

**Rosenfeld v Village of Great Neck Plaza**

2009 NY Slip Op 32550(U)

October 20, 2009

Supreme Court, Nassau County

Docket Number: 007058/07

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

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**CECILE ROSENFELD,**

**Plaintiff,**

**-against-**

**VILLAGE OF GREAT NECK PLAZA,  
METROPOLITAN TRANSPORTATION  
AUTHORITY, LONG ISLAND RAIL ROAD  
COUNTY OF NASSAU and TOWN OF NORTH  
HEMPSTEAD,**

**Defendants.**

**TRIAL TERM PART 47**

**INDEX NO.:007058/07**

**MOTION DATE:6-9-09  
SUBMIT DATE: 9-29-09  
SEQ. NUMBER - 004**

**MOTION DATE: 7-14-09  
SUBMIT DATE: 9-29-09  
SEQ. NUMBER - 006**

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**The following papers have been read on this motion:**

- Notice of Motion, dated 5-12-09.....1**
- Notice of Cross Motion, dated 6-25-09.....2**
- Affirmation in Opposition, dated 8-10-09.....3**
- Affirmation in Opposition and Reply, dated 9-3-09.....4**
- Reply Affirmation, dated 9-21-09.....5**

This motion by defendant Village of Great Neck Plaza for summary judgment dismissing the complaint and all cross claims asserted against it, and for common-law indemnity from co-defendants Metropolitan Transportation Authority and Long Island Rail Road is denied. The motion by defendants Metropolitan Transportation Authority and Long Island Rail Road (incorrectly denominated as a cross motion – see CPLR 2215)

for summary judgment dismissing the complaint and all cross claims is denied.

This is an action for personal injury arising from a trip and fall accident. The Great Neck station of the Long Island Rail Road is located in the Village of Great Neck Plaza and is below the street level. An "over grade" bridge, known as the LIRR Port Washington Bridge, crosses over the tracks at the street level. Barstow Road is the public street which is carried by the bridge, and on the west side of Barstow Road, there is a public sidewalk. On either side of the bridge, there are pedestrian stairways, which descend from the sidewalk to the east end of the station platforms.<sup>1</sup> Since a photograph of one of the stairways indicates that there are 31 steps, the bridge appears to be approximately 25 feet above the railroad grade.<sup>2</sup> A similar bridge crosses the tracks at the west end of the platforms.<sup>3</sup>

On March 29, 2006, an inspector for the New York State Department of Transportation conducted an inspection of the Port Washington bridge and concluded that "the sidewalk at the left side of the end approach had settled approximately 60 mm. with respect to the left sidewalk of the bridge." The inspector further concluded that the condition constituted a "potential tripping hazard."<sup>4</sup> From the photograph accompanying the inspector's report, it appears that the inspector was referring to a raised flag (concrete slab) on the left side of the entrance to the stairway leading to the platform

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<sup>1</sup> Defendant Village's ex. J, deposition of Michael Sweeney, at 40.

<sup>2</sup> See Village's ex G, photograph marked as ex. C on July 11, 2008.

<sup>3</sup> Defendant Village's ex. P, deposition of Joseph Bolo, at 25.

<sup>4</sup> Plaintiff's ex. D.

for the westbound trains. The inspector's report indicates that the Village was the "primary owner" and responsible for "primary maintenance" of the bridge, while the LIRR was the "secondary owner" and responsible for "secondary maintenance."

On April 6, 2006, the Department of Transportation sent the Village Superintendent of Public Works a letter, advising the Village of their findings and asserting that the Village was "responsible for taking corrective action."<sup>5</sup> On April 20, 2006, Joseph Diaz, the Village's Assistant Building Inspector, sent an email to the LIRR's branch line manager requesting the railroad to have the sidewalk repaired.<sup>6</sup> On April 24, 2006, John Kettell, the Engineer of Structural Maintenance for the LIRR, sent an email to the Village, advising that the condition was not on "LIRR property" and no action would be taken.

On May 16, 2006 at approximately 6:00 pm, plaintiff Cecile Rosenfeld tripped on the raised edge of a sidewalk flag on Barstow Road. Plaintiff alleges that the flag on which she tripped is the flag immediately to the left of the entrance to the stairway leading to the westbound trains.<sup>7</sup> Thus, it appears that the accident was related to the condition identified by the Department of Transportation inspector. As a result of the fall, plaintiff sustained a fractured upper arm and injury to her elbow.

This action to recover for plaintiff's injuries was commenced on April 25, 2007.

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<sup>5</sup> Plaintiff's ex. D.

<sup>6</sup> Plaintiff's ex. D.

<sup>7</sup> Plaintiff's ex. B.

Plaintiff alleges that defendant Village is the owner of the sidewalk and ultimately responsible for its maintenance. Plaintiff further alleges that defendant LIRR's failure to maintain the bridge structure properly caused the change in sidewalk elevation. In their answer, defendants MTA and LIRR assert a cross claim against the other defendants for contribution or indemnity. Although defendant Village has not asserted a cross claim in its answer, its failure to do so is not fatal to a contribution or indemnity claim. *Stein v Whitehead*, 40 AD2d 89, 92 (2d Dept 1972). By order dated August 1, 2008, the Court granted summary judgment to defendant County of Nassau on the ground that it did not receive prior written notice of the defect. The action has also been dismissed as to defendant Town of North Hempstead.

Defendant Village of Great Neck Plaza moves for summary judgment dismissing the complaint and all cross claims. The Village argues that it had no prior written notice of the defect. The Village asserts that notice to the Superintendent of Public Works is not notice to the Village Clerk as required by Village Law § 6-628. The Village further argues that it did not create the unsafe condition, maintenance of the sidewalk was the responsibility of defendant LIRR, and there was only a trivial defect. Alternatively, the Village moves for summary judgment granting it common law indemnification from the railroad.

Defendants MTA and LIRR cross move for summary judgment dismissing the complaint and all cross claims. MTA and LIRR assert that the Village owns the bridge and sidewalk along Barstow Road and the Village has the obligation to maintain the sidewalk. These defendants join with the Village in claiming that the defect was trivial.

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). In performing its review of the record, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). It should not attempt to resolve matters of credibility. *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court will first consider the defendant MTA and LIRR's cross motion.

Railroad Law § 93 provides that "When a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad corporation, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality having jurisdiction over

and in which the same are situated...." This section delineates the respective responsibilities of the railroad company and the municipality for the repair of dangerous conditions at overhead crossings, irrespective of the ownership of the bridge or the roadway. *Koles v Penn Central*, 55 AD2d 877 (1<sup>st</sup> Dept 1977).

On defendants MTA and LIRR's motion for summary judgment, it is their burden to establish prima facie that the settlement of the sidewalk flag was not caused by defendants' failure to properly maintain the framework of the bridge and its abutments. *Oppenheim v Great Neck Plaza*, 46 AD3d 527 (2d Dept 2007). Although the Railroad Law does not define the term "abutment," according to Webster's Dictionary, it is the part of a structure that directly receives thrust or pressure. From the photographs of the bridge, it appears that the abutments for the Port Washington Bridge are located on each side of the bridge at the end of the station platforms.<sup>8</sup>

Plaintiff submits an affidavit from a professional engineer who concludes that the change in sidewalk elevation was caused by "deterioration of the bridge deck."<sup>9</sup> A photograph of the underside of the stairway indicates that there is some degree of deterioration in the concrete structure beneath the sidewalk.<sup>10</sup> The report from the Department of Transportation, asserting that the Village was responsible for taking "corrective action," does not establish that the sidewalk condition was unrelated to MTA's failure to maintain the structure underneath the sidewalk. Thus, defendants MTA

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<sup>8</sup> See plaintiff's ex. C.

