

**Devuono v City of Yonkers**

2018 NY Slip Op 34249(U)

December 12, 2018

Supreme Court, Westchester County

Docket Number: Index No. 57877/2018

Judge: Charles D. Wood

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period 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**

-----X  
**GIULIANA DEVIUONO,**

**Plaintiff,**

**-against-**

**DECISION & ORDER  
Index No. 57877/2018  
Sequence No. 1**

**THE CITY OF YONKERS, THE VILLAGE OF  
BRONXVILLE, JAN P. MAHLSTEDT, and  
EVA MARIA ABADIA MAHLSTEDT,**

**Defendants.**

-----X

**WOOD, J.**

The following papers were read and considered in connection with moving defendant The Village of Bronxville (“the Village”) motion for summary judgment, and opposition of Jan P. Mahlstedt and Eva Maria Abadia Mahlstedt (“Mahlstedts”):

- Village’s Notice of Motion, Counsel’s Affirmation, Exhibits.
- Mahlstedts’ Cross-Motion and Counsel’s Affirmation in Opposition to Village’s motion, Memorandum of Law, Exhibits
- Village’s Counsel’s Reply Affirmation.

Plaintiff commenced this action against defendants as a result of a slip and fall on April 29, 2017, on a sidewalk located near 301 Bronxville Road in Yonkers. Plaintiff claims that she fell on a cracked, uneven, defective and slanted sidewalk, causing her serious injuries. The Village brings this motion for summary judgment dismissing all claims and cross-claims against it on the grounds that the Village does not own or maintain the accident location, and

has no duty to maintain it; and it did not receive prior written notice of the alleged defective condition. The Mahlstedts oppose the motion. No opposition papers from plaintiff have been submitted. NOW, upon the foregoing papers, the motion is decided as follows:

It is well settled that a 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” (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is “required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

In support of its motion for summary judgment, the Village offers the affidavit from James M. Palmer, the Village Clerk/Administrator. He attests that he is familiar with the

jurisdictional boundaries of the Village. According to Mr. Palmer, the alleged accident location of 301 Bronxville Road in Yonkers is located within the City of Yonkers, and not the Village of Bronxville. A zoning map of the Village, shows that Bronxville Road indeed is not located within the confines of the Village.

In light of the affidavit from the Village representative, the Village met its initial burden that it did not own, occupy or control that property. Moreover, a municipality cannot be held liable for the failure to maintain in a reasonably safe condition property it does not own or control unless it affirmatively undertakes such a duty (Mudgett v Long Island R.R., 81 AD3d 612, 613 [2d Dept 2011]). On this basis alone, the Village has met its prima facie case.

Palmer also attests that he conducted a search of any prior written notices and Notices of claim pertaining to the accident location at any time up to and including the accident date of April 29, 2017. He explains that the Village records are kept in a log book and claims are recorded in alphabetical order by street name, dating back 25 years ago. His search revealed that the Village did not receive written notice of the allegedly defective sidewalk or notices of claim regarding the subject location at any time prior to the accident date.

As the Village may be liable only for those defects and dangerous conditions on its streets and sidewalks of which it has been actually notified, in writing, the Village has demonstrated a prima facie entitlement to summary judgment (Farrago v Great Atl. & Pac. Tea Co., 17 AD3d 631, 632–33 [2d Dept 2005]).

As plaintiff failed to oppose this motion, and the record contains no sufficient evidence that the Village had prior written notice of the defective condition which allegedly caused the plaintiff to fall, no triable issues of fact have been raised to defeat the Village's motion for summary judgment.

Further, the Mahlstedts contention that the summary judgment was premature is without merit, since they failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. The Mahlstedts' "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis for denying the motion." (Conte v Frelen Assoc., LLC, 51 AD3d 620, [2d Dept. 2008]). In light of the foregoing, the Village's motion for summary judgment is granted in its entirety.

This constitutes the Decision and Order of the court.

NOW, therefore, it is hereby

ORDERED, that the motion by the Village of Bronxville for summary judgment dismissing the complaint and all cross claims asserted against it is **granted**; and it is further

ORDERED, that the caption of this matter shall be amended to read:

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

-----X  
**GIULIANA DEVUONO,**

**Plaintiff,**

**-against-**

**Index No. 57877/2018**

**THE CITY OF YONKERS, JAN P. MAHLSTEDT, and  
EVA MARIA ABADIA MAHLSTEDT,**

**Defendants.**  
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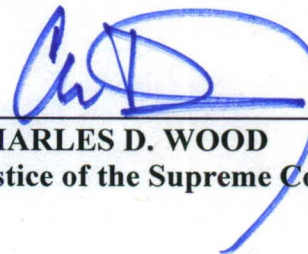
;and it is further

ORDERED, that all remaining parties shall appear for a conference in the Compliance Conference Part, Room 800, Westchester County Courthouse, 111 Dr. Martin Luther King Jr.

Blvd., White Plains, New York 10601, on *Feb. 13<sup>th</sup>, 2019* at 9:30 A.M.

The Clerk shall mark his records accordingly.

Dated: December 12, 2018  
White Plains, New York



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**CHARLES D. WOOD**  
Justice of the Supreme Court

To: All Parties by NYSCEF