

|                                                                                                                                                                                                                                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Ramos v Owens</b>                                                                                                                                                                                                           |
| 2022 NY Slip Op 32975(U)                                                                                                                                                                                                       |
| August 30, 2022                                                                                                                                                                                                                |
| Supreme Court, Wayne County                                                                                                                                                                                                    |
| Docket Number: Index No. CV086190                                                                                                                                                                                              |
| Judge: Daniel G. Barrett                                                                                                                                                                                                       |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.                                                                                                                                                         |

At a Term of the Supreme Court  
held in and for the County of  
Wayne at the Hall of Justice in the  
Town of Lyons, New York on the  
22<sup>nd</sup> day of June, 2022

STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

SUSAN RAMOS,

Plaintiff,

-vs-

DECISION AND ORDER  
Index No. CV086190

JONATHAN OWENS,  
AUSTIN OWENS,  
COUNTY OF WAYNE,  
VILLAGE OF CLYDE,

Defendants

### **DECISION AND ORDER**

The following e-filed documents, listed by NYSEF document number, were read on these motions pending in this application: 53-75, 77-102.

### **BACKGROUND**

Plaintiff commenced this action seeking damages for personal injuries sustained as a result of an alleged defective sidewalk located at 117 Sodus Street, Clyde, New York.

### **DISCUSSION**

On May 16, 2020, Plaintiff was jogging on the sidewalk on Sodus Street when her sneaker came in contact with an elevated portion of the sidewalk which caused her to fall and suffer personal injuries. The accident occurred at about 9:20 A.M. in front of 117

Sodus Street and it was a cloudy day. Jonathan and Austin Owens own the property at this address. The Plaintiff did not observe the elevated portion of the sidewalk. A short period of time after this accident the Plaintiff's daughter took photographs of the subject area. On July 17, 2020, an insurance adjuster for the Village's carrier took some photographs of the accident area. On June 4, 2022, the Plaintiff's expert examined the scene and took some measurements and photographs. The expert took a measurement of the sidewalk flag where the accident happened and measured 3/8" height differential between the two sidewalk flags where this accident occurred. The Plaintiff's daughter placed a tape measure between the flags and took a photograph(s) which had a tape measure which measured the distance between these two flags.

### **VILLAGE OF CLYDE'S MOTION FOR SUMMARY JUDGMENT**

The Village of Clyde raises three independent grounds for the dismissal of the Plaintiff's Complaint.

1. Lack of prior notice to the Village of the sidewalk defect;
2. The Village did not have a responsibility to maintain or repair the sidewalk;
3. Failure to specifically list the location of the incident in the Notice of Claim;
4. The sidewalk defect is trivial and thus this should be dismissed as a matter of law.

### **PRIOR NOTICE TO THE TOWN**

It is undisputed that the day after the fall the Plaintiff texted the Town Clerk, Ann Fenton, that she had fallen. The Plaintiff was unable to provide the address where she had fallen. The Village Clerk indicated she logged the incident in with an incomplete address. Consequently, she logged it in for Sodus Street without a house number.

Subsequent to this time she was requested to do a search for any incidents at 117 Sodus Street. She testified at her deposition and in her affidavit submitted with this application that she searched for 117 Sodus Street and found no prior incident complaints. At her deposition she testified that she did not conduct a search for Sodus Street. In the affidavit submitted with this application she did not specify she conducted a search for just Sodus Street. Since the non-moving party is afforded the benefit of every reasonable inference in a summary judgment application (see Williams v Jones, 139 A.D. 3d 1346 [4<sup>th</sup> Dept. 2016]), the motion for summary judgment is denied on this ground.

If the Village of Clyde by its active negligence caused the defect, there is no need to prove that prior to written notice has been served on the Village (see Horst v City of Syracuse, 191 A.D. 3d 1297 [4<sup>th</sup> Dept. 2021]). There is an unresolved issue whether the Village of Clyde did some work in the area of the sidewalk at 117 Sodus Street. The Zoning Officer who occupied that position for twenty-three years at the time of his deposition testified that the Village of Clyde periodically replaces sidewalks in different parts of the Village. He further testified that he assumed that at some point village work was done at 117 Sodus Street but he did not know what was done there or what year the work was done by the Village.

The Superintendent of the Department of Public Works for the Village of Clyde for eight years at the time of his deposition. He testified if the Village Board deemed to repair or replace sidewalks as part of a street project the DPW would do so. He testified that there has never been a street project performed on Sodus Street. However, he did not perform a search to determine whether a project had ever been performed on Sodus Street. The Village maintains files pertaining to street projects and he did not conduct a search prior to his deposition.