<sup>9</sup> Plaintiff's ex. S, affidavit of Jacques Wolfner, at ¶ 12.

<sup>10</sup> Village's ex. G, photograph identified at ex. A on July 11, 2008.

and LIRR have not carried their threshold burden that they did not cause the change in elevation in the sidewalk.

In determining whether a defect is trivial, a 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. *Mishaan v Tobias*, 32 AD3d 1000 (2d Dept 2006). As a centimeter is approximately a quarter of an inch, the Court takes judicial notice that 60 mm. is about an inch and a half change in elevation. Given that height discrepancy between flags, and photographs submitted on this motion, the Court finds that the defendants have not carried their prima facie burden of establishing that the defect was trivial. Thus, a triable issue exists as to whether defendants MTA and LIRR caused a dangerous sidewalk condition by their failure to properly maintain the framework of the bridge and its abutments. Defendants MTA and LIRR's motion for summary judgment dismissing the complaint and all cross claims therefore is denied.

The Court now turns to the Village's contention that it did not receive required written notice of the complained-of condition. Village Law § 6-628 provides "No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any...sidewalk....being defective, out of repair, unsafe, dangerous...unless written notice of the defective, unsafe, dangerous...condition...was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect...." The purpose of the prior written notice rule is to limit the municipality's duty of

care over its streets and sidewalks only to "those defects or hazardous conditions which its officials have been actually notified exist at a specified location". *Gorman v Huntington*, 12 NY3d 275, 279 (2009).

Prior written notice provisions are enacted in derogation of the common law and are to be strictly construed. *Doremus v Incorporated Vil. of Lynbrook*, 18 NY2d 362 (1966). Thus, a written request that a defect be repaired, addressed to a municipal agent other than the statutory designee, is ordinarily not effective to put the municipality on notice. *Gorman v Huntington, supra*. In *Gorman*, prior written notice of defect was sent to the Department of Engineering Services, rather than the Town Clerk or the Town Superintendent of Highways, the Town officials designated to receive notice by the statute. Town Law § 65-a. Although the Department of Engineering Services was the department responsible for the Town's sidewalks, the Court held that the notice was not effective.

Section 185-40 of the Great Neck Plaza Village Code provides that "The Village Clerk shall keep an indexed record in a separate book of all written notices which said clerk shall receive of the existence of a defective, unsafe, dangerous or obstructed condition in or upon ... any ... sidewalk..."<sup>11</sup> There is no evidence that the Village of Great Neck Plaza transferred responsibility to receive notices of defects and to maintain records thereof from the Village Clerk to some other Village department. See *Altamore v Barrios-Paoli*, 90 NY2d 378, 386 (1997). Therefore, on the defendant Village's motion

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<sup>11</sup> Defendant Village's ex. K, following the affidavit of Michael Sweeney.

for summary judgment, it is its burden to establish prima facie that the Village Clerk did not receive prior written notice as to the condition which allegedly caused plaintiff's accident.

In support of its motion, the Village submits an affidavit, not from the Village Clerk, but rather from Michael Sweeney, the Village's Commissioner of Public Services.<sup>12</sup> In his affidavit, Sweeney states that "The Village of Great Neck Plaza keeps a logbook of every written notice of any complaints sent to the Village Clerk relating to conditions of the sidewalk or of work performed on its behalf, on the sidewalks within the Village....The books and records are kept in file cabinets in the office of the Village Clerk and are filed by date of accident and logged in by the location where[] the accident took place."<sup>13</sup> Although Sweeney is assigned to another department within Village government, his affidavit establishes that he has first hand knowledge of record keeping procedures within the Village Clerk's office.

In his affidavit, Sweeney further states that "I have reviewed the official books, records, complaints and documents maintained by the Village of Great Neck Plaza regarding any complaints made with respect to any incidents that occurred at or near the location set forth in plaintiff's notice of claim,....and found no written notice was

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<sup>12</sup> According to Sweeney, the Department of Public Works is responsible for cleaning village streets, parking lots, and flower beds (defendant Village's ex. J., deposition of Michael Sweeney at 42). Since the Department of Public Works referred the Department of Transportation notice to the Department of Public Service, and Sweeney himself inspected the location, it appears that the Department of Public Services is responsible for Village sidewalks (Affirmation of Bruce Torino at ¶ 20; deposition of Sweeney at 13).

<sup>13</sup> Defendant Village's ex. K, affidavit of Michael Sweeney at ¶ 5.

received in accordance with the laws of the Village of Great Neck Plaza prior to May 16, 2006, the day of the subject accident....<sup>14</sup>

The Court concludes that defendant Village has carried its prima facie burden that no written notice of defect pertaining to the subject condition was received by the Village Clerk. Accordingly, the burden shifts to plaintiff to establish a triable issue as to whether the notice concerning the subject condition was received by the Village Clerk.

That has been accomplished here. Given the favorable treatment to be accorded the opponent's proof on a motion for summary judgment, the Court finds that an issue fact exists as to whether the Village Clerk received notice of the defect.

Unlike the circumstance present in *Gorman v Huntington*, there apparently is no Village ordinance similar to Huntington Town Code § 174-4, requiring the Commissioner of Public Services to transmit notices of defect to the Village Clerk. However, there also appears to be no Village Code provision, corresponding to Huntington Town Code § 174-5, that service of a notice of defect on a person other than the Village Clerk would invalidate the notice. *Gorman v Huntington*, supra, 12 NY3d at 278. At his deposition, Sweeney testified that, "[I]f there's a notification, we would then also put one in a log logbook that's maintained by the village Clerk."<sup>15</sup> Thus, Sweeney's deposition suggests that it was the custom and practice of the Department of Public Services to transmit notices of defect to the Village Clerk's office.

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<sup>14</sup> Affidavit of Michael Sweeney at ¶ 6.

<sup>15</sup> Defendant Village's ex. J, deposition of Michael Sweeney at 21 (so in original).

Evidence of habit is generally admissible to prove conformity on specified occasions because one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again. *Rivera v Anilesh*, 8 NY3d 627, 633-34 (2007). The applicability of this rule is dependent upon proof of a "deliberate and repetitive practice" by a person "in complete control of the circumstances," as opposed to conduct likely to vary depending upon the surrounding circumstances. *Id.*, at 634.

In this case, and reading the record, as it must, favorably to the plaintiff, the Court finds the practice of the Department of Public Services to be sufficiently deliberate and repetitive to create an issue of fact as to whether Sweeney or someone in his department transmitted the Department of Transportation report to the Village Clerk prior to the accident. Moreover, as plaintiff notes, Sweeney's affidavit does not state that he did not forward the DOT notice to the Clerk's office.<sup>16</sup> Thus, although Sweeney testified at his deposition that his search of the Clerk's records did not discover the notice of defect, there is a triable issue as to whether notice of defect encompassing the tripping hazard alleged by the plaintiff was in fact received by the Village Clerk's office. *See, Delany v Town of Islip*, 63 AD3d 658 (2d Dept. 2009); *Murphy v City of Corning*, 302 AD2d 1006 (4<sup>th</sup> Dept. 2003). Accordingly, defendant Village's motion for summary judgment dismissing the complaint and all cross claims is denied. Further, because Railroad Law § 93 assigns responsibility for maintaining the roadway, including the sidewalk, to the

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<sup>16</sup> Affirmation of Allen Goldberg at ¶ 75.

municipality, defendant Village's motion for common law indemnity from defendants MTA and LIRR is also denied.

The foregoing constitutes the Decision and Order of this Court.

ENTER:

Dated: October 20, 2009

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

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**ENTERED**  
OCT 23 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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