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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1996-13T1

ROSA NAPPI,

Plaintiff-Appellant,

v.

TOWN OF SECAUCUS and
GREGORY KOHL

Defendants-Respondents.

Submitted January 6, 2015 – Decided January 12, 2015

Before Judges Yannotti, Fasciale and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-524-12.

Christopher P. Gargano argued the cause for appellant.

Robert J. Gallop argued the cause for respondent Town of Secaucus (O'Toole Fernandez Weiner Van Lieu L.L.C., attorneys; Mr. Gallop, on the brief).

John J. Gorssi, III argued the cause for respondent Gregory Kohl (Carey & Grossi, attorneys; Ashley A. Harris, on the brief).

PER CURIAM

Plaintiff appeals from a December 6, 2013 order granting summary judgment to the Town of Secaucus (the "Town") and

Gregory Kohl (collectively referred to as "defendants"). We affirm.

Plaintiff fractured her leg after she slipped and fell outside Kohl's residence on an area that connects his driveway to the street (the "driveway apron"). Plaintiff filed a complaint alleging that the Town negligently plowed snow onto the driveway apron, causing her to slip and fall. Plaintiff also alleged that Kohl, as the homeowner, improperly maintained a dangerously-angled driveway apron.

It is undisputed that the Town plowed snow and that Kohl removed snow from the driveway apron on the day plaintiff fell. Although the Town's unofficial snow removal policy is to avoid plowing snow onto sidewalks and driveway aprons, the Town Administrator indicated that there have been incidents where snow from plows might have been "accidentally" pushed onto sidewalks and driveway aprons. He pointed out, however, "that unfortunately[,] when plowing snow in an urban environment, that's a consequence . . . because there's no place for the snow to go . . . ."

The Town has an ordinance requiring homeowners to clear snow from the sidewalks abutting their property. Kohl, plaintiff, and plaintiff's husband stated that the Town has previously pushed snow back onto driveway aprons after

homeowners have cleared them, like here. Their statements corroborated the Town Administrator's acknowledgment that sometimes snow, as ordinarily expected from the dangers flowing from a snowstorm, is plowed onto driveway aprons because the snow has no place else to go.

Plaintiff also retained an engineering expert who opined that (1) the driveway apron's slope was twenty-six percent, which is greater than the twelve-and-a-half percent slope allowed under New Jersey's purported current Building Code; and (2) the driveway apron did not have a "surface textured broom finish." Defendants denied constructing the driveway apron and sidewalk. Plaintiff's engineer could not determine when the driveway apron was designed and constructed or whether the driveway apron complied with the construction standards in effect at that time. Plaintiff "think[s] it can be inferred" that the sidewalk and driveway apron were constructed on or around 1920, when Kohl's house was built.

Defendants moved for summary judgment and the judge held oral argument. The judge viewed the facts in a light most favorable to plaintiff and determined that the Town could not be liable as a matter of law because of the well-recognized common-law snow removal immunity enunciated in Miehl v. Darpino, 53 N.J. 49, 54 (1968). The judge also found that Kohl was not

liable pursuant to Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 159 (1981).

On appeal, plaintiff argues that the judge erred in granting summary judgment to defendants because (1) the Town was not entitled to snow removal immunity; (2) the Town owned or controlled the driveway apron; (3) Kohl was liable for the dangerous condition created by his predecessor in title; and (4) Kohl should have known that there was a dangerous condition.

We conclude that plaintiff's arguments "are without sufficient merit to warrant discussion in a written opinion[,]" R. 2:11-3(e)(1)(E), and affirm substantially for the reasons expressed by the judge in her comprehensive oral opinion. We add the following remarks.

I.

Summary judgment may be granted when, considering the evidence before the court on the motion in a light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). When reviewing an order granting summary judgment, we apply the same standards that the trial court applied when ruling on the motion. Oyola v. Xing Lan Liu, 431 N.J. Super. 493, 497 (App. Div.), certif. denied, 216 N.J. 86 (2013).

A.

The judge properly granted the Town's motion for summary judgment. It is well-established that a municipality has common-law immunity for suits related to snow removal. Miehl, supra, 53 N.J. at 54 (holding that snow removal is one type of government act "which should not give rise to tort liability" (citation and internal quotation marks omitted)). This is because "[t]he unusual traveling conditions following a snowfall are obvious to the public" and "[t]he public benefit arising from snow removal far outweighs any slight, private detriment which could accompany such a municipal act." Ibid.

The immunity established in Miehl was not abrogated by the Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 to 12-3. See Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 412 (1988). The Court in Rochinsky recognized, however, that a municipality may not be immune under Miehl if the "public entity's snow-removal activities might result in hazardous conditions different in character from the dangers ordinarily expected from a snowstorm." Id. at 416. The creation of such conditions "would necessarily involve palpably unreasonably conduct by a public entity that was separate and distinct from its snow-removal functions." Ibid. (citing N.J.S.A. 59:4-4). The Court has defined "palpably unreasonable" to mean "behavior that is

patently unacceptable under any given circumstance" such that "no prudent person would approve of its course of action or inaction." Polzo v. Cty. of Essex, 209 N.J. 51, 75-76 (2012) (internal citations and quotation marks omitted).

The judge properly concluded that there are no facts showing that the Town's "conduct of plowing snow onto the driveway apron while clearing the street [was] extreme or different in character from the dangers ordinarily expected from a snow storm or even palpably unreasonable under the Rochinsky analysis." See id. at 75 n. 12 (finding that "[a]lthough ordinarily the question of whether a public entity acted in a palpably unreasonable manner is a matter for the jury, in appropriate circumstances, the issue is ripe for a court to decide on summary judgment"). The Town cleared snow from the main roadways and although it had an informal policy to avoid clearing snow onto driveways and sidewalks, having snow end up in those locations is an unavoidable consequence of plowing snow within "dangers ordinarily expected from a snowstorm." Rochinsky, supra, 110 N.J. at 416. The Town's ordinance requiring homeowners to clear snow from walkways and driveways abutting their property also indicates that the Town took additional steps to mitigate the dangers from snowfall and snow removal.

B.

Plaintiff's contention that summary judgment was inappropriate because the Town owned or controlled the driveway apron and sidewalk, and was therefore liable for its alleged unsafe condition, is unpersuasive.

The TCA "provides protection for public entities involved in tort claims" and "[g]enerally, immunity prevails over liability to the extent that immunity has become the rule and liability is the exception." Henebema v. S. Jersey Transp. Auth., 219 N.J. 481, 490 (2014). The TCA declares that a public entity can be liable for an injury caused by a condition of its property only if:

> [T]he 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:
>
> 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 . . . 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 public entity has actual notice of a dangerous condition "if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." N.J.S.A. 59:4-3a. A public entity has constructive notice "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." N.J.S.A. 59:4-3b. A public entity is not liable "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.

Here, it is undisputed that the area where plaintiff slipped and fell was in the Town's right-of-way. Plaintiff presents no facts, however, that a Town employee constructed the driveway apron or that the Town had actual or constructive notice of the purported improper slope of the driveway apron. Plaintiff admits that it is indeterminable when the driveway apron and sidewalk were constructed, who performed the construction work, and whether the construction met the construction standards in effect at the time of its installation.

Plaintiff also raises no genuine issue of fact to show that the Town engaged in any action which was palpably unreasonable. Viewing the facts in a light most favorable to plaintiff, even if the driveway apron was built at a steeper grade than present standards allow, this is not generally "a high priority, even if the [municipality] were on notice of its presence" because of "limited public resources." Polzo, supra, 209 N.J. 51 at 77-78 (finding an uneven road shoulder was not a high priority in the context of public demands); see also N.J.S.A. 59:2-3d (providing public entity immunity "for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources . . . unless a court concludes that the determination of the public entity was palpably unreasonable").

C.

The judge properly granted summary judgment to Kohl. It is well-established that a residential property owner has no duty to maintain the sidewalk that borders the premises, and will not be liable unless the owner creates or exacerbates a dangerous sidewalk condition. Stewart, supra, 87 N.J. at 159 (confining the duty to maintain the sidewalks to "owners of commercial property"); see also Lechejko v. City of Hoboken, 207 N.J. 191, 195, 210 (2011) (reaffirming Stewart and noting that

"[r]esidential homeowners can safely rely on the fact that they will not be liable unless they create or exacerbate a dangerous sidewalk condition"). Thus, a residential landowner can only be liable for "'the negligent construction or repair of the sidewalk by himself [or herself] or by a specified predecessor in title . . . .'" Stewart, supra, 87 N.J. at 153 (quoting Yanhko v. Fane, 70 N.J. 528, 532 (1976)).

Here, the undisputed facts show that Kohl did not construct the driveway apron or sidewalk, he does not know who constructed it, and he has not modified or done any work to the sidewalk which might have exacerbated a dangerous sidewalk condition. Even accepting plaintiff's assertion that it can be inferred that some predecessor in title constructed the sidewalk, which we must do, such an assumption still fails to answer which predecessor in title created the condition so as to give notice to the homeowner. See id. at 156 (stating that the proofs necessary to establish a prima facie case, including when the sidewalk was constructed and the proper standard, can be "extremely elusive").

D.

We reject plaintiff's remaining contention that summary judgment in favor of Kohl was precluded under our Supreme

Court's decision in Brown v. Racquet Club of Bricktown, 95 N.J. 280 (1984).

The Court in Brown held that when a commercial building's wooden stairwell collapsed eleven months after the defendant took possession of the building, the jury could be appropriately charged on the doctrine of res ipsa locquitur. Id. at 295. Under those circumstances, the Court determined there could be "an inference that some negligent act on the part of defendant contributed to the happening of the accident . . . and that this inference could be drawn from the accidental occurrence itself." Ibid.

Brown is inapplicable to this case. Kohl is a residential homeowner and has immunity from suit under the holdings in Stewart and Lechejko. And, unlike the defendant in Brown, who knew the builder and took possession of the defective stairwell, the facts are undisputed that Kohl does not know who constructed the driveway apron or when it was built. Therefore, Kohl could not have determined if there was a defect in the driveway based upon inspection because it is impossible to determine whether the driveway was constructed to the proper standard at the time of its installation.

Affirmed.