

**Perdomo v Ramrikhi**

2007 NY Slip Op 33944(U)

November 27, 2007

Supreme Court, Nassau County

Docket Number: 1345-05/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

PRESENT:

**Honorable James P. McCormack**  
**Acting Justice of the Supreme Court**

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**KEVIN PERDOMO, by m/n/g, ZUNILDA ESPINOLA  
and ZUNILDA ESPINOLA, individually,**

Plaintiff(s),

Index No. 001345/05

-against-

Motion Seq. No.: 002 & 003  
Motion Submitted: 10/3/07

**DON RAMRIKHI, TONYA L. PERKINS, TOWN OF  
HEMPSTEAD, TOWN COMMISSIONER OF  
HIGHWAY DEPARTMENT TOWN OF HEMPSTEAD,**

Defendant(s).

\_\_\_\_\_x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits(Seq. No. 002).....X
- Notice of Motion/Supporting Exhibits(Seq. No. 003).....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Motion by defendants Town of Hempstead and Town Commissioner of Highway (hereinafter "Town of Hempstead") for an order pursuant to CPLR §3212 granting summary judgment on liability. Defendants Ramrikhi and Perkins also move for an order pursuant to CPLR §3212 granting summary judgment on liability. Plaintiffs' oppose Town of Hempstead's motion but do not oppose defendants Ramrikhi and Perkins motion and thus concede that they could not establish a prima facie case against them. Accordingly, defendants Ramrikhi and Perkins motion is

granted and plaintiffs' action against them is hereby dismissed. The Court therefore will address defendant Town of Hempstead's motion.

### BACKGROUND

This is an action for a trip and fall which occurred on October 31, 2003 on the sidewalk in front of the premises located at 95-03 238<sup>th</sup> Street in Floral Park, New York. Plaintiff, Kevin Perdomo, five years of age at the time of the accident, claimed to have tripped and fell while walking along the sidewalk near the southern end of 95-03 238<sup>th</sup> Street, Floral Park adjacent to the second tree from the southeast corner of 95<sup>th</sup> Avenue and 238<sup>th</sup> Street. Plaintiff, in his Bill of Particulars, alleges that the trip and fall was caused by "the cracked, broken,.....uneven sidewalk" at the location which the Town of Hempstead "had negligently maintained and managed" and had actual written notice of. Plaintiff did not claim that the Town of Hempstead had constructive notice of this condition.

In support of its motion, the Town of Hempstead claims that the plaintiff cannot meet the prior written notice requirement of Section 6-3 of the Code of the Town of Hempstead and §65-2(2) of the Town Law of the State of New York which is a condition precedent for maintaining a civil action against the Town for injuries arising from a defective sidewalk. In both a sworn affidavit and deposition testimony, George Brush, compliance coordinator of the Town sidewalk division, stated that for a period of five (5) years prior to October 31, 2003, the Town records had no written notices or

complaints concerning the sidewalk in the area where plaintiff fell nor had the Town performed any repairs at the subject location.

The Town however did receive a letter from co-defendant Don Ramrikhi on or about May 15, 2002 requesting a removal of a tree at the Ramrikhi address of 95-03 238<sup>th</sup> Street. The letter made no mention of any hazardous condition created by the tree on the sidewalk but requested its removal because it was close to power lines. As a result of this letter, the Town produced Peter Rizzo, a Town of Hempstead highway department inspector who has been dispatched after this letter was received to inspect the tree at the subject location. The Town's Department of General Services usually dealt with sidewalk defects and repairs while the Department of Highways responded to complaints of dead or problematic trees. However, if a Department of Highways inspector, during the course of conducting a tree inspection, noticed any defects in the sidewalk or curb, he would memorialize those defects in his tree inspection report. Peter Rizzo testified that he observed the tree co-defendant Ramrikhi had mentioned in his letter requesting it to be removed and noticed that the tree was on private property, not Town property, and therefore the Town had no responsibility for its removal. Co-defendant Ramrikhi testified that he was present on or about May 22, 2002 when Peter Rizzo came to his home for the tree inspection and saw Rizzo inspecting the tree and the area near the sidewalk flagstone which the plaintiff tripped on October 31, 2003. For his part, Peter Rizzo denied observing any tree on 238<sup>th</sup> Street in the vicinity where plaintiff fell as that was not the location mentioned in the letter sent by co-defendant

Ramrikhi. Rizzo testified the letter referred to a tree on 95<sup>th</sup> Avenue, not on 238<sup>th</sup> Street, where plaintiff had fallen. The letter, however, written by Ramrikhi to the Town complains of a tree "in front of" Ramrikhi's house and that his house is located "between the cross streets of Superior Road and 95<sup>th</sup> Avenue." Defendant's Exhibit F) Co-defendant Ramrikhi testified he observed Peter Rizzo inspecting a tree in front of his house on 238<sup>th</sup> Street and identified photographs depicting the location he observed Rizzo at on this day which showed the raised flagstone which caused plaintiff's fall. (Plaintiff's Exhibit L, M, O).

#### DISCUSSION

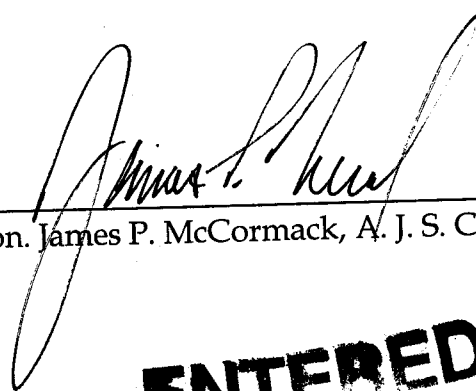
It is a well-settled principle that a municipality which has enacted a prior written notice statute is not subject to liability for personal injury resulting from an improperly maintained sidewalk unless it received prior written notice of the condition, the accident was proximately caused by an affirmative act of negligence or a special use confers a benefit on the municipality. (*Amabile v. City of Buffalo*, 93 NY 2d 471 [1999]; *Delgado v. County of Suffolk*, 2007 WL1289986 [2<sup>nd</sup> Dept. 2007]; *Miller v. City of Albany*, 278 AD 2d 647 [3<sup>rd</sup> Dept. 2000]. Here, there is no question that Section 6-3 of the Code of the Town of Hempstead requires prior written notice of a defective or unsafe condition. Contrary to plaintiff's argument, the only prior written notice in this instance would be the letter from co-defendant Ramrikhi dated May 15, 2002 which only made reference to a tree which needed to be removed and made no mention of any

sidewalk defect or hazard. (See, Defendant's Exhibit F). In addition, the Highway department inspector, Peter Rizzo, denied observing any sidewalk defect when he made his tree removal inspection and his report generated afterwards failed to mention any defect or irregularity pertaining to the sidewalk at 95-03 238<sup>th</sup> Street. (See, Defendant's Exhibit G).

As no constructive notice exception has been held to override the statutory requirement of prior written notice of a sidewalk defect, so too in this instance can plaintiff rely on such an argument which it asks this Court to adopt. (Berner v. Town of Huntington, 304 AD 2d 513 [2d Dept. 2003]; Cename v. Town of Smithtown, 303 AD 2d 351 [2d Dept. 2003]; Sparrock v. City of New York, 242 AD 2d 289 [ 2d Dept. 1992]. The plaintiff herein does not allege, as an alternative, that the accident was caused by an affirmative act of negligence or a special use.

Accordingly, defendant Town of Hempstead's motion is granted and plaintiff's complaint is dismissed. The foregoing constitutes the Decision and Order of the Court.

Dated: November 27, 2007  
Mineola, N.Y.

  
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Hon. James P. McCormack, A. J. S. C.

**ENTERED**  
DEC 04 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE