

**Moncrieffe v City of White Plains**

2011 NY Slip Op 3401 J(U)

December 16, 2011

Supreme Court, Westchester County

Docket Number: 27098/2008

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED ON 12-22 2011 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF WESTCHESTER PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

FILED DEC 22 2011 TIMOTHY C. IDONI COUNTY CLERK COUNTY OF WESTCHESTER

PATRICIA MONCRIEFFE,

Plaintiffs,

-against-

Index No. 27098/2008 DECISION & ORDER

CITY OF WHITE PLAINS, WESTCHESTER COUNTY AND LIBERTY LINES TRANSIT, INC.,

Defendants.

The following papers numbered 1 to 50 were read on defendant City of White Plains' ("White Plains") motion for summary judgment dismissing the complaint and defendants Westchester County and Liberty Lines Transit, Inc.'s ("Westchester Defendants") motion for summary judgment dismissing the complaint.

PAPERS NUMBERED

Table listing papers and page numbers: White Plain's Notice of Motion/Affirmation/Affidavit/Exhibit A-K (1-14), White Plain's Memorandum of Law (15), Plaintiff's Affirmation in Opposition/Exhibits A-K (16-27), White Plains' Reply Affirmation/Exhibit A-B (28-30), Westchester Defendants' Notice of Motion/Affirmation/Exhibits A-M (31-45), Plaintiff's Affirmation (46), White Plains' Affirmation in Opposition/Exhibit A-B (47-49).

Based on the submissions, the motion and cross motion are GRANTED.

### **Factual & Procedural Background**

On December 15, 2007, at about 6:45 a.m. plaintiff slipped and fell, allegedly on an icy condition, while she was walking across Ferris Avenue at its intersection with New Street near the Transcenter in downtown White Plains.

Plaintiff commenced this personal injury action on December 16, 2008. In her complaint, plaintiff alleges, *inter alia*, her fall was caused by the unsafe piling and plowing of snow which blocked the crosswalk causing an icy condition for pedestrians to traverse. White Plains interposed an answer on February 18, 2009 and the Westchester Defendants answered on January 8, 2009. In its answer, White Plains asserted a cross claim against the Westchester Defendants claiming that it was their negligence that caused the accident. The Westchester Defendants also asserted a negligence cross claim against White Plains.

White Plains now moves for summary judgment dismissing the complaint on the ground that it had no prior written notice of the condition that caused plaintiff's fall. White Plains also argues that this case does not fall within the exception to the prior written notice statute, because there is no evidence that it caused the condition which caused plaintiff's fall. White Plains argues that there is no evidence that the plowing performed by its Department of Highways created the icy condition or made the natural snow or ice condition which existed at the time of plaintiff's fall. Further, according to White Plains, even if it permitted snow to remain on top of a median in the middle of the street, that did

not constitute an affirmative act of negligence which obviates the prior written notice statute.

In opposition, plaintiff argues that when she was crossing Ferris Avenue she was prevented from crossing through the median by a large pile of snow. Therefore, as result of this blockage, she had to walk on the street to go around the obstruction. As she was attempting to by-pass the snow obstruction, she slipped and fell on an icy patch. In support of her position, plaintiff relies on the deposition testimony of Patsy Fucale, White Plains Highway Superintendent. At his deposition, Fucale testified that White Plains had plowed the area where plaintiff fell. Further, pursuant to White Plains' guidelines plow drivers were to push the snow against the curbs on the side of the road and sometimes the plowing creates mounds of snow. Fucale also acknowledged that mounds of snow obstructed cross walks. Therefore, according to plaintiff, there is a question of fact regarding whether White Plains created the condition which caused her fall.

In reply, White Plains argues during the winter of 2007/2008 it never plowed or removed snow from the intersection formed by Ferris Avenue and New Street except for the portion of Ferris Avenue located between the two pedestrian islands. White Plains also argues that plaintiff submitted only portions of depositions transcripts and those transcripts were not signed by the deponent. Therefore, the evidence submitted by plaintiff was not in admissible form.