Based on the assumption of the Zoning Officer and the lack of a search of the records by the Superintendent of the Department of Public Works, a reasonable inference, to which the Plaintiff is entitled, is that the Village of Clyde did some work relative to the sidewalk at 117 Sodus Street.

### **DEFICIENT NOTICE OF CLAIM**

There is no specific address on the Notice of Claim. However, the testimony of the Superintendent of Public Works indicated that he was sent out to inspect the sidewalk at 117 Sodus Street around the date of May 16, 2020. He did go out and inspect the sidewalk and took some photographs and gave them to the Village Clerk. He indicated he walked Sodus Street and gave a verbal report of his inspection to the Village Clerk. It is not disputed that the day this event happened that the Plaintiff was in contact with the Village Clerk regarding her fall. Additionally, the insurance adjuster for the carrier of the Village took photographs of the subject sidewalk on July 7, 2020. Based upon the facts of this case, this Court is not dismissing this action based on the fact that the specific address of the alleged defect was not listed on the Notice of Claim.

In addition, there is no indication any changes occurred to this sidewalk from the time the accident occurred until the precise location was determined by the Village. In this unique case the Village has not been prejudiced in any way by the late notification of the correct address.

### **VILLAGE NOT LIABLE**

It is argued that the Village is not liable for the care and repair of the sidewalk by Local Law. This issue will not be addressed as it is irrelevant in the event that the Village was actively negligent with respect to the construction or repair of the subject sidewalk.

## TRIVIAL DEFECT

Photographs of the alleged defect were submitted in this application. They show a uniform height differential from one flag to the other. In June the Plaintiff's expert measured this differential as 3/8 inch. "Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the particular fact of each case... including the width, depth elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury." Trincere v County of Suffolk, 90 N.Y. 2d 976, 977-978, 665 N.Y.S. 2d 615, 688 N.E. 2d 489. The existence or nonexistence of a defect "is generally a question of fact for the jury" (id at 977). Thus "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable...and therefore...granting summary judgment to a defendant based on the dimensions of the defect is unacceptable" (Hutchinson v Sheridan Hill House Corp., 26 N.Y. 3d 66 at 77, 19 N.Y. 3d 802, 41 N.E. 3d 766).

The Plaintiff's expert submitted an affidavit in this application that the condition of the sidewalk with a 3/8" height differential between flags constituted a tripping hazard and thus was a dangerous and defective condition. A 1/4" height differential in a sidewalk was found to be a tripping hazard and thus a dangerous condition (Argenio v Metropolitan Transp. Auth., 277 A.D. 2d 165 [1<sup>st</sup> Dept.2000]). A 3/4" difference in flags of a sidewalk were found to be a dangerous condition where it was found that the difference in height between the two flags was abrupt and not gradual thus posing a tripping hazard. (McKenzie v Crossroads Arena, 291 A.D. 2d 860 [4<sup>th</sup> Dept 2002]). A defect in the sidewalk with a height differential of 1/2" or less was found by the court not to be trivial as a matter of law. (Clauss v Bank of America, N.A., 151 A.D. 3d 1629 [4<sup>th</sup> Dept. 2017]). There was also evidence in this case that such a defect could constitute a tripping hazard.

Based on the foregoing, the application to dismiss on the basis that the condition of the sidewalk was a trivial defect is denied.

### **PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

A triable issue of fact exists whether the alleged condition of the sidewalk constituted a dangerous or defective condition. Consequently, Plaintiff's application for summary judgment is denied.

### **CONCLUSION**

Accordingly it is hereby:

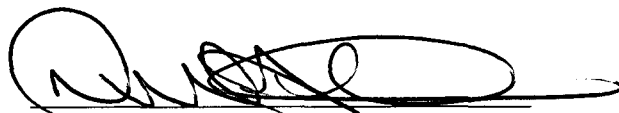
ORDERED that the Defendant, Village of Clyde's motion for summary judgment is denied; and it is further

ORDERED that the Plaintiff Susan Ramos' cross-motion for summary judgment is denied; and it is further

ORDERED that any relief sought and not expressly addressed herein has nonetheless been considered and is denied.

This constitutes the Decision and Order of the Court.

Dated: August 30, 2022  
Lyons, New York

A handwritten signature in black ink, appearing to read 'Daniel G. Barrett', with a long horizontal flourish extending to the right.

Daniel G. Barrett  
Acting Supreme Court Justice