accident, no complaints were ever made about the condition of the walkway. According to the library director, David Franz, part of the library staff's routine duties was to inspect the area leading up to the door in the rear of the library and bring to his attention any hazardous condition observed. No such complaints concerning the pathway leading to the library were ever made to him. The Borough employs a cleaning service for the library's interior that also addresses the property's landscaping needs. In addition, the Borough's Department of Public Works occasionally sweeps the parking lot area.

Plaintiff sued defendants alleging that they "negligently and carelessly allowed a dangerous and hazardous condition to exist on the property or failed to warn of same which caused plaintiff to slip and fall." Following discovery, the judge granted defendants' motion for partial summary judgment as to that portion of plaintiff's complaint alleging negligent design of the sidewalk ramp. Defendants later moved for summary judgment dismissal of the remainder of plaintiff's complaint based on the immunities afforded under the New Jersey Tort Claims Act (Act), N.J.S.A. 59:1-1 to 12-3. In granting the requested relief, the motion judge held that, as a matter of law, plaintiff failed to establish that (1) the property was in

a dangerous condition at the time of the accident; (2) her injuries were proximately caused by the alleged condition; (3) the alleged condition created a reasonably foreseeable risk of the kind of injury which plaintiff incurred; (4) that neither (a) a negligent or wrongful act or omission of one of defendants' employees within the scope of employment created the dangerous condition or that (b) defendants had actual or constructive notice of the alleged condition; and (5) that neither defendant acted in a palpably unreasonable manner.

On appeal, plaintiff argues that summary judgment was improper because there were genuine issues of material fact as to the existence of a dangerous condition, defendants' constructive notice thereof, and whether their failure to take action was palpably unreasonable. We disagree and conclude that the area of plaintiff's fall did not constitute a "dangerous condition" within the meaning of the Act, N.J.S.A. 59:4-2.

We review a trial court's grant of summary judgment de novo, applying the same standard as the trial court. Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003). 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); see also Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). The court first decides whether there was a genuine issue of material fact. If there was not, the court then decides whether the trial court's ruling on the law was correct. Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 258 (App. Div. 1987).

N.J.S.A. 59:4-2 provides:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes 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 either:
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> a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> b. a public entity had actual or constructive notice of the dangerous condition under section 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.]

Thus, in order to impose liability on a public entity, such as defendants, pursuant to this section, a plaintiff must prove, among other things, that at the time of the injury the public entity's property was in a dangerous condition, that the condition created a foreseeable risk of the kind of injury that occurred, and that the dangerous condition proximately caused the injury. N.J.S.A. 59:4-2. Even if each of the above elements is proven, the Act imposes no liability on a public entity "if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable." Ibid. "Those 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 a public property must fail." Polzo v. Cnty. of Essex, 196 N.J. 569, 585 (2008).

Essential to the determination of a public entity's tort liability is the definition of the statutory phrase "dangerous condition." The Act 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." N.J.S.A. 59:4-1(a). Thus, by its very terms, the Act explicitly requires that a dangerous condition can be found to exist only when the defect creates a "substantial risk of injury" when used with due care "in a manner in which it is reasonably foreseeable that it will be used." Ibid.

A "substantial risk" is "one that is not minor, trivial or insignificant." Polyard v. Terry, 160 N.J. Super. 497, 509 (App. Div. 1978), aff'd o.b., 79 N.J. 547 (1979). There, the plaintiff sued the State, alleging that small potholes in the surface macadam of a roadway constituted a dangerous condition. Id. at 507. We rejected this argument as a matter of law and held that these imperfections do not constitute a dangerous condition as defined by the statute. Id. at 509-10. We reasoned that not every defect, even if caused by negligent maintenance, is actionable. Id. at 508.

To be sure, the threshold determination whether property is in a "dangerous condition" is generally a question for the finder of fact. See Roe ex rel. M.J. v. N.J. Transit Rail Operations, Inc., 317 N.J. Super. 72, 77-78 (App. Div. 1998) (stating that whether property was in a "dangerous condition" was a question for the jury), certif. denied, 160 N.J. 89 (1999); Daniel v. N.J. Dep't of Transp., 239 N.J. Super. 563,

573 (App. Div.) (same), certif. denied, 122 N.J. 325 (1990). However, "'like any other fact question before a jury, [that determination] is subject to the court's assessment whether it can reasonably be made under the evidence presented.'" Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 124 (2001) (quoting Black v. Borough of Atl. Highlands, 263 N.J. Super. 445, 452 (App. Div. 1993)); see also Cordy v. Sherwin Williams Co., 975 F. Supp. 639, 643-44 (D.N.J. 1997). Thus, the critical question in this appeal is whether a reasonable factfinder could have concluded that plaintiff demonstrated that the property was in a "dangerous condition." Daniel, supra, 239 N.J. Super. at 573 (holding that because reasonable jury could have reached a decision in favor of plaintiff, trial court properly allowed jury to consider public entity's liability under the Act).

Here, we are satisfied that no reasonable jury could have concluded that the area of plaintiff's fall constituted a "dangerous condition" within the intent of the Act. The demonstrative evidence merely shows a small amount of dirt and pebbles had accumulated in the area between the curb cut and the parking lot. Such a condition is not at all uncommon and pedestrians must expect some imperfect surfaces. Absent is any proof that the minor condition of which plaintiff complains

created a "substantial" risk of injury, particularly when used with "due care" in the normal, "foreseeable" manner. In fact, plaintiff's own expert has failed to explain how the presence of dirt and pebbles created a "substantial" risk of injury when the "ramp" was used with due care and in the normal foreseeable manner. And as to the manner of its use, plaintiff herself attributes the loss of her balance to placing her right foot onto the decline in the curb cut, rather than the so-called debris at its base. Given the nature of plaintiff's acknowledged activity as well as the demonstrative evidence, the condition of the property cannot reasonably be said to have been dangerous or, for that matter, to have caused plaintiff's injury.

But assuming a dangerous condition had caused plaintiff's injury, there is no proof that defendants had actual or constructive knowledge of it. No complaints were ever voiced about the condition of the property nor prior incidents reported. Moreover, library staff never notified the director of any hazard or defect in the area. Equally lacking is any proof of how long the so-called dangerous condition was in existence so as to have imputed notice to defendants.

But even if a jury could reasonably find all other elements, plaintiff has failed to prove that defendants'

inaction was "palpably unreasonable." See, e.g., Muhammad v. N.J. Transit, 176 N.J. 185, 199-200 (2003); Carroll v. N.J. Transit, 366 N.J. Super. 380, 390-91 (App. Div. 2004). For a public entity such as defendants to have acted, or failed to act, in manner that is palpably unreasonable, "'it must be manifest and obvious that no prudent person would approve of its course of action or inaction.'" Holloway v. State, 125 N.J. 386, 403-04 (1991) (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)). In other words, the term implies behavior that is "patently unacceptable under any given circumstance." Lindedahl, supra, 100 N.J. at 493.

Here, we find no proof of "palpable unreasonableness" to warrant jury consideration. The unrefuted evidence is that part of the routine for library staff was to inspect the premises leading into the rear of the library, and employees were instructed to alert the library director of any hazards. Also, the Borough's Department of Public Works performed landscaping for the library and would sweep the parking lot area. And, as previously noted, the record is devoid of any evidence of a history of incidents or complaints similar to plaintiff's, or a demonstrable pattern of conduct or practice to suggest the need for a more frequent inspection schedule. As such, plaintiff's claims of palpable unreasonableness presented no jury question.

Because plaintiff cannot establish the existence of a "dangerous condition" on defendant's property, we affirm the summary judgment dismissal of her complaint. Although we need not reach the remaining elements, we nevertheless conclude that there is an equally fatal lack of evidence that defendants had actual or constructive notice of the condition of which plaintiff complains, or that their inaction in this regard was "palpably unreasonable."

Affirmed.