

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D18564  
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Submitted - February 21, 2008

A. GAIL PRUDENTI, P.J.  
HOWARD MILLER  
MARK C. DILLON  
WILLIAM E. McCARTHY, JJ.

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2007-03194

DECISION & ORDER

Janine Farrell, plaintiff-appellant, v City of  
New York, respondent, Grace Industries, Inc.,  
et al., defendants-appellants.

(Index No. 17216/03)

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Roura & Melamed (Alexander J. Wulwick, New York, N.Y., of counsel), for plaintiff-appellant.

Torino & Bernstein, Mineola, N.Y. (Vincent J. Battista of counsel), for defendants-appellants.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Edward F. X. Hart, Andrew Potak, and Marta Ross of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Battaglia, J.), dated February 15, 2007, as granted that branch of the cross motion of the defendant City of New York which was for summary judgment dismissing the complaint insofar as asserted against it, and the defendants Grace Industries, Inc., El Sol Contracting & Construction, Inc., and Grace Industries, Inc./El Sol Contracting & Construction, Inc., J.V., separately appeal, as limited by their brief, from so much of the same order as granted the cross motion of the defendant City of New York for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

March 25, 2008

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ORDERED that the appeal by the defendants Grace Industries, Inc., El Sol Contracting & Construction, Inc, and Grace Industries, Inc./El Sol Contracting & Construction, Inc., J.V., from so much of the order as granted that branch of the cross motion of the defendant City of New York which was for summary judgment dismissing the complaint insofar as asserted against it is dismissed, as those defendants are not aggrieved by that portion of the order; and it is further,

ORDERED that the order is affirmed insofar as reviewed, with one bill of costs payable to the respondent by the appellants appearing separately and filing separate briefs.

At approximately 6:20 A.M. on May 15, 2002, the plaintiff, a New York City police detective, was driving to work on the Manhattan-bound Gowanus Expressway, approaching the toll booths at the Brooklyn Battery Tunnel, when her vehicle was struck by a metal object, later identified as a brake shoe that had apparently fallen off of a truck. The object pierced the windshield of the plaintiff's vehicle, striking her in the head. The plaintiff was rendered unconscious and lost control of her vehicle which crashed into a concrete median and toll booth barrier. The plaintiff sustained significant injuries as a result of the accident.

In the order appealed from, the Supreme Court, inter alia, granted the City's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, finding that the City was not given prior written notice of the alleged dangerous condition as required by Administrative Code of the City of New York § 7-201(c)(2). We affirm the order insofar as reviewed.

Pursuant to Administrative Code of the City of New York § 7-201(c)(2), a plaintiff must plead and prove that the City had prior written notice of a roadway defect, or dangerous or obstructed condition before it can be held liable for its alleged negligence related thereto (*see Estrada v City of New York*, 273 AD2d 194). Transitory conditions present on a roadway or walkway such as debris, oil, ice, or sand have been found to constitute potentially dangerous conditions for which prior written notice must be given before liability may be imposed upon a municipality (*see Min Wan Ock v City of New York*, 34 AD3d 542; *Estrada v City of New York*, 273 AD2d at 194; *White v Town of Islip*, 249 AD2d 464, 465; *Almodovar v City of New York*, 240 AD2d 523; *Rogers v Town of Ramapo*, 211 AD2d 775; *Baez v City of New York*, 236 AD2d 305). The only two exceptions to compliance with prior written notice statutes are where the municipality affirmatively created the alleged defect or dangerous condition, or where a special use conferred a special benefit upon the municipality (*see Amabile v City of Buffalo*, 93 NY2d 471, 474; *Ferreira v County of Orange*, 34 AD3d 724, 724-725). Neither actual nor constructive notice may substitute or override a prior written notice requirement (*see Silva v City of New York*, 17 AD3d 566, 567).

Here, it was undisputed that the City had no prior written notice of the alleged dangerous condition. Accordingly, the City established its prima facie entitlement to judgment as a matter of law (*see Koehler v Incorp. Village of Lindenhurst*, 42 AD3d 438; *Ferreira v County of Orange*, 34 AD3d at 725). In opposition, neither the plaintiff nor the other defendants (hereinafter collectively the appellants) raised a triable issue of fact as to whether the allegedly dangerous or obstructed condition was created by any affirmative acts of negligence by the City (*see Smith v Town of Brookhaven*, 45 AD3d 567; *Ferreira v County of Orange*, 34 AD3d at 725). The mere failure to maintain or repair a roadway constitutes an act of omission rather than an affirmative act of

negligence (*see Monteleone v Incorp. Vil. of Floral Park*, 74 NY2d 917, 919; *Silva v City of New York*, 17 AD3d 566, 568; *Alfano v City of New Rochelle*, 259 AD2d 645).

The appellants' remaining contentions either are improperly raised for the first time on appeal or are without merit.

PRUDENTI, P.J., MILLER, DILLON and McCARTHY, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer  
Clerk of the