CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DuPage County, Illinois

505 N. County Farm Road
Wheaton, IL 60187

BRIAN R. McKILLIP
Associate Judge

August 11, 2017

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Re: CAROL GENTILE v. VILLAGE OF ITASCA
2016 L 157

Counsel:

This matter came before the court on the defendant's Motion for Summary Judgment. The motion was fully briefed and argued on July 12. The matter was taken under advisement and continued to August 23 for status on decision.

The plaintiff's complaint seeks damages for personal injuries sustained when she tripped and fell while walking her dog near her home. She alleges that she fell by reason of a defect existing in a sidewalk maintained by the Village of Itasca. The defendant Village has moved for summary judgement, asserting three bases for its motion.

I. *DE MINIMIS* DEFECT

The Village argues that the defect which allegedly caused the plaintiff's fall was too small to impose a duty upon the Village for repair. The Village correctly points out that it is not under a duty to repair *de minimis* defects in sidewalks, by reason of both the economic burden and the harsh weather conditions that exist in our area.

Certainly, whether a defect is *de minimis* or not depends upon numerous facts and circumstances. The defendant acknowledges that there is no "bright-line" standard to determine whether or not a defect is too minor to be actionable. However, the Village then proceeds to argue that anything less than two inches is *de minimis* and warrants summary judgment in the instant case.

The parties have provided the court with numerous pictures of the defect in question, together with the deposition testimony of John Heimburger, a Village employee. Mr. Heimburger works for the public works department of the Village and has been involved in its sidewalk inspection program for many years. He has been employed by the Village for 36 years. He testified concerning the IDOT standards, which he believed to be an inch and a half, and his own standards, which are more restrictive, approaching three-quarters of an inch.

Considering the testimony of Mr. Heimburger, but even more importantly the photographs, I believe that whether or not the defect in this case is *de minimis* will not be decided as a matter of law on a motion for summary judgment.

II. NOTICE

The Village argues that it is immune from liability by reason of §3-102 (a) of the Local Governmental and Governmental Employees Tort Immunity Act. Under the provisions of that Act, the Village must have either "actual or constructive notice of the existence of such a condition that is not reasonably safe and reasonably adequate time prior to an injury."

The plaintiff's Response to the Motion for Summary Judgment seems to concede that the Village did not receive actual notice of the defect. The plaintiff does, however, argue that the Village had constructive notice of the dangerous condition that existed and arguably caused the plaintiff's fall. The plaintiff's argument in this regard, however, seems to rely upon the general principle that weather conditions of freezing and thawing over the winter months will result in the heaving and shifting of sidewalks, exposing cracks and resulting in shifting and uneven sidewalks.

The plaintiff cites the Village's "windshield survey" to support its theory that there was constructive notice. The argument seems to be based upon the principle that the Village is aware that the winter will cause defects in the sidewalks every year — "it is an event that always occurs" and that the Village "knows that cracks exist on the sidewalks. For that reason, they conduct said inspections." Therefore, the plaintiff's argument concludes, these conditions charge the Village with constructive knowledge of the defect that in this instance caused the plaintiff's fall.

However, just general knowledge that weather conditions will cause the heaving and shifting of sidewalks which may (or may not) result in uneven surfaces and, in some instances, a dangerous condition, does not constitute constructive notice of the defect that purportedly caused the plaintiff's fall in this case. Consider the facts and ruling in the ***Zameer v. City of Chicago***, 2013 ILApp (1st) 120198.

There, the plaintiff cited a number of complaints about sidewalk cracks in the 6000 block of Sacramento Ave. in the City of Chicago in support of actual or constructive notice to the City. However, none of the complaints were about the sidewalk defect that was responsible for the plaintiff's fall. Further, the plaintiff argued the multiple complaints about defects in the area, photographs of the defect, and finally the fact that there were sidewalk repair projects in the area combined to establish constructive notice to the City. The court rejected that argument, holding that it is necessary to establish that the defendant "had timely notice of the specific defect that caused her injuries." *Id.* at ¶23. Also, the court in ***Krivokuca v. City of Chicago***, 2017 ILApp (1st) 152397 cited ***Zameer*** for the principle that constructive notice must be of the "specific defect that caused the plaintiff's injuries, not merely the condition of the area." ***Zameer***, 2013 IL App (1st) 120198 at ¶16.

Here, the plaintiff attempts a similar argument. There is no evidence of constructive notice of the specific defect; only the general knowledge that winter weather will cause movement and shifting of sidewalks. Nor is there evidence that the defect existed for such a period of time[1] or was so conspicuous that the Village, in the exercise of reasonable care, should have been aware of it.[2]

For the foregoing reasons, I find that there is no genuine issue of material fact with respect to the absence of actual or constructive notice of the defect which would be required in order to impose liability on the Village under the Local Governmental and Governmental Employees Tort Immunity Act.

III. DISCRETIONARY IMMUNITY

Under §2–201 of the Local Governmental and Governmental Employees Tort Immunity Act, a public employee is not liable (and therefore the Village is not liable) for an injury "resulting from his act or omission in determining policy when acting in the exercise of discretion even though abused."

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[1] Mr. Heimburger testified in his deposition that it was not there when he did is inspection the prior spring.

[2] From the plaintiff's deposition testimony is clear that she traversed the area numerous times and was unaware of any dangerous condition or defect.

Review of Mr. Heimburger's deposition shows that the Village has empowered him with great discretionary authority in managing the sidewalk repair program of the Village. Based upon other responsibilities, he determines when the inspection will take place, the manner and extent of the inspections, and which repairs will be contracted for in any particular year. His testimony shows that he alternates geographically in conducting inspections and establishes priorities in repairs based upon budgetary considerations and his evaluation of the danger posed by any particular defect.

Very much like Mr. Kornsey in ***Richter v. College of DuPage***, 2013 IL App (2d) 130095, Mr. Heimburger shows policy determination and the exercise of discretion in administering the sidewalk repair program at the Village. Mr. Heimburger determines when the inspection would take place, which conditions would be addressed, how they would be repaired, and established priorities in addressing and scheduling repairs, based upon budgetary considerations and other needs of the Village.

Clearly, §2–201 is applicable and grants the Village immunity in this instance.

For the foregoing reasons, the Motion for Summary Judgment is granted and judgment is entered in favor of the defendant, Village of Itasca, and against the plaintiff, Carol Gentile.

I direct Mr. Fioretti to prepare an order consistent with this letter of opinion and present it for entry on the next court date.

Very truly yours,

Brian R. McKillip