NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1104-14T2

KIM WALTER,

Plaintiff-Appellant,

v.

CITY OF OCEAN CITY,

Defendant-Respondent.

Submitted December 8, 2015 – Decided March 22, 2016

Before Judges St. John and Guadagno.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-0485-12.

Mazraani & Liguori, LLP, attorneys for appellant (Joseph C. Liguori, on the brief).

Birchmeier & Powell, LLC, attorneys for respondent (Erin R. Thompson, on the brief).

PER CURIAM

Plaintiff Kimberly Walter appeals an order of the Law Division granting summary judgment to defendant, the City of Ocean City. Having reviewed the record in light of the applicable law, we affirm.

The record reveals the following facts and procedural history. Shortly before midnight on New Year's Eve 2010, plaintiff slipped and fell on the Ocean City boardwalk while attending a fireworks display. The Ocean City fireworks were hosted by First Night, Inc., which was not a party to this suit. According to plaintiff, approximately 10,000 tickets are sold for the event each year. Attendees gather on the boardwalk between 8th Street and 14th Street to view the display and enjoy the shops, rides, and musical performances.

Although it did not snow in Ocean City on December 31, approximately five to ten inches of snow had fallen a few days earlier. City employees cleared a fifteen-foot-wide pathway on the boardwalk from Moorlyn Terrace to 12th Street. The cleared snow was pushed into piles, where some of it melted in the relatively warm daytime temperatures onto the walkway. The area in front of the music pier, between 8th Street and 9th Street, was salted and sanded periodically throughout the evening. According to plaintiff, there was no salting or sanding of the boardwalk between 8th Street and 14th Street.

Plaintiff and her companions arrived on the boardwalk somewhere in the area of 14th Street. Although a path was cleared through the snow, the boardwalk was icy and appeared unsafe. Nonetheless, plaintiff felt she could proceed toward

the music pier if she shuffled arm-in-arm with a friend. Somewhere between 9th Street and 10th Street, plaintiff slipped and fell, fracturing both of her wrists. She and her companions stayed to watch the fireworks before returning home.

Plaintiff filed a complaint against Ocean City on July 5, 2012. Ocean City subsequently filed cross-claims for contribution and indemnification against its insurer, Harleysville Insurance Co. Thereafter, Ocean City moved for summary judgment of plaintiff's claims. Following oral argument, on March 7, 2014, Judge J. Christopher Gibson issued a comprehensive twenty-six page order and opinion granting Ocean City's motion for summary judgment.

On September 22, 2014, Ocean City stipulated to the dismissal of its remaining claims against Harleysville Insurance Co. Plaintiff filed a notice of appeal on October 31, 2014, appealing the March 7, 2014 order of summary judgment.

"An appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). Summary judgment must 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, and that the moving party is entitled to a

judgment or order as a matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529-30 (1995).

In performing this review, we must interpret the facts, and any inferences therefrom, in the light most favorable to the non-moving party. See Lippman v. Ethicon, Inc., 222 N.J. 362, 367 (2015) (citing Brill, supra, 142 N.J. at 523, 540). If there is a genuine issue as to any material fact, or credibility issues are presented, summary judgment should be denied. See R. 4:46-2(c); Brill, supra, 142 N.J. at 540.

On appeal, plaintiff contends that common law snow removal immunity does not apply because the boardwalk is not a public roadway. Plaintiff also contends that, even if common law snow removal immunity does apply, the facts fall under the egregious conduct exception. We disagree with plaintiff's arguments, and affirm.

Municipalities have no duty to clear snow and ice from the streets, but they are often under tremendous pressure to do so. See Miehl v. Darpino, 53 N.J. 49, 53 (1968). Frequently, the very act of attempting to clear snow and ice creates new perils for the public in the form of obstructive snow piles and melt water that refreezes on walkways. Id. at 53-54; Luchejko v. City of Hoboken, 414 N.J. Super. 302, 317 (App. Div. 2010),

aff'd, 207 N.J. 191 (2011) (citing Lathers v. Twp. of West Windsor, 308 N.J. Super. 301, 304 (App. Div. 1998), certif. denied, 154 N.J. 609 (1998)).

The common law doctrine of snow removal immunity was born out of a recognition that complete "broom-swept" snow clearance is unrealistic, and even negligent snow removal is better than no snow removal. Id. at 54. The immunity recognizes that municipalities face a difficult task of prioritization following a snowfall, and seeks to protect them from the "limitless liability" that could result if "they had to compensate every person injured from ice and snow on the State's hundreds of miles of streets and highways." Bligen v. Jersey City Hous. Auth., 131 N.J. 124, 131 (1993).

In Bligen, the Court held the immunity did not apply to a public housing complex that failed to remove ice from its internal driveway. Id. at 133. Because the housing complex occupied a relatively small finite area and employed its own maintenance staff, the Court held that it did not involve the same problems of prioritization, nor engender the same concern for potentially limitless liability, that a municipality must face following a snowfall. Id. at 131, 133-34.

Similarly, in Tymczyszyn v. Columbus Gardens, we held the immunity did not apply to the sidewalk abutting a residential

building owned by the Hoboken Housing Authority. 422 N.J. Super. 253, 261 (App. Div. 2011). In support of our holding, we noted that it is municipal defendants, rather than mere public entities, that face the risk of unlimited liability arising from snow clearance. Id. at 262.

Unlike Bligen and Tymczyszyn, the defendant in this case is a municipality, potentially subject to limitless liability from its attempts at snow and ice removal. Thus, the defendant in this case is precisely the type of entity that the common law snow removal immunity is intended to protect. Ibid. Likewise, a municipally-owned boardwalk is the type of surface covered by the common law immunity.

The common law snow removal immunity has traditionally applied to plowed streets and "the area contiguous to plowed streets, including private driveways and sidewalks," which may be "encumbered by additional snow through street plowing." Miehl, supra, 53 N.J. at 53. Plaintiff contends that the boardwalk is fundamentally different from a street or sidewalk because there is no emergency traffic, and shops are for the most part closed during the winter (though they were apparently open on New Year's Eve).

Although a boardwalk is not "contiguous" to the street as that term is used in Miehl, the logic underlying the snow

removal immunity clearly extends to boardwalks. In this case, the boardwalk is maintained by Ocean City, and is apparently open to pedestrian traffic year-round. Thus, when Ocean City determines how to allocate scarce snow removal resources, the boardwalk is necessarily among the areas it must consider. This distinguishes the boardwalk from the public housing developments in Bligen and Tymczyszyn, because the boardwalk does not represent a discrete area with its own maintenance staff. In fact, even if the boardwalk was a distinct public entity maintained by a dedicated maintenance staff, it would likely still be covered by the common law immunity. See, e.g., Lathers, supra, 308 N.J. Super. 301, 305 (interpreting Bligen as a narrow exception to the common law immunity, rejecting finiteness of space and self-maintenance as dispositive factors); Sykes v. Rutgers, State University of New Jersey, 308 N.J. Super. 265, 268-69 (App. Div. 1998) (rejecting notion that a plaintiff can "fractionalize" public land to meet the "finite, bounded area" definition in Bligen).

Finally, we disagree with plaintiff's contention that Ocean City's actions were so egregious as to render the immunity inapplicable in this case. The Supreme Court has noted in dicta that, "under unique circumstances the immunity for snow removal activities could be construed to permit a cause of action

against a public entity for conduct so egregious that its insulation from liability would be inconsistent with the public policy that the Miehl immunity was intended to foster." Rochinsky v. State Department of Transportation, 110 N.J. 399, 415 n.7 (1988). However, the outer limits of the common law snow removal immunity have not yet been clearly defined.

Plaintiff argues that Ocean City's actions are egregious because it had notice that many visitors would attend the boardwalk on New Year's Eve, it had notice of the icy condition of the boardwalk, and the extra burden of salting and sanding six blocks of boardwalk would have been minimal. However, even viewing the facts in the light most favorable to the non-moving party, such a conclusion would be contrary to the weight of our prior decisions.

In Davenport v. Borough of Closter, plowed snow blocked the sidewalk leading to a strip mall. 294 N.J. Super. 635, 38 (App. Div. 1996). Because of this obstruction, the plaintiff crossed a "well-worn path" over an empty lot and fell on a sheet of ice formed by melting mounds of piled snow. Ibid. The Borough had notice of the condition, since it plowed the snow, owned the lot, and the lot itself was adjacent to Borough Hall. Ibid. Even so, we affirmed an order granting summary judgment to the Borough, stating "[a]s a matter of law, it is clear that the

Borough's snow removal activities were not so egregious as to require this court to consider the 'outer limits of the Miehl immunity.'" Id. at 642.

There is nothing in this case to render the acts of Ocean City any more "egregious" than those in Davenport. As the Supreme Court stated in Miehl, "the unusual traveling conditions following a snowfall are obvious to the public. Individuals can and should proceed to ambulate on a restricted basis, and if travel is necessary, accept the risks inherent at such a time." Miehl, supra, 53 N.J. at 54.

Affirmed.