

**Lopez v Port Chester-Rye Union Free Sch. Dist.**

2014 NY Slip Op 32909(U)

October 6, 2014

Supreme Court, Westchester County

Docket Number: 56391/2011

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.

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

-----X  
ISABEL LOPEZ and JOSE LOPEZ,  
Plaintiff,

Index No. 56391/2011

-against-

**DECISION & ORDER**

PORT CHESTER-RYE UNION FREE SCHOOL DISTRICT,  
VILLAGE OF PORT CHESTER and TOWN OF RYE, and  
OUR LADY OF THE ROSARY ROMAN CATHOLIC  
CHURCH a/k/a OUR LADY OF THE ROSARY PARISH,  
Defendants.

-----X  
The following papers numbered 1 to 12 were read on defendant Village of Port Chester's motion for summary judgment dismissing the complaint and defendant Port Chester-Rye Union Free School District's motion for summary judgment dismissing the complaint in this slip and fall case.

PAPERS NUMBERED

The Village's Notice of Motion/Affirmation/Exhibits	_____	1-3
Plaintiffs' Affirmation in Opposition/Exhibits	_____	4-5
Reply Affirmation	_____	6
The District's Notice of Motion/Affirmation/Exhibits	_____	7-9
Plaintiff's Affirmation in Opposition	_____	10
The Church's Affirmation in Opposition	_____	11
Reply Affirmation	_____	12

**Factual and Procedural Background**

On May 20, 2011, plaintiff Isabel Lopez tripped and fell on a defective curb abutting a school located at 18 Central Avenue in Port Chester. The curb in question was at the main driveway entrance to the school.

On October 4, 2011, plaintiff commenced this personal injury action against defendant Port Chester Union Free School District ("the School District") who operated the school at the location where she fell. The building in which the school was operated is owned by defendant Our Lady of the Rosary Roman Catholic Church ("the Church"). The School District leased the building from the Church. The action against the Town of Rye was previously dismissed. Defendant Village of Port Chester ("the Village") owns the sidewalk in question.

The Village now moves for summary judgment dismissing the complaint on the ground that it had no prior written notice of the defective curb which caused plaintiff's fall nor did it create the condition which caused her fall.

In opposition, the plaintiffs argue the Village had issued a street & sidewalk opening permit to have work done on the premises where plaintiff fell. Further, at least two years prior to the accident, work was done by the Village at the location of plaintiff's fall. Therefore, according to plaintiff the Village had actual notice of the condition which caused her fall and the Village was affirmatively negligent in repairing the sidewalk in question.

In reply, the Village argues that it did not do repair work in the area where plaintiff fell.

The School District also moves for summary judgment dismissing the complaint on the ground that pursuant to its lease with the Church it was the Church's responsibility to maintain the sidewalk area.

In opposition, plaintiffs argue that the District leased the entire area from the Church and the sidewalk area in question was maintained by the District. Plaintiffs note that the school district performed snow removal from the sidewalk and driveway area where she fell. Further, plaintiffs argue that the defective sidewalk condition had existed for at least 20 months prior to plaintiff's fall. Therefore, they claim the District had constructive notice of the defective curb.

The Church opposes the motion arguing that the curb upon which plaintiff fell was owned by the Village. Further, the entire premises was leased to the School District. Thus, the sidewalk, driveway, and parking lot were used exclusively by employees of the School District and School District students. The Church argues that the School District's use of the driveway and sidewalk created a special use and, therefore, summary judgment dismissing the complaint against the School District should be denied.

In reply, the School District argues that the lease specifically states that the Church is responsible for the maintenance and repair of the exterior of the building. Further, to the extent the Church is claiming a special use of the driveway area, the School District claims that the defective curb where plaintiff fell is not in the driveway area.

## **Discussion**

### **The Village's Motion for Summary Judgment**

A party moving for summary judgment must assemble *affirmative* proof to establish its entitlement to judgment as a matter of law. (*Zuckerman v. City of N. Y.*, 49 NY2d 557 [1980]). In order to meet its burden of entitlement to summary judgment as a matter of law, the Village must establish that it did not receive prior written notice of an alleged defect in

the sidewalk. (See *Kravatz v. County of Suffolk*, 40 AD3d 1042 [2<sup>nd</sup> Dept 2007]; *Ferreira v. County of Orange*, 34 AD3d 724 [2<sup>nd</sup> Dept 2006]).

The Code of the Village of Port Chester § 16 Liability in Certain Cases, provides:

In addition to the requirements for notice of claim set out and provided for in Article 4 General Municipal Law, no civil action shall be brought or maintained against the Village of Port Chester, its officers or employees for damages or injuries to person or property sustained in consequence of any real or personal property of the Village of Port Chester, including, but without limitation, buildings, steps, ramps, stairs, marinas, walkways, storm sewers, sanitary sewers, drain lines, easements, walls, parking lots, recreational facilities, parks playgrounds \* \* \* or any other property, both real or personal, being defective, out of repair, unsafe, dangerous or obstructed, unless written notice of the existence of such condition with designation of the particular location, had theretofore actually been given to the village clerk, and there has been a failure on the part of the village to cause such condition to be corrected, or the place otherwise made reasonably safe within a reasonable time after the receipt of such notice.

\* \* \*

Here, the Village through the affidavit of Janusz Richards, the Village Clerk, established that it did not have prior written notice of the allegedly defective curb that caused plaintiff's fall. Moreover, whether the Village had actual or constructive notice of the defective curb does not satisfy the prior written notice requirement (see *Wilkie v. Town of Huntington*, 29 A.D.3d 898, 816 N.Y.S.2d 148 [2<sup>nd</sup> Dept 2006]; [Where a municipality has enacted a prior written notice statute, it cannot be liable for injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies; actual or constructive notice of a defect does not satisfy this requirement.]) Finally, there is no evidence that the Village created the unsafe curb condition which caused plaintiff's fall.

Based upon the foregoing, the Village met its burden of establishing entitlement to summary judgment by demonstrating that it did not have prior written notice of the defects alleged by plaintiff. (See *Peters v. City of White Plains*, 58 AD3d 824 [2<sup>nd</sup> Dept 2009]). "A municipality that has enacted a prior written notice law is excused from liability absent proof of prior written notice or an exception thereto" (*Regan v Town of N. Hempstead*, 66 A.D.3d 863, 887 N.Y.S.2d 259 [2<sup>nd</sup> Dept 2009]).

Accordingly, the Village of Port Chester's motion for summary judgment dismissing the complaint is GRANTED.

#### **The District's Motion for Summary Judgment Dismissing the Complaint**

The District contends that there is no dispute that the curb in question was owned by the Village. Further, pursuant to the terms of the lease, the Church reserved the right to maintain the exterior of the leased building. Therefore, the District owes no duty to plaintiff. In opposition, the Church argues that the District's use of the driveway and the area around the driveway was a special use and therefore, the District is not entitled to summary judgment. Further, according to the Church one of the District's employees shoveled snow in the area where plaintiff fell, therefore, there is a question of fact regarding whether the District maintained the area in question. Plaintiffs oppose the motion on the ground that the District performed maintenance on the sidewalk area and that it had actual or constructive notice of the defective curb.

The "Principle of special use" imposes an obligation on an abutting landowner, when he puts part of a public way to special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid


injury to others. (See *Breland v. Bayridge Air Rights, Inc.*, 65 A.D.3d 559, 884 N.Y.S.2d 143 [2<sup>nd</sup> Dept 2009]).

Here, there is no dispute that the accident occurred on a public curb area, an area not owned, controlled or maintained by the District. Moreover, as the Second Department noted in *Nixdorf v. East Islip School Dist.*, (276 A.D.2d 759, 715 N.Y.S.2d 432 [2<sup>nd</sup> Dept 2000]), the use of public parking spaces on a public road in front of an elementary school is not a special benefit giving rise to a special use. Thus, the use of the sidewalk area where plaintiff fell was not a special benefit giving rise to a special use. (See also *Furey v. Sayville Union Free School Dist.*, 36 A.D.3d 588, 828 N.Y.S.2d 168 [2<sup>nd</sup> Dept 2007]). Moreover, the fact that a District employee may have shoveled the area where plaintiff fell does not mean that the District had the responsibility to repair a defective curb.

Accordingly, the District's motion for summary judgement dismissing the complaint is GRANTED.

**The remaining parties are directed to appear in the Settlement Conference Part on October 22, 2014 room 1600 at 9:15 a.m. for further proceedings.**

Dated: White Plains, New York  
October 6, 2014

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