

McElearney v City of Yonkers
2024 NY Slip Op 35249(U)
June 13, 2024
Supreme Court, Westchester County
Docket Number: Index No. 67995/2022
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
CHRISTINE MCELEARNEY,

Plaintiff,

-against-

CITY OF YONKERS, 472 PALMER REALTY LLC AND
WESTCHESTER FAMILY MEDICAL,

Defendants.
-----X

DECISION & ORDER
Index No. 67995/2022
Seq Nos. 1,2,&3

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Document Numbers 22-76 were read in connection with each defendants' motion for summary judgment to dismiss plaintiff's complaint: Seq 1- the City of Yonkers ("the City"), based on the lack of prior written notice; Seq 2- Westchester Family Medical ("Family Medical"); and Seq 3- 472 Palmer Realty LLC ("Palmer"). Plaintiff commenced this action to recover personal injuries plaintiff allegedly sustained when she purportedly tripped and fell on the public sidewalk adjacent to 472 Palmer Road, in Yonkers on September 19, 2021 at approximately 6:30 p.m.

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 sidewalk 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).

To prove no prior written notice, the City offered the testimony of Jamal Ibrahim, an administrator in the office of the Commissioner of the City’s Department of Public Works (NYSCEF#35). 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 sidewalk from 1996 to present date. This search produced no results of prior written notices for the subject sidewalk (NYSCEF#35 pgs. 12-14).

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 N.Y.3d 726, [2008]).

Plaintiff's opposition papers appear to be untimely. As the City points out, pursuant to the Trial Readiness Order dated January 30, 2024 (NYSCEF #38), any and all opposition papers were due no later than thirty (30) days after the filing of a summary judgment motion. The City's motion was filed on February 15, 2024 (NYSCEF # 22-38). Thus, plaintiff's opposition papers were due on or before March 18, 2024, but were not filed until the late afternoon of April 12, 2024, and plaintiff never sought, nor obtained, additional time or any adjournment of the motion. On this basis alone, plaintiff's opposition papers will not be considered.

However, even if plaintiff's papers were considered, 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. In light of the foregoing on the basis that the City did not receive prior written notice of the alleged condition or defect of the subject sidewalk, and plaintiff has failed to demonstrate an exception to the prior written notice requirement, plaintiff's complaint as against the City is dismissed.

Turning to the motions for summary judgment brought by Family Medical (Seq 2) , and Palmer (Seq 3), it is undisputed that there was a valid lease agreement in effect in September 2021 between Palmer (Landlord) and Family Medical (Tenant) (NYSCEF#55). Pursuant to the lease

agreement, Palmer is responsible for making any repairs on the exterior of the building inclusive of the sidewalk.

The record shows that no complaints or incidents were received by Palmer or Family Medical regarding the subject sidewalk, nor was there any notices of violations, summons or tickets or fines ever given out by the City.

In opposition plaintiff offers two Google Street View photographs allegedly showing that the crack plaintiff tripped over was present for at least two and a half years prior to her accident.

As a preliminary matter, plaintiff did not object to Family Medical's motion, and on that basis alone, Family Medical's motion for summary judgment dismissing the complaint against it, is granted.

In any event, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks, generally is placed on the municipality, and not the abutting landowner. "However, an abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk where the landowner created the defect, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk" (*Lagawo v Myers*, 149 AD3d 1056 [2d Dept 2017]).

Here, Palmer established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the accident occurred on a public sidewalk and that Palmer did not create the defect, make special use of the sidewalk, or violate any statute or ordinance charging it with a duty to maintain the sidewalk and making it liable for injuries caused by a breach of that duty. While Yonkers City Code § 103-1 requires landowners to maintain sidewalks abutting their property in a safe condition, it does not impose tort liability upon them for injuries caused by a violation of that duty (*Lagawo v Myers*, 149 AD3d at 1057

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 motion (Seq 2) for summary judgment by 472 Palmer Realty LLC; and (Seq 3) by Westchester Family Medical, are both granted, and the complaint is dismissed against these defendants.

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 15 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
June 13, 2024


HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF