

Meyers v Long Is. R.R.
2024 NY Slip Op 35596(U)
June 27, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 607004/2020
Judge: Christopher Modelewski
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.

SHORT FORM ORDER

INDEX No. 607004/2020CAL. No. 202301265OTSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY**P R E S E N T :**HON. CHRISTOPHER MODELEWSKI
Justice of the Supreme CourtMOTION DATE 12/21/2023
ADJ. DATE 02/26/2024
Mot. Seq. # 001-MG
Mot. Seq. # 002-MG; CASEDISP-----X
MIRIAM MEYERS,

Plaintiff,

- against -

LONG ISLAND RAILROAD,
METROPOLITAN TRANSIT AUTHORITY,
TOWN OF ISLIP, and COUNTY OF SUFFOLK,Defendants.
-----XCARTIER, BERNSTEIN, AUERBACH &
STEINBERG, P.C.
Attorney for Plaintiff
100 Austin Street, Building 2
Patchogue, New York 11772LAW OFFICE OF CURTIS, VASILE,
MEHARY & DORRY, P.C.
Attorney for Defendants LIRR and MTA
2174 Hewlett Avenue
Merrick, New York 11566JAKUBOWSKI, ROBERTSON, MAFFEI,
GOLDSMITH & TARTAGLIA, LLP
Attorney for Defendant Town of Islip
969 Jericho Turnpike
Saint James, New York 11780

Upon the following e-filed papers read on these motions for summary judgment: Notice of Motion and supporting papers by defendant Town of Islip, dated November 29, 2023; Notice of Cross Motion and supporting papers by defendants Metropolitan Transportation Authority and Long Island Railroad, dated December 4, 2023; Answering Affidavits and supporting papers by defendants Metropolitan Transportation Authority and Long Island Railroad, dated December 6, 2023; Answering Affidavits and supporting papers by defendant Town of Islip, dated November 29, 2023; Answering Affidavits and supporting papers by plaintiff, dated February 9, 2024; Answering Affidavits and supporting papers by plaintiff, dated February 9, 2024; Replying Affidavits and supporting papers by defendants Metropolitan Transportation Authority and Long Island Railroad, dated February 15, 2024; Replying Affidavits and supporting papers by defendant Town of Islip, dated February 16, 2024; Replying Affidavits and supporting papers by defendant Town of Islip, dated February 16, 2024, it is

ORDERED that the motion by defendant Town of Islip for summary judgment dismissing the complaint and cross-claims against it is granted; and it is further

Myers v Long Island Railroad
Index No. 607004/2020
Page 2

ORDERED that the cross-motion by defendants Metropolitan Transportation Authority and Long Island Railroad for summary judgment dismissing the complaint and cross-claims against them is granted.

This action was commenced by plaintiff Miriam Meyers to recover damages for injuries she allegedly sustained on May 6, 2019 (the date of the accident), when she tripped and fell due to a broken and displaced concrete curb at the Central Islip train station, located on East Suffolk Avenue in Central Islip, New York. By her complaint, plaintiff alleges that the subject premises was owned and/or maintained by defendants County of Suffolk (the County), the Metropolitan Transportation Authority (MTA), the Town of Islip (the Town), and the Long Island Railroad (LIRR). By the terms of a stipulation dated January 26, 2023, the case as against the County, only, was discontinued, with prejudice.

The Town now moves for summary judgment in its favor, arguing that it enacted a prior written notice statute, and that “[t]here is no evidence in the record to suggest [the Town] had any written notice, or any notice at all for that matter, of the broken cement/curb that which [sic] Plaintiff alleges caused the accident.” It further argues that “[a]ny argument that [the Town] created this condition based solely on a prior work order for a different area on a different date (2017) which states the damage therein was done by ‘snowplows’ is not enough to create a question of fact in this instance” and is “purely speculative.” In support of its motion, the Town submits, among other things, a transcript of plaintiff’s General Municipal Law § 50-h hearing testimony, transcripts of the parties’ deposition testimony, a copy of a maintenance agreement between the County and the Town, a copy of a Town “service notice,” as well as affidavits of Peter Kletchka, Noelle M. Martin, and Teresa Bogardt.

The MTA and LIRR (collectively, the Railroad defendants) also move for summary judgment in their favor, arguing that they had no duty to maintain the accident location, as it was “owned and constructed by the County of Suffolk,” then “transferred to the Town of Islip pursuant to a written agreement for its use as a park and ride parking lot.” In support of their motion, the Railroad defendants submit, among other things, transcripts of the deposition testimony of the parties, a copy of a Town “service notice,” three photographs, and a copy of a maintenance agreement between the County and the Town.

Plaintiff testified that at approximately 8:30 a.m. on the date of the accident, she intended to take an LIRR train from the Central Islip train station to Brooklyn. She stated that the weather was sunny, and that, after exiting her motor vehicle in the parking lot of the Central Islip LIRR station, she walked through its parking lot and toward “the paved walkway next to railroad station.” Plaintiff indicated that as she walked forward, her right foot tripped on a “piece of cement” curbing that was “raised” “[s]ix or eight” inches “above the rest of the sidewalk.” Plaintiff explained that she intended to walk up the inclined, wheelchair-accessible ramp from the parking lot to the paved walkway, and while the two sides of such a ramp are usually arched or curved to transition smoothly to the full-height sidewalk, in this instance the ramp’s right corner “appeared to be part of the curb which normally would be laying flat that was upturned instead.” She described the width of the “loose,” upturned “chunk of cement” as “slightly larger than a cinder block,” with a height “[m]uch higher” than anything around it. Asked if she knows how the curb became upturned, she indicated that “[p]eople have had hunches that it may

Myers v Long Island Railroad
Index No. 607004/2020
Page 3

have been snowplowed and knocked the curb up,” but she has no personal knowledge thereof, and does not know which entity, if any, performs snow plowing in that area. She also acknowledged that she does not know who owns “the land beneath the curb,” where the “chunk” of cement came from, or how long the alleged defective condition had been present. Nevertheless, plaintiff testified that the curb was “in a shadow” of a nearby parked car as she walked toward it, and she did not notice it until she tripped on it. She acknowledged that the asphalt parking lot, the sidewalk, and the curb separating them, were all differently-colored. Plaintiff further testified that she is unaware of any complaints being lodged regarding such condition at any time prior to the date of the accident.

Peter Kletchka testified that he is currently employed by the Town’s Department of Public Works (DPW) as a part-time traffic engineer, having returned to a position similar to one he held, full-time, for 35 years, until his retirement in February 2022. He stated that his duties include providing assistance in the defense of claims “brought about the Town that involve the DPW.” He indicated that he has an administrative aide, Noelle Martin, who, under his direction, performs records searches. With regard to the instant matter, Mr. Kletchka indicated that he is aware of a 1988 agreement between the County and the Town setting forth their respective responsibilities for the maintenance of the accident location. He testified that the Town “has obligations with regard to the lighting within the parking lot, striping within the parking lot, pavement asphalt surface within the parking lot, median and concrete work within the parking lot, and not relating to the platform or adjacent platform areas.” Shown a photograph purporting to depict plaintiff sitting on the ground after her fall, and asked if the Town had a duty to maintain the curb to plaintiff’s left, Mr. Kletchka stated that “[i]t is the position of [the Town] that it is not our obligation to maintain that area as it constitutes what we consider the platform area and the adjacent sidewalk.” Prompted to explain further, he acknowledged that the Town has maintenance obligations to the paved area immediately adjacent to the subject curb, “which [he] would consider the actual parking lot surface,” but not to the curb itself. Asked “what information, if any, [the Town] has relied upon” to take such stance, Mr. Kletchka stated, “[i]t is an institutional knowledge that [he is] quoting and relying upon after [his] own personal institutional knowledge, as well as discussions with the highway supervisor,” John Hillenbrand. He explained that he uses the term “institutional knowledge” to describe his “understanding of the department’s obligations throughout the course of [his] career, which include . . . discussions with other individuals in advance of this deposition with regard to that knowledge and understanding.”

Mr. Kletchka further testified that the Town’s “position” on this issue is that the MTA or the LIRR had the responsibility to maintain the location of plaintiff’s fall. However, Mr. Kletchka indicated that upon the Town’s receipt of plaintiff’s notice of claim, “and in the interest of public safety, the Town of Islip perform[ed] minor masonry work at the location in question” on August 22, 2019. He testified that he “would consider that a repair in the interest of public safety,” and, thus, would not be determinative as to whether the Town owns or maintains such location. Mr. Kletchka stated that “it is our position and our history that anything outside the asphalt surface . . . is not within our maintenance responsibilities.” Upon being asked if he has any knowledge of curbs in the parking lot of the Central Islip train station being damaged by snow plows prior to plaintiff’s accident, Mr. Kletchka responded in the affirmative. More specifically, he stated that after he began researching plaintiff’s claim, he discovered a “service notice,” dated September 7, 2017. Mr. Kletchka indicated that such service notice recorded that a person with the name “Gruber” called to complain that “curbs and pavement” at the

Myers v Long Island Railroad
Index No. 607004/2020
Page 4

Central Islip train station had been damaged by plows. He acknowledged that the service notice also noted complaints of large concrete pieces in the parking lot of the train station. Mr. Kletchka testified that the service notice directed a crew from the highway division of the DPW to “pick up the concrete in question,” and recorded that such work was completed on September 11, 2017. However, he stated that he has no indication that any of the damaged curbs was repaired at that time. Mr. Kletchka explained that, “as a standard practice,” the snowplowing of parking lots is “done by rented equipment and outside vendors” hired by the Town. He noted that while Town “highway employees” would inspect the work done by the vendors “during the course of addressing the weather event,” the Town did not conduct regular inspections of the parking lots, nor did it keep records of its inspections. Shown a photograph of the accident location labeled Plaintiff’s Exhibit 2 and asked if the “piece of cement” plaintiff’s foot appears to be resting against in the photograph is “part of what would have been a curb at that location,” Mr. Kletchka replied, “Yes.”

In his affidavit, Mr. Kletchka states that he “caused and supervised a search to be performed for any and all records within the Public Works Department for complaints, work orders, or any documents pertaining to the main concrete island platform located at the Central Islip Railroad Station, Central Islip, New York, at or near the subject accident location for a period of 3 years prior to May 6, 2019.” He also indicates that “[a]t [his] direction, Noelle Martin, Administrative Aide, performed a search for any and all work orders, complaints and documents related to pertaining to the main concrete island platform located at the Central Islip Railroad Station.” Mr. Kletchka avers that the searches “revealed only a work order from September 7, 2017, indicating broken curbs with loose cement that was picked up and removed on September 11, 2017,” but found “no written notice of any defects or complaints regarding the curbs and or sidewalks at the Central Islip Railroad Station prior to May 6, 2019.”

In her affidavit, Noelle Martin states that she is an administrative aide with the Town’s DPW, and that at the request of Mr. Kletchka she “conducted a search of any and all records within the [DPW] for any written complaints, work orders, or any documents pertaining to the main concrete island platform located at the Central Islip Railroad Station, Central Islip, New York, at or near the subject accident location for a period of 3 years prior to May 6, 2019.” Ms. Martin indicates that “[n]o written notice and/or complaints or work orders and/or documents were found except a work order from September 7, 2017, indicating broken curbs with loose cement that was picked up and removed on September 11, 2017.”

In her affidavit, Teresa Bogardt states, in relevant part, that she has been employed by the Town as “the assistant to the Town Clerk” since 2009. She indicates that the “Town Clerk’s office maintains a ‘Notice of Defect’ logbook . . . [which] contains any written notice of any defect that has been received by the Town Clerk’s office,” and that she is “charged with the responsibility of keeping an indexed record of all written notices of defective conditions received by the Town Clerk.” Ms. Bogardt avers that she “personally made a search of the Town Clerk’s records for any written notice of an alleged defect at the Central Islip Railroad Station” in the five years preceding the accident date, and “found no written notice or written complaint or other written document of any defective condition at Central Islip Railroad Station concerning the subject main concrete island platform or curbs or aprons thereat.” Thus, she states that neither the Town Clerk’s office, nor the Town Attorney’s office, received prior written notice of the subject defect.

Myers v Long Island Railroad
Index No. 607004/2020
Page 5

Bernardo Gomez testified that he is employed by the “MTA LIRR” as “an assistant engineer for the track department.” He stated that he is “responsible for the vegetation management program,” that he assists with “cleaning up multiple stations,” and that his department “also do[es] a lot of crossings paving.” Mr. Gomez indicated that he is familiar with the subject train station, having used it to commute to and from his employer’s Hillside maintenance facility five days a week in the years spanning 2018 to 2021. Asked if he is “familiar with, in any way, the maintenance and repair responsibilities with regard to the parking lot area that is adjacent to the Central Islip train station and the curb and sidewalk area that is adjacent to the parking lot area,” he answered in the affirmative. Mr. Gomez further testified that he “did some research because they asked [him] to put together some documents . . . and one of them was an aerial map to show where the Long Island Rail Road ends, and it shows clearly where the line ends and it’s way before the concrete walkway that is adjacent to the station.” He explained that such aerial map is generated by a “Graphical Information System” (GIS) program “within the internet of the Long Island Rail Road,” and can be used to see “where exactly the property line is for the tracks.” He stated that the GIS uses “valuation maps” to figure out “where exactly the property line of the LIRR would end and start,” and that he has no reason to believe that the information is inaccurate. Mr. Gomez testified that any area within the orange lines of the map “would be the responsibility of the Long Island Rail Road and then [its] forces would go out and do the repair.” Asked if, pursuant to his research, the accident location was within the orange lines of the GIS map, or was “the responsibility of the Long Island Rail Road or the MTA to maintain or repair” prior to the incident date, he replied in the negative. Pressed to state which entity had the responsibility to maintain the accident site, Mr. Gomez testified that it “would be the town or the municipality of that location.” He further testified that neither the MTA nor the LIRR had any responsibility for snow plowing or snow removal at the subject station.

An agreement between the County and the Town, dated June 1, 1988, provides, in relevant part, that the County “agrees to assume and pay all of the costs incurred associated with the construction of [the Central Islip train station],” that “it would be mutually beneficial to transfer maintenance of [the Central Islip train station] to the Town” and that the Town “agrees to accept and properly maintain, at its own expense, the completed physical and operational improvements in accordance with sound engineering principles.”

A party moving for summary judgment “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 Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (see *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

Myers v Long Island Railroad
Index No. 607004/2020
Page 6

“To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant’s part to plaintiff, breach of the duty and damages” (*Orlando v New York Homes By J & J Corp.*, 128 AD3d 784, 785, 11 NYS3d 76 [2d Dept 2015], quoting *Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576, 934 NYS2d 43 [2011]). Liability for a dangerous or defective condition on property is generally “predicated upon ownership, occupancy, control, or special use of the property” (*Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019] [internal quotations and citations omitted]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]). A defendant who moves for summary judgment “has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence” (*Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137, 61 NYS3d 523 [2017]). A defendant has constructive notice of a hazardous condition on property “when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it” (*Torre v Aspen Knolls Estates Home Owners Assn., Inc.*, 150 AD3d 789, 790, 54 NYS3d 84 [2d Dept 2017]; *see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]).

However, a municipality that has adopted a prior written notice law “cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies” (*Douglas v City of Mount Vernon, New York*, 226 AD3d 973, 209 NYS3d 174 [2d Dept 2024] [internal citations and quotation marks omitted]). “To be entitled to summary judgment, the municipality must first establish that it lacked prior written notice of the alleged defect[, after which] the burden shifts to the 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” (*id.*). A “municipality’s actual or constructive notice of the allegedly defective condition does not satisfy the prior written notice requirement” (*Dutka v Odierno*, 145 AD3d 661, 663, 43 NYS3d 409 [2d Dept 2016]; *see DeVita v Town of Brookhaven*, 128 AD3d 759, 9 NYS3d 115 [2d Dept 2015]). Islip Town Code § 47A-3 (A) provides, in relevant part,

No civil action shall be maintained against the Town of Islip or any of its employees for damages or injuries to persons or property sustained by reason of any highway, street, bridge, culvert, sidewalk, crosswalk, highway or street marking, traffic sign, signal or device, tree, tree limb or other property owned or maintained by the Town of Islip being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, out of repair, unsafe, dangerous or obstructed condition of such highway, street, bridge, culvert, sidewalk, crosswalk, highway or street marking, traffic sign, signal or device, tree, tree limb, or other property was actually given to the Town Clerk or Commissioner of Public Works and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger, obstruction or condition complained of . . .

Myers v Long Island Railroad
Index No. 607004/2020
Page 7

Here, defendants have each established prima facie case their entitlement to summary judgment (see **Rampersaud v Metro. Transp. Auth. of the State of New York**, 73 AD3d 888, 899 NYS2d 858 [2d Dept 2010]; see generally **Alvarez v Prospect Hosp.**, 68 NY2d 320, 508 NYS2d 923). The Town demonstrated, prima facie, that despite its contractual duty to maintain the railroad station in question, it did not receive prior written notice of the alleged dangerous condition, barring plaintiff's suit (see Islip Town Code § 47A-3 [A]). The prior written notice provisions of Islip Town Code § 47A-3 (A) apply to property "owned or *maintained* by the Town" (emphasis added) and, thus, cover the accident location. As to defendants MTA and the LIRR, Mr. Gomez testified that neither entity owned the locus of plaintiff's accident, or possessed a duty to repair or maintain it. The burden then shifted to any opposing party to raise a triable issue (see generally **Vega v Restani Constr. Corp.**, 18 NY3d 499, 942 NYS2d 13).

