

<b>Naeem v City of Yonkers</b>
2024 NY Slip Op 35110(U)
August 28, 2024
Supreme Court, Westchester County
Docket Number: Index No: 58131/2022
Judge: Charles D. Wood
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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  
SAIMA NAEEM, as mother and natural guardian of A.A., an infant over the age of fourteen years old and, SAIMA NAEEM, Individually,

**Plaintiffs,**

DECISION & ORDER  
Index No. 58131/2022  
Seq No. 1

**-against-**

THE CITY OF YONKERS,

**Defendant.**

-----X  
**WOOD, J.**

New York State Courts Electronic Filing (“NYSCEF”) Document Numbers 34-76 were read in connection with the motion for summary judgment by defendant City of Yonkers (“the City”), based on the lack of prior written consent of an alleged pothole as required pursuant to Chapter 24-11 of the Yonkers City Charter, and that plaintiffs did not sustain a serious injury as defined by Article 51 of the Insurance Law. Plaintiff commenced this action to recover personal injuries allegedly sustained by infant plaintiff A.A., as brought by her mother, Saima Naeem, also as an individual plaintiff. It arises from a single vehicle automobile incident in front of 7 Palisade Ave., in Yonkers on April 5, 2021, wherein approximately 7:00 p.m. when plaintiff mother, as the driver of a vehicle in which A.A. was a passenger, drove into a pothole. Plaintiffs filed a Notice of Claim with the City of Yonkers pursuant to General Municipal Law Section 50-e on May 27, 2021.

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]). 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]).

The Second Department has found that in prior written notice cases “where the City establishes that it lacked prior written notice under [Administrative Code § 7-201(c)(2)], the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to [that defense],” even where the complaint alleged that the defendants created the allegedly dangerous condition (*Smith v City of New York*, 210 AD3d 53,69 [2d Dept 2022]), citing *Yarborough v City of New York*, 10 NY3d at 728; see *Groninger v Village of Mamaroneck*, 17 NY3d 125). Thus, once the defendant establishes the absence of prior written notice, the burden shifts to a plaintiff to establish by admissible evidence the applicability of either of the two recognized exceptions: “the municipality’s affirmative creation of a defect or where the defect is

created by the municipality's special use of the property” (*Smith v City of New York*, 210 AD3d at 54). The affirmative negligence exception [is] limited to work by a municipality that immediately results in the existence of a dangerous condition” (*Oboler v City of New York*, 8 NY3d 888, 889-90 [2007]; *Yarborough v City of New York* 10 NY3d 726, 728 [2008]). Wear and tear and environmental factors are not an affirmative act of negligence (*Smith v Town of Brookhaven* 45 AD3d 567, 568 [2d Dept 2007]). As for the special use exception, it can only be found “where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use and is therefore required to maintain a portion of that property” (*Poirier v City of Schenectady*, 85 NY2d 310, 315 [1995]).

Specifically, pursuant to Section 24-11 of the Charter of the City of Yonkers, which requires as a condition precedent to maintaining a lawsuit against the city, if based on a defective street, highway, bridge, etc. condition, that prior written notice of such condition be provided to the Commissioner of the Department of Public Works by certified or registered mail. That statute states:

“(1) No civil action shall be maintained against the city, its officers or employees for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe and dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the Commissioner of the Department of Public Works or any person or department authorized by the Commissioner to receive such notice by certified or registered mail, or where there was previous existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to the Commissioner by certified or registered mail, or 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, or the place otherwise made reasonably safe” (NYSCEF#53 at pg. 4).

The City offered the testimony and affidavit of Jamal Ibrahim, an administrator in the office of the Commissioner of the City's Department of Public Works. Ibrahim's duties include serving as the custodian of the City's records of statutory prior written notice. He conducted a search for prior written notices for the subject location maintained by the City. This search produced no results of prior written notices for the subject location. Plaintiff mother herself testified that she never complained to the City about the subject condition and is unaware of anyone else who did.

In light of the foregoing, the City demonstrates its prima facie entitlement to judgment at law that it lacked prior written notice of the condition of the alleged dangerous condition at the subject sidewalk. The burden shifts to plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality” (*Yarborough v. City of New York*, 10 NY3d 726 [2008]).

In opposition, plaintiff raises that a work order for the subject location existed, in that Kenneth Greehan, a manager at the Department of Public Works on January 22, 2021, ten weeks prior to plaintiffs' incident, the Yonkers Police Department alerted the Department of Public Works of a condition of the catch basin located at 7 Palisade Avenue in Yonkers.

The City certifies that its Department of Public Works, the Department of Traffic Engineering, the Police Department, the Mayor's Helpline, do not have work orders/documents regarding any painting (red or white), as appears in plaintiff's photo of the roadway at the subject location nor does it have work orders and other documents reflecting work performed on the subject site for two years prior to April 6, 2021, the date of the subject accident (NYSCEF #49; NYSCEF #58).

In any event, contrary to plaintiff's contentions, and as pointed out by the City, the City's prior written notice law is explicitly clear that only certified or registered mail sent to the attention of the Commissioner of the Department of Public Works constitutes prior written notice to the City. "Prior written notice provisions, enacted in derogation of common law, are always strictly construed" (*Gorman v Town of Huntington*, 12 NY3d 275, 279 [2009]). Not every written complaint to a municipal agency necessarily satisfies the strict requirements of prior written notice. Nor is it true that "any agency responsible for fixing the defect that keeps a record of such complaints has, ipso facto, qualified as a proper recipient of such notice. Simply put, whereas a written notice of defect is a condition precedent to suit, a written request to any municipal agent other than a statutory designee that a defect be repaired is not sufficient to comply with the strict requirements of the law" (*Horst v City of Syracuse*, 191 AD3d 1297 [2021]).

Accordingly, plaintiff in opposition failed to raise a triable issue of fact regarding the existence of affirmative City negligence, and no judicially recognized exception to the prior written notice requirement is raised within the opposing papers. On the basis that the City did not receive prior written notice of the alleged condition or defect of the subject location, and plaintiff has failed to demonstrate an exception to the prior written notice requirement, plaintiff's complaint as against the City is dismissed. NOW, therefore, it is hereby

ORDERED, that the motion (Seq 1) for summary judgment by the City is **granted**, and plaintiff's complaint is dismissed against the City; and it is further

ORDERED, that the City shall serve this decision and order within 20 days of entry unto NYSCEF, upon all parties in this action, and shall serve an Affidavit of Service within 5 days after

service. The Clerk shall mark his records accordingly. Plaintiff's complaint is dismissed. Case disposed.

All matters not specifically addressed are denied as moot. This constitutes the Decision and Order of the court.

Dated: White Plains, New York  
August 28, 2024



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

To: All Parties by NYSCEF