

**Avgerakis v City of Yonkers**

2021 NY Slip Op 33335(U)

February 24, 2021

Supreme Court, Westchester County

Docket Number: Index No. 60252/2019

Judge: Terry Jane Ruderman

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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

-----X  
GEORGE AVGERAKIS,

Plaintiff,

DECISION and ORDER

-against-

Motion Sequence No. 1  
Index No. 60252/2019

THE CITY OF YONKERS, and KYLE GARDNER,

Defendants.

-----X  
RUDERMAN, J.

The following papers were considered in connection with the motion of defendant City of Yonkers pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint as against it:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - K, and Memorandum of Law	1
Affirmation in Opposition, Exhibit 1	2
Reply Affirmation	3

This is an action for personal injuries allegedly sustained by plaintiff George Avgerakis on March 5, 2019, at approximately 9:45 a.m., when he slipped and fell on the sidewalk in front of the property located at 6 Lockwood Avenue in in Yonkers, New York. Plaintiff stated at his 50-h hearing that it had snowed a foot or two in the previous 48 hours, and there was snow and ice on the ground, but that the sidewalk in front of 6 Lockwood Avenue had been shoveled. After parking his car, he walked on the cleared sidewalk toward the parking meter, when he slipped and fell due to "black ice" which had formed there.

Discovery has been completed, and plaintiff filed his note of issue on October 23, 2020. The City of Yonkers now moves for summary judgment, contending that the City lacked prior written notice of the claimed condition. It relies on the deposition testimony of Robert Greco, a manager with the Yonkers Department of Public Works, who stated that he conducted a search of the City's prior written notice records, both electronic and hard copies, and found no records relating to the subject location. Greco also testified that the City does not perform snow removal from the sidewalks adjoining private property, because that is the responsibility of the adjoining property owner; the City only performs snow removal on sidewalks in front of City-owned properties.

Co-defendant Kyle Gardner acknowledged that he owns the property at the location of plaintiff's accident. Gardner testified at his deposition that one of his tenants, Joseph DiFranco, was responsible for shoveling and salting the sidewalks after snowfalls, pursuant to an oral agreement between them. DiFranco testified at a non-party deposition held on August 25, 2020 that he alone was responsible for shoveling the sidewalk at the property.

Plaintiff, in opposition, argues that the motion is premature because DiFranco has not completed a deposition transcript errata sheet, and that "it is not impossible that Joseph DiFranco will make changes to his deposition errata sheet" in such a way that implicates the City of Yonkers' negligence and responsibility for plaintiff's accident.

#### Analysis

Defendant City has made a prima facie showing of a right to summary judgment dismissing the complaint as against it. Section 244 of the Second Class Cities Law requires prior written notice of the existence of a snow or ice condition on a sidewalk as a condition precedent to maintaining a civil action against a city to which the statute applies, and City of Yonkers is

one such city (*see Fellmeth v City of Yonkers*, 222 App Div 815 [2d Dept 1928]). In addition, section 24-11 of the Charter of the City of Yonkers imposes a prior written notice requirement on actions involving falls on a sidewalk in Yonkers (*see Cuebas v City of Yonkers*, 97 AD3d 779 [2d Dept 2016]). The only exceptions to the prior written notice laws are where the municipality created the alleged hazardous condition through an affirmative act of negligence, and where a special benefit is conferred onto the municipality by "special use" (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). The special use exception has no applicability here (*see Poirier v City of Schenectady*, 85 NY2d 310 [1995]), and nothing in plaintiff's allegations would support the application of the affirmative act exception.

Yonkers has made a prima facie showing that it lacked the necessary prior written notice, and that neither exception to that requirement is applicable.

In opposing summary judgment, plaintiff does not dispute that the City made out its prima facie entitlement to summary judgment. Nor does plaintiff argue that the City received prior written notice of the subject icy sidewalk condition, or that the City derived a special benefit from the subject sidewalk. As to the affirmative act exception, plaintiff does not present evidence that would create a question of fact as to whether the City affirmatively created the subject icy condition. Plaintiff's sole argument in opposition to the City's motion for summary judgment is that the motion is premature because the non-party witness DiFranco has not yet returned an errata sheet regarding his deposition. He speculates that DiFranco could make changes to his deposition errata sheet that would implicate the City as affirmatively liable for the hazard.

This motion is not premature; the DiFranco deposition was held on August 25, 2020, and counsel for co-defendant Gardner advised the court that he had forwarded the deposition

transcript to DiFranco on September 9, 2020. The motion was properly and timely filed on October 29, 2020, after the filing of a Trial Readiness Order and plaintiff's filing of a note of issue. Plaintiff may no longer claim, as of the filing of his opposition on November 21, 2020, that he is awaiting additional discovery.

In any event, CPLR 3116, which is equally applicable to deposed parties and non-party witnesses, gives the witness sixty days to make any changes to a deposition transcript. If no changes were made by DiFranco by November 21, 2020, his transcribed deposition testimony stands as accurate, as if it had been signed (CPLR 3116). Therefore, plaintiff may not successfully oppose the City's motion with mere speculative expressions of hope that DiFranco could completely alter his previous testimony and implicate the City of Yonkers.

Inasmuch as the City of Yonkers has demonstrated its prima facie entitlement to summary judgment, and the plaintiff has failed to come forward with any admissible evidence to raise a triable issue of fact, summary judgment must be granted in favor of the City of Yonkers, and the complaint and cross-claim against it must be dismissed.

Based upon the foregoing, it is hereby,

ORDERED that the motion by The City of Yonkers for an order granting it summary judgment dismissing the complaint and cross-claim as against it is granted, and the complaint is severed and dismissed as against that defendant; and it is further

ORDERED that all remaining parties are directed to appear in the Settlement Conference

Part on a date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
February 24, 2021

  
HON. TERRY JANE RUDERMAN, J.S.C.