In opposition, plaintiff submits her own affidavit and a copy of the Town's "service notice" related to the September 2017 complaint. Plaintiff argues that the September 2017 "service notice," concerning broken concrete strewn about the subject parking lot, proves that "there was a prior complaint from a concerned citizen," and that the Town merely removed the concrete pieces at that time, negligently failing to also repair the broken curbs from which the concrete pieces ostensibly came. This argument is inadequate to raise a triable issue. Significantly, plaintiff neglects to provide authority for her contention that a "service notice"—generated by the Town after it received a "call" from a resident named "Gruber"—fulfilled the requirements for providing "prior written notice" to the Town. Specifically, plaintiff submits no evidence that the Town received sufficiently-specific written notice of the subject condition, delivered in proper form, to the correct department, prior to her accident date (see **Gorman v Town of Huntington**, 12 NY3d 275, 879 NYS2d 379 [2009]). Prior written notice of a dangerous or defective condition on municipal property must strictly conform to the mandates of the associated statute, and may not be provided to a municipality by alternative means, such as telephonically, or by submission of the written complaint to a division of the municipality different from those specified in the relevant statute, rule, or regulation (see **Szuba v City of Buffalo**, 193 AD3d 1386, 147 NYS3d 785 [4th Dept 2021]). As applies to the Town here, prior written notice must be "actually given to the Town Clerk or Commissioner of Public Works." Thus, the telephonic communication received from "Gruber" in 2017 did not provide prior written notice of the alleged property condition at issue here (see **Wilson v Inc. Vil. of Hempstead**, 120 AD3d 665, 991 NYS2d 651 [2d Dept 2014]). "[E]vidence that certain residents had made phone calls to the Town . . . [does] not create a triable issue of fact as to prior written notice, which cannot be established by verbal complaints" (**Panzavecchia v County of Nassau**, 211 AD3d 846, 848, 179 NYS3d 763 [2d Dept 2022]). Therefore, plaintiff has failed to demonstrate that the Town received prior written notice of the alleged condition.

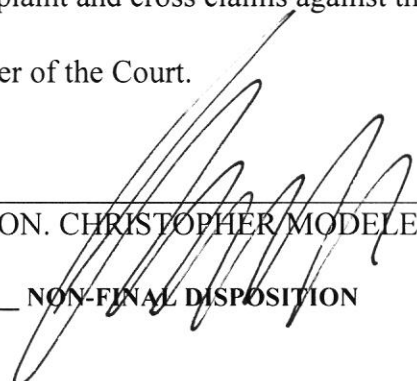
Turning to plaintiff's other argument, namely that Town-owned or Town-hired snow plows created the subject condition by breaking and uplifting the concrete curb upon which she tripped, such contention is speculative (see generally **Maloney v Consol. Edison Co. of New York, Inc.**, 290 AD2d 540, 736 NYS2d 630 [2d Dept 2002]). While it is undisputed that a resident named "Gruber" reported, via telephone call to the Town on September 7, 2017, that "curbs and pavement" at the subject premises were "damaged from plows," and that "large concrete pieces have been left in parking spaces," there is no allegation in the service notice that such plows were owned or hired by the Town. Even assuming, arguendo, that "Gruber" had witnessed snow plows striking curbs at the Central Islip train station during

Myers v Long Island Railroad
Index No. 607004/2020
Page 8

some winter storm, there is no evidence specifying which curbs at the train station were struck or when. Notwithstanding the foregoing, the previously-mentioned "service notice" also recorded that "all concrete debris [was] removed" by the Town on September 11, 2017. Thus, plaintiff submits no evidence, beyond speculation, that the defective condition that allegedly caused her fall in 2019 was in any way related to the alleged dangerous condition that existed in 2017. As to the Railroad defendants, plaintiff offers only the barest of arguments in opposition to their motion, essentially contending that material issues remain as to whether they "fulfilled their duty to maintain the parking lot by failing to repair the damage to the cement curb created when the Town plowed the parking lot where the plaintiff fell." Having submitted no evidence that the Railroad defendants owned, or had a duty to maintain, the location of plaintiff's accident, such argument lacks merit. Accordingly, the motion by the Town for summary judgment dismissing the complaint and cross claims against it, and the motion by the Railroad defendants for summary judgment dismissing the complaint and cross claims against them, are granted.

The foregoing constitutes the decision and Order of the Court.

Dated: June 21, 2024



HON. CHRISTOPHER MODELEWSKI, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION