

**Harrison v Gueli**

2014 NY Slip Op 32911(U)

September 15, 2014

Supreme Court, Westchester County

Docket Number: 57655/11

Judge: Robert M. DiBella

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of 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**

-----X  
**PAUL HARRISON,**

**Plaintiff,**

**-against-**

**DECISION AND ORDER  
Motion Seq. No. 001**

**IRIS GUELI and THE CITY OF MOUNT VERNON,**

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**Defendants.**

-----X  
**DIBELLA, J.**

The following papers have been read and considered on this motion by defendant The City of Mount Vernon for summary judgment dismissing the complaint, pursuant to CPLR 3212:

- 1) Notice of Motion; Affirmation of Brian G. Johnson, Esq.; Affidavit of Anthony Amiano; Exhibits A–G; and
- 2) Affirmation in Opposition of Calvin H. Scholar, Esq.; Exhibits A–V.

In this personal injury action, defendant The City of Mount Vernon (the “City”) moves for summary judgment dismissing the complaint, pursuant to CPLR 3212.<sup>1</sup> Plaintiff opposes the motion. For the reasons set forth below, the motion is granted.

Plaintiff commenced this action to recover for personal injuries allegedly resulting from a defective and dangerous condition located on the driveway and/or sidewalk area in front of defendant Iris Gueli’s house. On July 25, 2010 at approximately 1:00 PM in the vicinity of 112 Hutchinson Boulevard, plaintiff allegedly fell while walking in the area of the

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<sup>1</sup> The Court notes that a Stipulation of Discontinuance was filed on August 20, 2013 discontinuing the action as against defendant Iris Gueli only; however, it does not appear that the caption was ever formally amended as a result of that stipulation.

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driveway, street, and sidewalk and suffered injury to his legs. The alleged dangerous area was illegally modified by defendant Iris Gueli, the sidewalk was removed, and a driveway was put in without the appropriate permits from the City.

The City moves for summary judgment dismissing the complaint contending that plaintiff cannot establish that prior written notice of the allegedly dangerous or unsafe condition which caused plaintiff to fall was provided to the Commissioner of Public Works, as required pursuant to local law.

It is well settled that the proponent of a summary judgment motion 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. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d at 562. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *Id.*

Section 265 of the Charter of the City of Mount Vernon provides, in relevant part, that:

No civil action shall be maintained against the City for damages or injuries to person or property sustained in consequence of any . . . sidewalk . . . being defective, out of repair, unsafe, dangerous or obstructed unless, previous to the occurrence resulting in such damages or injury, written notice of the defective, unsafe, dangerous or obstructed condition of

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said . . . sidewalk . . . was actually given to the Commissioner of Public Works and that there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of.

“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 North Hempstead*, 66 AD3d 863, 864 (2d Dep’t 2009). A party maintaining an action against the city for damages related to a defective sidewalk must establish prior written notice as a condition precedent and the failure to do so warrants dismissal of the action. See *Vertsberger v. City of New York*, 34 AD3d 453 (2d Dep’t 2006); *Cassuto v. City of New York*, 23 AD3d 423 (2d Dep’t 2005). The Court of Appeals has recognized only two exceptions to the requirement of prior written notice—when either the municipality created the defect through an affirmative act of negligence or when it has made a special use of the area. See *Yarborough v. City of New York*, 10 NY3d 726 (2008); *Amabile v. City of Buffalo*, 93 NY2d 471 (1999). Actual or constructive notice, absent prior written notice, has been held insufficient. See *Amabile*, 93 NY2d at 471; *Berner v. Town of Huntington*, 304 AD2d 513 (2d Dep’t 2003).

Here, the City has established its *prima facie* entitlement to judgment as a matter of law by submitting the deposition testimony and affidavit of Anthony Amiano, an employee in the City of Mount Vernon’s Department of Public Works responsible for handling notices of claim, who stated that a search of the prior written notice file maintained by the City was conducted and it revealed that no prior written notices had been received with respect to the condition of the subject sidewalk before plaintiff’s

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accident. See *McCarthy v. City of White Plains*, 54 AD3d 828 (2d Dep't 2008). Although plaintiff stated that he called the City to make complaints and was aware of others who did as well, he acknowledged during his deposition that he never sent a written notice to the City and he did not have any knowledge that anyone else did.

The burden now shifts to plaintiff to put forth admissible evidence to demonstrate that the City did have written notice or that an exception to the prior written notice requirement existed. See *Yarborough*, 10 NY3d at 728; *Kiszenik v. Town of Huntington*, 70 AD3d 1007 (2d Dep't 2010). Plaintiff, however, is unable to meet his burden.

In opposing the motion, plaintiff relies heavily on the fact that the defendant-homeowner was a former employee of the City<sup>2</sup> and surmises that such status and "nepotistic and incestuous relationship" caused the City to negligently fail to take any action against that defendant (Scholar Affirmation in Opp ¶ 57). However, plaintiff's theory is nothing more than speculation without any evidentiary support and, in any event, even if correct, prior written notice of the defect or dangerous condition is nonetheless required. And, here, there is no evidence of any prior written notice to the City.

Any testimony or evidence of phone calls made to the City, even if the City's procedure is to make a written note upon receiving the phone call, is insufficient to satisfy the prior written notice requirement. See *Gorman v. Town of Huntington*, 12 NY3d 275

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<sup>2</sup> The Court notes that it appears defendant Iris Gueli worked as a typist for the Building Department for the City of Mount Vernon for a short time, from November 30, 1984 until February 23, 1985, many years before the alleged modifications to the property and accident at issue herein took place.

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(2009); *Politis v. Town of Islip*, 82 AD3d 1191 (2d Dep't 2011); *Kiszenik*, 70 AD3d at 1008; *McCarthy*, 54 AD3d at 829–30; *Akcelik*, 38 AD3d at 483–84; *Dalton v. City of Saratoga Springs*, 12 AD3d 899 (3d Dep't 2004); *Cename v. Town of Smithtown*, 303 AD2d 351 (2d Dep't 2003). In addition, plaintiff's statement at his deposition that he also spoke to the mayor about the issue is likewise insufficient. See *Gorman v. Town of Huntington*, 12 NY3d 275, 279 (2009). Further, any evidence that the City inspected the sidewalk prior to the accident does not obviate the need for prior written notice. See *Cename*, 303 AD2d at 352. "Neither actual nor constructive notice of a condition is sufficient to satisfy the requirement of prior written notice." *Groninger v. Village of Mamaroneck*, 67 AD3d 733 (2d Dep't 2009); see also *Berner v. Town of Huntington*, 304 AD2d 513 (2d Dep't 2003); *Harvey v. Monteforte*, 292 AD2d 420 (2d Dep't 2002).

The court has considered the parties' remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that defendant The City of Mount Vernon's motion for summary judgment is granted and the complaint is dismissed as to said defendant, and the Clerk shall enter judgment accordingly.

This is the Decision and Order of the Court.

Dated: September 15, 2014  
White Plains, New York

  
Hon. Robert DiBella, JSC