

Diaz v City of Yonkers
2025 NY Slip Op 35352(U)
February 5, 2025
Supreme Court, Westchester County
Docket Number: Index No. 62610/2023
Judge: Damaris E. Torrent
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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
LUIS DIAZ,

Plaintiff,

-against-

CITY OF YONKERS, EPISCOPAL CHURCH
PROTESTANT, ST. ANDREWS MEMORIAL CHURCH
and IGLESIA EPISCOPAL SAN ANDRES,

Defendants.

-----X
DAMARIS E. TORRENT, A.J.S.C.

DECISION AND ORDER

Index No.: 62610/2023

Motion Date: 11/26/2024¹

Seq. Nos. 1 – 3

The following papers numbered 1 to 43 were read on (Seq. No. 1) the motion by defendant City of Yonkers (City) for an order granting summary judgment dismissing the complaint against it; (Seq. No. 2) the motion by defendants St. Andrews Memorial Church and Iglesia Episcopal San Andres (Church) for an order granting summary judgment dismissing the complaint against them; and (Seq. No. 3) the motion by Church for an order granting them leave to correct the record on their prior motion by submitting a proposed Memorandum of Law:

<u>PAPERS</u>	<u>NUMBERED</u>
(Seq. No. 1) Notice of Motion / Affirmation (Levinson) / Exhibits A – L / Statement of Material Facts / Memorandum of Law	1 – 16
Affirmation in Opposition (Mittman) / Response to Statement of Material Facts / Exhibits A – B	17 – 20
Reply Affirmation (Levinson)	21

¹ Motion Seq. No. 2 was marked submitted in the Motion Support Office on December 17, 2024, evidently in response to a request for adjournment for the purpose of submitting reply papers contained in a letter dated November 6, 2024 (NYSCEF Doc. #78). As no reply papers were submitted, and the party requesting the adjournment instead filed a separate motion (Seq. No. 3), the Court considers these motions together upon all papers submitted on or before the return date stated, with the single exception indicated in note 2 below.

(Seq. No. 2) Notice of Motion / Affirmation (Frey) / Exhibits 1 – 11 / Statement of Material Facts	22 – 35
Affirmation in Opposition (Mittman) / Response to Statement of Material Facts / Exhibits A – D	36 – 41
(Seq. No. 3) Notice of Motion / Affirmation (Frey)	42 – 43 ²
Letter Opposition (Mittman)	44

Upon the foregoing papers, City's motion for summary judgment (Seq. No. 1) is granted; Church's motion for summary judgment (Seq. No. 2) is granted; Church's motion to correct the record (Seq. No. 3) is denied; and the complaint is dismissed.

In this action for personal injuries arising out of a trip and fall accident that occurred on a sidewalk/curb abutting premises owned by Church in Yonkers, Westchester County, City (Seq. No. 1) and Church (Seq. No. 2) each move for an order granting summary judgment dismissing the complaint against them. Church separately moves (Seq. No. 3) for an order granting leave to correct the record on their motion for summary judgment by filing a proposed Memorandum of Law. Due to the nature of the relief sought, the Court considers the motions in reverse sequence order.

Seq. No. 3: Motion for Leave to Correct the Record

Church seeks leave to correct the record on their motion for summary judgment by filing a proposed Memorandum of Law, asserting that the memorandum was inadvertently omitted from their prior filing. Church, by the affirmation of their attorney, submit that the memorandum was prepared with the moving papers and is referenced in the Notice of Motion and the attorney affirmation, and that there can be no claim of surprise as to the arguments contained in the memorandum, as same are set forth in the sections of the attorney affirmation in which the

² As indicated in the Affirmation in Support of Seq. No. 3, Exhibit 1 thereto is a Memorandum of Law which, for the reasons set forth herein, was not read or considered in connection with these motions.

memorandum is referenced. Church thus concludes that the Court should permit the omission to be corrected pursuant to CPLR 2001, and to set the terms upon which such relief is granted, in the form of an extension of time for all parties to file opposition to the motion for summary judgment.

After the return date set in the Notice of Motion passed, and in the absence of any affirmation or memorandum in opposition, the motion was marked submitted without opposition in the Motion Support Office. However, upon examination of the papers filed to NYSCEF, the Court located a letter filed by plaintiff's counsel (NYSCEF Doc. # 82, "Letter / Correspondence to Judge" and NYSCEF Doc. #83, "Notice of Rejection") in which plaintiff objects to the relief sought on the motion. In the interest of deciding the motion upon all arguments presented, the Court considers the position taken in this letter as it would had an affirmation or memorandum been filed. Plaintiff essentially objects to the relief sought on the ground that permitting Church to file its memorandum and extending the return date of the underlying summary judgment motion to permit the filing of papers in opposition thereto would cause unwarranted delay. Plaintiff thus concludes that the Court should deny this motion and consider the underlying summary judgment motion on the papers filed.

Although the omission of the proposed memorandum was clearly inadvertent, the Court finds that extending the return date on the underlying summary judgment motion would cause unnecessary delay and a waste of judicial resources for the reasons set forth below in the discussion of Seq. No. 2. This motion thus is denied.

Seq. No. 2: Church's Motion for Summary Judgment

By Notice of Motion filed on September 20, 2024, Church seeks an order granting summary judgment dismissing the complaint against it. Church contends that, as the owner of premises adjoining a municipal sidewalk, it is not liable to plaintiff in damages because the relevant

City ordinance does not impose tort liability on an adjoining landowner for failure to maintain a sidewalk. Church further contends that the record reveals no evidence that it created the claimed defect or made special use of the sidewalk. Finally, Church contends that Section 103-1 of the City of Yonkers Code (the Code) does not apply to this matter, as the accident occurred on a curb and not on a sidewalk. Church thus concludes that the motion should be granted.

In opposition, plaintiff asserts that the motion must be denied on procedural grounds, as it was filed more than 60 days after the filing of the Note of Issue without a showing of good cause for the delay, and because the moving papers reference a memorandum of law which was not filed. Plaintiff further asserts that the Code is applicable to this matter because the subject accident was caused by a defect on the sidewalk and curb, and thus that Church is liable to plaintiff for its failure to maintain the sidewalk in good repair and safe condition. Plaintiff contends that Church's motion lacks any showing of lack of notice of the subject condition, as the evidence shows that Church had no inspection process in place and the subject defect was present for several years prior to the accident. Plaintiff thus concludes that the motion should be denied.

The Court has fully considered the submissions of the parties.

The Court must first resolve plaintiff's procedural objections to the motion. As an initial matter, the absence of the referenced memorandum of law did not prevent plaintiff from opposing the motion, as the arguments advanced in support of the motion are sufficiently laid out in the supporting Affirmation. Indeed, plaintiff in opposition elected to specifically oppose several of the arguments set forth in the supporting Affirmation. Plaintiff's assertion that the motion should be denied for failure to file the referenced memorandum is not persuasive.

As for the timeliness of the motion, the Trial Readiness Order entered on July 3, 2024 (NYSCEF Doc. #32) directed that the Note of Issue be filed within 20 days of the entry thereof

(i.e., on or before July 23, 2024), and that motions for summary judgment be filed within 60 days following the filing of the Note of Issue. This 60-day limitation is set forth in the Westchester Supreme Court Civil Case Management Rules. Plaintiff filed the Note of Issue on July 17, 2023 (NYSCEF Doc. # 33). Pursuant to the County Rules, motions for summary judgment thus were due on or before September 16, 2024.³ Church's motion, filed four days later, on September 20, 2024, thus is untimely pursuant to the County Rules and requires "a satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]).

In this matter, a satisfactory explanation for the extremely short delay is contained in paragraph 6 of the Affirmation in support of the motion (NYSCEF Doc. # 52), wherein Church's attorney affirms that "... on July 26, 2024, the plaintiff filed a Note of Issue and Statement of Readiness. This application is filed within this Court's sixty-day time limit for the filing of dispositive motions." No further explanation is required to permit the Court to exercise its discretion to consider the motion on the merits, as the late filing was obviously the result of an error in calendaring the filing date of the Note of Issue – July 26 as opposed to the actual filing date, July 17. Given that the extremely short delay was clearly the result of a calendaring error, and not any attempt to gain a strategic advantage or any lack of respect for the applicable rules, the Court is not persuaded that the purpose of the requirement of a showing of good cause in CPLR 3212(a) – "to end the practice of eleventh-hour summary judgment motions" (*Brill*, 2 NY3d at 652) – would be served by denial of the motion without consideration of the merits. Indeed, for the reasons set forth below, denial of the motion on timeliness grounds would result in a profound waste of resources for the parties and the Court, as this matter would be advanced to the trial

³ The 60th day after the filing of the Note of Issue, September 15, 2024, was a Sunday (*see* General Construction Law § 25-a).

calendar, and presumably to trial, when as a matter of law, irrespective of any jury verdict, the inevitable result is the dismissal of plaintiff's claims against Church.

Church correctly contends that it cannot be liable to plaintiff in damages because the applicable ordinance, Section 103-1 of the City of Yonkers Code, which imposes a duty to maintain sidewalks upon the owner of adjoining premises, does not specifically state that a breach of that duty will result in the landowner's liability to persons injured by such breach. It is well settled that "in order for a statute or ordinance to impose tort liability upon an abutting owner for injuries caused by a sidewalk defect, the language thereof must not only charge the landowner with a duty, it must also specifically state that a breach of that duty will result in the landowner's liability to those who are injured" (*Lagawo v Myers*, 149 AD3d 1056, 1056 [2d Dept 2017], citing *Dalder v Incorporated Vil. of Rockville Ctr.*, 116 AD3d 908, 909 [2d Dept 2014]; *Conlon v Village of Pleasantville*, 146 AD2d 736, 737 [2d Dept 1989]). Church's moving papers also include evidence sufficient to establish prima facie that it did not create the defective condition or cause it to occur by special use of the sidewalk (see *Daniel v Khadu*, 190 AD3d 817 [2d Dept 2021]; *Santelices v City of New York*, 170 AD3d 914 [2d Dept 2019]).

In opposition to the motion, though specifically quoting the language of Section 103-1 in connection with the assertion that the Code is applicable because the subject accident occurred on the sidewalk and not solely on the curb, plaintiff did not address the absence of language imposing tort liability on the adjoining landowner and did not address Church's prima facie showing that it neither created the subject condition nor caused it to occur by a special use of the sidewalk. A party's failure to oppose any part of a summary judgment motion on which the movant has met its prima facie burden entitles the movant to judgment as a matter of law as to the unopposed branch of the motion (*Genovese v Gambino*, 309 AD2d 832 [2d Dept 2003]). Further, "facts appearing

in the movant's papers which the opposing party does not controvert may be deemed to be admitted" (*Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]).

In the absence of any triable issue of fact, Church's motion is granted, and the complaint against it is dismissed.

Seq. No. 1: City's Motion for Summary Judgment

By Notice of Motion timely filed on July 26, 2024, City seeks an order granting summary judgment dismissing the complaint against it. City contends that the instant action is subject to a prior written notice requirement found in Section 24-11 of the Charter of the City of Yonkers (the Charter), which applies to alleged conditions of disrepair on, inter alia, streets and sidewalks, and that there was no such prior written notice of the condition alleged to have caused plaintiff's accident. City further contends that the record contains no evidence which could demonstrate that an exception to the prior written notice requirement is applicable. City thus concludes that the motion should be granted.

In opposition, plaintiff contends that the prior written notice requirement in the Charter is not applicable to this matter, as the Charter does not apply to a curb, and plaintiff's accident was caused by a defective condition on both the sidewalk and the curb. Plaintiff does not address City's prima facie showing of the absence of prior written notice and does not contend that the record contains any evidence demonstrating that an exception to the prior written notice requirement applies. Rather, plaintiff asserts that the sidewalk and the curb are separate and apart, and the absence of any mention of a curb in the Charter renders the prior written notice requirement inapplicable. Plaintiff thus concludes that triable issues of fact require denial of the motion.

In reply, City submits that Courts evaluating this argument with respect to similar prior written notice statutes have consistently concluded that a curb is in fact part of the street and the

sidewalk and thus is included in the prior written notice requirement. City thus concludes that its motion should be granted.

The Court has fully considered the submissions of the parties.

Section 24-11 of the Charter of the City of Yonkers reads, in relevant part, “No civil action shall be maintained against the City... for... injury to person... sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any portion of the foregoing... being out of repair, unsafe, and dangerous... unless it appears that written notice of the... condition was actually given to the Commissioner of the Department of Public Works or any person authorized by the Commissioner to receive such notice by certified or registered mail... .” Contrary to plaintiff’s assertion, it is well settled that statutes and codes containing this sort of language impose a prior written notice requirement with respect to defects alleged to exist on curbs (*see e.g. Mellor v Village of Elmsford, N.Y.*, 101 AD3d 1092 [2d Dept 2012] [applying prior written notice requirement in Village Law § 6-628 with respect to “any street, highway, bridge, culvert, sidewalk or crosswalk” to an allegedly defective curb]). Plaintiff’s attempt to distinguish a curb from a street or a sidewalk “would require a strained and unrealistic construction or interpretation” of the law (*Skelly v Village of Port Chester*, 6 AD2d 717, 717 [2d Dept 1958]).

City’s moving papers demonstrate prima facie that it received no prior written notice of the alleged defective condition of the sidewalk and curb. Plaintiff in opposition failed to raise a triable issue of fact as to whether prior written notice was given, and failed to submit any evidence to demonstrate that an exception to the prior written notice requirement is applicable. The motion thus is granted, and the complaint against City is dismissed.

Accordingly, it is hereby

ORDERED that the motion of defendants St. Andrews Memorial Church and Iglesia Episcopal San Andres (Seq. No. 3) for leave to correct the record on a prior motion is denied; and it is further

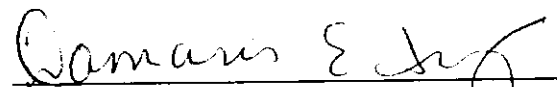
ORDERED that the respective motions of defendants City of Yonkers (Seq. No. 1) and of St. Andrews Memorial Church and Iglesia Episcopal San Andres (Seq. No. 2) for summary judgment are granted, and the said defendants shall have judgment dismissing the complaint against them, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that defendants shall serve a copy of this Decision and Order, with notice of entry, upon plaintiff, and shall file proof of said service via NYSCEF.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 5, 2025
White Plains, New York

ENTER:


HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF