

**Matheis v Long Beach City School Dist.**

2009 NY Slip Op 30991(U)

March 31, 2009

Supreme Court, Nassau County

Docket Number: 3172/2005

Judge: F. Dana Winslow

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SUAN

SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK

Present:  
HON. F. DANA WINSLOW,

Justice  
TRIAL/IAS, PART 7  
NASSAU COUNTY

JANET A. MATHEIS and ROBERT S. MATHEIS,

Plaintiffs,

-against-

MOTION SEQ. NO.: 003, 004  
MOTION DATE: 12/16/08

LONG BEACH CITY SCHOOL DISTRICT AND  
CITY OF LONG BEACH,

INDEX NO.:3172/2005

Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Motion.....1  
 Notice of Motion for Summary Judgement.....2  
 Affirmation in Opposition.....3  
 Reply Affirmation.....4  
 Memorandum of Law.....5

This motion by the defendant the City of Long Beach (“City”) and cross-motion by the defendant Long Beach City School District (“School District”) for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them are **granted**.

The plaintiff in this action seeks to recover damages for personal injuries she sustained when she tripped over a concrete slab on the sidewalk in front of one of the defendant School District’s schools on June 22, 2004 that was elevated one and one eighth of an inch. The flag had been installed by the School District some five years before in 1998 to replace a damaged deteriorated one. Both the City and School District seek summary judgment dismissing the complaint against them.

“On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering

sufficient evidence to demonstrate the absence of any material issues of fact.” Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff’d. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Sheppard-Mobley v King, *supra*, at p. 74; Alvarez v Prospect Hosp., *supra*; Winegrad v New York Univ. Med. Ctr., *supra*. Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., *supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

The City has established that under the circumstances extant, liability has been validly transferred to the adjacent property owner via Sections 256 and 256(A)(3) of its City Charter which place responsibility for sidewalks as well as trees on abutting property owners respectively. See, Hausser v Giunta, 88 NY2d 449 [1996]; see also, Falco v Jennings Hall Senior Citizen Housing Development Fund, Inc., 19 Misc3d 1107(A)(Supreme Court Kings County 2008), citing Seplow v Solil Mgt. Corp., 15 Misc3d 1138(A)(Supreme Court New York County 2000). The City has also established that it did not receive prior written notice of the defect as required by Section 256(A)(1) of its Charter for it to be liable (see, Amabile v City of Buffalo, 93 NY2d 471 [1999]; Poirer v City of Schenectady, 85 NY2d 310 [1995]) and that none of the exceptions to that rule, namely, where the municipality created the defect through an affirmative act of negligence or made a special use of the property which conferred a special benefit,

apply here (see, Lowenthal v Theodore H. Heidrich Realty Corp., 304 AD2d 725 [2<sup>nd</sup> Dept. 2003], citing Monteleone v Incorporated Vil. of Floral Park, 74 NY2d 917 [1989]).

There is an issue of fact as to whether the raised concrete flag caused the plaintiff's fall. Contrary to the School District's position, the plaintiff's prior testimony does not negate that allegation nor are her affidavit in opposition to these applications markedly different with her prior testimony. The City Charter's requirement that the School District obtain the City's permission before removing the nearby tree whose roots allegedly caused the elevated concrete slab does not relieve the School District of responsibility here, either, since there is no evidence that the School District ever sought the City's permission to remove the tree or to otherwise address the problem. See, Gangemi v City of New York, 13 Misc3d 1112 (Supreme Court Kings County 2006), citing Society of Plastics Industry, Inc. v County of Suffolk, 77 NY2d 761, 772-773 (1991). Nor does the City's authority to require that repairs be made or to make them itself and bill the School District relieve the School District of the liability imposed on it by the City Charter. And, while the plaintiff must show that the School District either created the condition that caused her fall or that it had actual or constructive notice of it for the School District to be held liable (Gangemi v City of New York, *supra*, at p. 1130, citing Gaeta v City of New York, 213 AD2d 509, 510 [2<sup>nd</sup> Dept. 1995]), in view of the fact that the School District had the flag installed and had received complaints about the condition of the sidewalk around the school, an issue of fact on that issue exists.

The School District, nevertheless, is also entitled to summary judgment dismissing the complaint against it.

"While it is generally true that the finding of the existence of a dangerous or defective condition depends on the peculiar facts and circumstances of each case and is

ordinarily a question of fact for the jury, not every determination poses a jury question.” Hymanson v A.L.L. Assoc., 300 AD2d 358 (2<sup>nd</sup> Dept. 2002), citing Trincere v County of Suffolk, 90 NY2d 976 (1997). “Injuries resulting from trivial defects are generally not actionable.” Outlaw v Citibank, N.A., 35 AD3d 564 (2<sup>nd</sup> Dept. 2006), citing Velez v Institute of Design & Constr., Inc., 11 AD3d 453, 454 (2<sup>nd</sup> Dept. 2004); Sanna v Wal-Mart Stores, 271 AD2d 595 (2<sup>nd</sup> Dept. 2000); Hecht v City of New York, 89 AD2d 524 (1<sup>st</sup> Dept. 1982), mod on other grounds 60 NY2d 57 (1983). “In determining whether a defect is trivial, the court must examine all of the facts presented ‘including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place, and circumstances of the injury.’ ” Outlaw v Citibank, N.A., supra, quoting Sanna v Wal-Mart Stores, supra, at p. 595, citing Trincere v County of Suffolk, supra. “[A] property owner may not be held liable in damages for ‘trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his [or her] toes or trip over a raised projection.’ ” Hymanson v A.L.L. Assoc., supra, at p. 358, quoting Marinaccio v LeChambord Rest., 246 AD2d 514, 515 (1998).

There is no evidence that the elevated slab was jagged, substantial in width, abrupt in grade or obscured by the weather or lighting conditions. The presence of other people on the sidewalk does not render this defect a trap or snare, either. The School District has established that considering the width and depth of the defect as well as the time, place and circumstance of the plaintiff’s injury, the one and one eighth inch elevated slab was not a trap or snare and was too trivial to be actionable. Morris v Greenburgh, 5 AD3d 567 (2<sup>nd</sup> Dept. 2004), citing Trincere v County of Suffolk, supra; see also, Hawkins v Carter Community Housing Development Fund, 40 AD3d 812 (2007). The burden accordingly shifts to the plaintiff to establish the existence of a

material issue of fact.

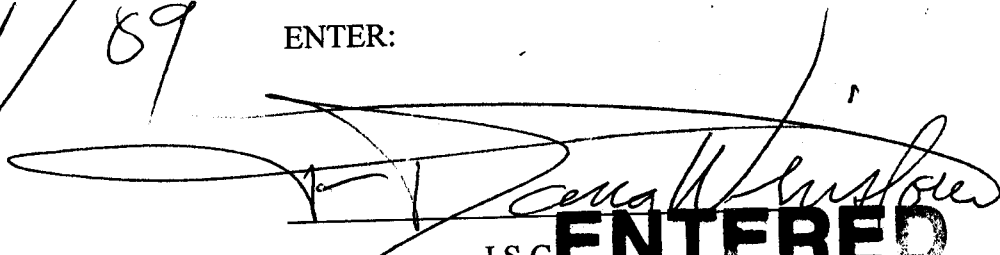
The plaintiff has failed to meet her burden. She has entirely failed to address the City's lack of prior written notice. As for the school, the plaintiffs' expert professional engineer was never disclosed and his affidavit should not be considered. Gerry v Commack UFSD, 52 AD3d 467 (2<sup>nd</sup> Dept. 2008); Soldano v Bayport-Blue Point Union Free School District, 29 AD3d 891 (2<sup>nd</sup> Dept. 2006). In any event, he examined the sidewalk on November 14, 2008, over four years after the plaintiff's accident. His opinion regarding the sidewalk defect and its role in the plaintiff's accident is therefore not admissible. DeCarlo v Village of Dobbs Ferry, 36 AD3d 749 (2<sup>nd</sup> Dept. 2007); Cruz v Deno's Wonder Wheel Park, 297 AD2d 653 (2<sup>nd</sup> Dept. 2002). Assuming, *arguendo*, that it was, he opines only that the sidewalk was not properly repaired in 1998 because there was a defective empty expansion joint which allowed water to penetrate and caused additional growth of the tree roots. Without any authority or explanation, he declares that "the sidewalk flag is a defect that is certainly not trivial," because "1.035 inches . . . is certainly more than the approximately one half inch elevation difference that would be expected to create a significant trip hazard." Without more, his conclusory opinion fails to raise an issue of fact as to whether the defect was trivial.

The defendants' motions are **granted** and the complaint is **dismissed** in its entirety.

This constitutes the Order of the Court.

Dated: 3/31/09

ENTER:



J.S.C. **ENTERED**

APR 28 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**