

**Tebrow v Town of Huntington**

2007 NY Slip Op 30371(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0026270

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 8-9-06  
ADJ. DATE 10-2-06  
Mot. Seq. # 002 - MG; CASEDISP

-----X		
DELICIA TEBROW and LARRY TEBROW,	:	ROSENBERG & GLUCK
	:	Attorneys for the Plaintiffs
Plaintiffs,	:	1176 Portion Road
	:	Holtsville, New York 11742
- against -	:	
	:	GACOVINO, LAKE & ASSOCIATES
	:	Attorneys for the Defendant
THE TOWN OF HUNTINGTON,	:	270 West Main Street
	:	Sayville, New York 11782
Defendant.	:	
-----X		

Upon the following papers numbered 1 to 10 read on this motion by defendant for summary judgment dismissing the complaint on the ground that it lacked prior written notice of the defect; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers 5-8; Answering Affidavits and supporting papers 9-10; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion by defendant for summary judgment is granted and the complaint is dismissed.

On November 17, 2001, plaintiff Delicia Tebrow fell in an area between a concrete slab and the adjoining curb at the Town of Huntington's Recycling Center at 641 New York Avenue. Plaintiff alleges that a hole exists between the concrete slab and the adjoining curb which she did not see because the area was not maintained and covered with leaves. As a result of the accident, plaintiff alleges that she sustained significant injuries to her left leg and ankle.

Plaintiff, and her husband suing derivatively, commenced this action against defendant for negligence in permitting the dangerous and defective condition to exist. Defendant now moves for summary judgment dismissing the complaint on the grounds that it did not have prior written notice of the defective condition.

Huntington Town Code, article V, § 173-18, requires that prior written notice of a sidewalk or street condition be given to the Town of Huntington Clerk or Superintendent of Highways before an action may be maintained against the Town for personal injuries (*Filaski-Fitzgerald v Town of Huntington*, 18 AD3d 603, 795 NYS2d 614 [2005]). In support of the motion, defendant has submitted, *inter alia*, the affidavit of the Town Clerk and the affidavit of the Highway Project Assistant for the Town of Huntington Highway Department. Both employees assert that upon a search of the records, no prior written notice was found regarding the subject area. Thus, defendant has made a prima facie showing that it did not have prior written notice of the allegedly defective condition as required by the Town Code (*see, Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Filaski-Fitzgerald v Town of Huntington, supra*).

In opposition, plaintiff does not dispute the lack of prior written notice. Rather, plaintiff contends that such notice is not required as the condition which caused her accident did not occur on a highway bridge, culvert, street, sidewalk or crosswalk. This contention is baseless, as section 174-2 of the Town Code defines a “sidewalk” as “the area between the edge of a roadway or highway pavement and the lot line of the abutting property, including but not limited to the curb, utility, brick, tree, dirt or landscape areas.”

Plaintiff also contends that summary judgment is not warranted as there are issues of fact as to whether defendant created the defective and dangerous condition or had actual or constructive notice of the condition. These arguments are unavailing.

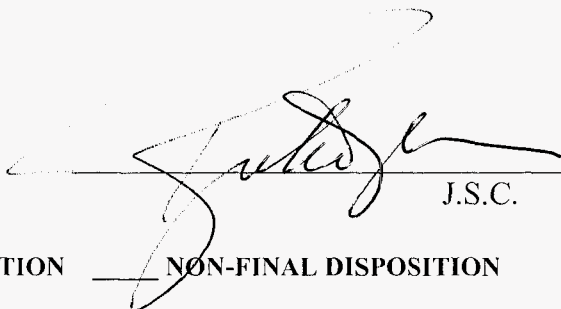
It is a well settled exception to the notice rule that no prior written notice of a defective or dangerous condition is necessary where the municipality caused or created the condition (*see, Amabile v City of Buffalo, supra; Corey v Town of Huntington*, 9 AD3d 345, 780 NYS2d 156 [2004]). To apply this exception, plaintiff must establish affirmative negligence on the part of the defendant, as a locality is insulated from liability due to nonfeasance, i.e., not repairing or maintaining a sidewalk (*see, Corey v Town of Huntington, supra; Morzello v Village of Briarcliff Manor*, 260 AD2d 611, 688 NYS2d 679 [1999]), or demonstrate that the defendant knew or should have known of the defective and dangerous condition because it either inspected or performed work upon the subject area shortly before the accident (*Giganti v Town of Hempstead*, 186 AD2d 627, 588 NYS2d 413 [1992]).

Here, plaintiff has submitted the Notice to Admit wherein the defendant admits it owns and maintains the subject sidewalk and that prior to November 17, 2001, it reconstructed the sidewalk. Plaintiff has also submitted the deposition testimony of the defendant’s witness who confirmed that on the day of the accident, there was a hole between the concrete slab and the curb. Nevertheless, there is no proof that the reconstruction was performed negligently or improperly (*see, Lauer v Great South Bay Seafood Co.*, 299 AD2d 325, 750 NYS2d 305, *lv denied* 99 NY2d 508, 757 NYS2d 818 [2003]; *White v Incorporated Vill. Of Port Washington*, 114 AD2d 359, 493 NYS2d 879 [1985]), or that the defendant created the allegedly defective

condition through any affirmative act (*see e.g., Corey v Town of Huntington, supra; Zizzo v City of New York*, 176 AD2d 722, 574 NYS2d 966 [1991]; *Michela v County of Nassau*, 176 AD2d 707, 574 NYS2d 1001 [1991]). Additionally, there is no evidence that defendant inspected or performed any work in the area shortly before the accident (*see Nonnon v Town of East Hampton*, 238 AD2d 489, 656 NYS2d 657, *lv denied* 91 NY2d 804, 668 NYS2d 559 [1997]). Finally, neither constructive notice nor actual notice of a defect obviates the need for prior written notice to a municipality (*see, Amabile v City of Buffalo, supra; Cennamo Town of Smithtown*, 303 AD2d 351, 755 NYS2d 651 [2003]).

Therefore, as plaintiff has failed to raise an issue of fact, defendant is entitled to summary judgment. Accordingly, the motion is granted.

Dated: MAR 05 2007

  
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J.S.C.

FINAL DISPOSITION       NON-FINAL DISPOSITION