The Westchester Defendants move for summary judgment dismissing the complaint on the ground that there is no evidence that they created the condition that caused plaintiff's fall. In support of their motion, the Westchester Defendants rely on the deposition testimony of Thomas A. Boyle, Liberty Lines Director of Safety and Training. At his

deposition, Boyle testified White Plains is responsible for snow and ice removal at the intersection of New Street and Ferris Avenue. Further, in December 2007, Liberty Lines did not perform any snow or ice removal near that intersection. The Westchester Defendants also rely on the deposition testimony of Richard Stiller, Director of Surface Transportation for Westchester County of Public Works. At his deposition, Stiller testified that he was familiar with the intersection where plaintiff fell. Stiller testified that he was responsible for deploying the County snow and ice removal operations. Further, the White Plains TransCenter consisted of a Metro North Station, a bus depot and a parking garage. According to Stiller neither Ferris Avenue nor New Street is a County Road. However, the County owns the bus depot. Stiller testified that on or before December 15, 2007, the County did not perform any snow or ice removal on New Street. The only plowing done was along that portion of Ferris Avenue which lies north of the sign that says "Buses Only." The County did not perform any snow removal south of that sign or the cross walks or walkways south of that sign where plaintiff fell. Based on the foregoing, the Westchester Defendants argue that there is no evidence they were negligent since they did not perform the snow or ice removal where plaintiff fell.

In opposition, White Plains argues that the Westchester Defendants' moving papers contain inaccurate statements. White Plains reiterated that there is no evidence that it performed snow removal in the area where plaintiff fell.

In response to the Westchester Defendants' motion, plaintiff submitted her attorney's affirmation in which she states that she does not believe the Westchester Defendants are liable for her fall.

## Discussion

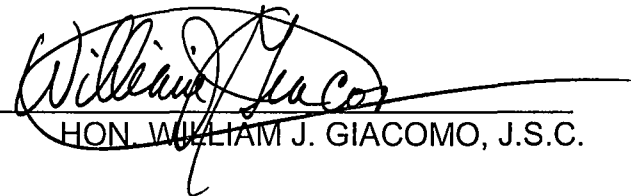
A defendant owner who moves for summary judgment in a “slip-and-fall” case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. (See *DeLeon v. Westhab, Inc.*, 60 A.D.3d 888 [2<sup>nd</sup> Dept 2009]; *Sloane v. Costco Wholesale Corp.*, 49 A.D.3d 522 [2<sup>nd</sup> 2008]; *Goldman v. Waldbaum, Inc.*, 248 A.D.2d 436 [2<sup>nd</sup> Dept 1998]).

Here, both White Plains and the Westchester Defendants have established entitlement to summary judgment as a matter of law by demonstrating that they did not have notice of the snow/ice condition or that they did not create the condition which caused plaintiff's fall.

While plaintiff concedes that the Westchester Defendants are not liable for her accident, she attempts to create an issues of fact with respect to White Plains by claiming White Plains plowed the snow into the crosswalk on the median thereby causing her to walk around the median and fall on the ice/snow condition. However, in support of her argument plaintiff relies on only portions of the unsigned deposition testimony of Patsy Fucale. Mr. Fucale's deposition is unsigned and there is no showing that it was previously forwarded to him for his review pursuant to CPLR 3116(a). Therefore, this transcript does not constitute admissible evidence and cannot be considered by the Court. (See CPLR 3116; see also *Martinez v. 123-16 Liberty Ave. Realty Corp.*, 850 N.Y.S.2d 201, 203 [2<sup>nd</sup> Dept 2008]; *Scotto v. Marra*, 23 A.D.3d 543, 806 N.Y.S.2d 603 [2<sup>nd</sup> Dept 2005]).

Based on the foregoing, White Plains' motion for summary judgment dismissing the complaint and all cross claims is GRANTED and the Westchester Defendants' motion for summary judgment dismissing the complaint and all cross claims is GRANTED.

Dated: White Plains, New York  
December 16, 2011



HON. WILLIAM J. GIACOMO, J.S.C.

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