

<b>Montoya v Village/Town of Mount Kisco</b>
2017 NY Slip Op 33441(U)
July 21, 2017
Supreme Court, Westchester County
Docket Number: Index No. 67304/16
Judge: William J. Giacomo
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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  
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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MARTHA MONTOYA and ALONSO MONTOYA,  
  
Plaintiff,

– against –

Index No. 67304/16

VILLAGE/TOWN OF MOUNT KISCO and THE UNITED  
METHODIST CHURCH OF MOUNT KISCO,  
  
Defendants.

**DECISION & ORDER**

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In this action to recover damages for personal injuries, etc., the defendants Village/Town of Mount Kisco and The United Methodist Church of Mount Kisco separately move for summary judgment dismissing the complaint pursuant to CPLR 3212.

**Papers Considered**

1. Notice of Motion/Affirmation of Amanda M. Zefi, Esq./Exhibits A-D;
2. Affirmation of Gerard A. Falco, Esq. in Opposition/Exhibits A-D;
3. Reply Affirmation Amanda M. Zefi, Esq.;
4. Notice of Motion/Affirmation of Michael Driscoll, Esq./Exhibits A-L;
5. Affirmation of Gerard A. Falco, Esq. in Opposition/Exhibits A-C;
6. Reply Affirmation of Christopher J. Walsh, Esq.

**Factual and Procedural Background**

On April 29, 2016, Martha Montoya tripped and fell on the sidewalk adjacent to the premises located at 31 Smith Avenue in the Village/Town of Mount Kisco, owned by the United Methodist Church of Mount Kisco.

*The Village's Motion for Summary Judgment*

The Village/Town of Mount Kisco ("Village") moves for summary judgment dismissing the complaint insofar as asserted against it on the grounds that it did not

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receive prior written notice of any defect or dangerous condition on the sidewalk. The Village further argues that it did not create any defect in the area of the accident.

In support, the Village submits an affidavit of Edward W. Brancati, Village Manager. As manager, Mr. Brancati's duties include maintaining all prior written complaints as to roadways and sidewalks and notices of claim. All such notices are kept in a binder in Mr. Brancati's office. Mr. Brancati attests that he conducted a search of all prior written notices and notices of claim pertaining to the accident location dating back to the year 2000. According to Mr. Brancati, the Village has never received prior written notice or a notice of claim regarding the location where plaintiff's accident occurred. Mr. Brancati further states that the Village did not perform any work in the area.

The Village also submits an affidavit of Anthony Markus, its Deputy Mayor and a member of the Board of Trustees. Mr. Markus states that all members of the Board of Trustees transfer all prior written notices or notices of claim to Mr. Brancati for recordkeeping. Mr. Markus attests that no member of the Board of Trustees received prior written notice of any alleged defect in the area where plaintiff's accident occurred.

The Village further submits an affidavit of Joseph Luppino, the Highway Foreman. His duties include inspecting all roads located in the jurisdiction of the Village to ensure that all roads and sidewalks are properly maintained. Mr. Luppino attests that the policy of the Village is to spray paint sidewalk flags with white spray paint, not yellow spray paint. In addition, he states that the Village did not perform any work on, near, or around the area where plaintiff's accident occurred.

In opposition, plaintiffs argue that the Village failed to demonstrate entitlement to summary judgment. Plaintiffs submit photographs depicting a sidewalk flag that is highlighted with yellow spray paint. Plaintiffs also attach each defendant's response to demands for discovery, which include photographs of the sidewalk. These photographs reveal both yellow and blue spray paint on other portions of the sidewalk in question. Plaintiffs contend that the photographs exhibiting a painted yellow line "clearly suggests that the line could only have been painted by or on behalf of the Village or the adjacent landowner since there are no other known parties in interest".

#### *The United Methodist Church's Motion for Summary Judgment*

The United Methodist Church moves for summary judgment dismissing the complaint on the grounds that it did not have a duty to maintain the sidewalk and it did not create the defective condition or confer a special benefit of the sidewalk.

In support, the United Methodist Church submits an affidavit of its pastor, Parker H. Prout, as well as Art Covey and Andre Ferrara. All three attest that the church did not spray paint the sidewalk or make any repairs on the sidewalk, as it was the Village's responsibility to maintain and repair the sidewalk. Pursuant to Town/Village Code section 93-3, repair and reconstruction of the sidewalk is the responsibility of the

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Town/Village and that the code does not impose tort liability on the owners of any abutting property.

Pastor Prout attests that he did not witness plaintiff's accident but did observe plaintiff after the accident allegedly occurred. Upon a review of the church's billing records and relevant documents, the church never repaired or replaced the adjacent sidewalk for ten years prior to the accident.

Mr. Covey attests that he has been the Sexton of the church since 1998, except for the period between 2010 and 2011. His duties included performing all maintenance on the church and the grounds. Mr. Covey states that he never spray-painted a yellow line on the sidewalk and did not perform any repairs or construction on the sidewalk. He never directed anyone to perform repairs, maintenance or construction on the sidewalk or the surrounding area.

Mr. Ferrara states that he was the Sexton of the church for 2010 and 2011, in the absence of Mr. Covey. His duties included performing all maintenance on the church and the grounds. Mr. Ferrara states that he never spray-painted a yellow line on the sidewalk and did not perform any repairs or construction on the sidewalk. He also never directed anyone to perform repairs, maintenance or construction on the sidewalk or the surrounding area.

In opposition, plaintiffs argue that the United Methodist Church's motion is premature. Plaintiffs argue that the paint placed over the defect in the sidewalk constitutes a repair which the church "is liable for if they took such action".

Plaintiffs submit photographs depicting the sidewalk, a copy of the church's response to discovery demands, and a copy of the church's website listing its staff. Plaintiffs claim that someone with a longer affiliation with the church, other than the pastor or sextons would be better suited to comment on the sidewalk.

## Discussion

A party seeking summary judgment has the burden of tendering evidentiary proof in admissible form to demonstrate the absence of material issues of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the moving party establishes prima facie entitlement to judgment as a matter of law, the burden then shifts to the opposing party to demonstrate that genuine issues of fact exist to preclude summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

### I. The Town's Motion for Summary Judgment

"Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street or sidewalk unless it has received written notice of the defect, or an exception to the written notice requirement applies" (*Abreu-Lopez v Incorporated Vil. of Freeport*, 142

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AD3d 515, 516 (2d Dept 2016) *citing Cimino v County of Nassau*, 105 AD3d 883, 884 [2d Dept 2013]). "Exceptions to the prior written notice requirement have been recognized where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it" (*Braver v Village of Cedarhurst*, 94 AD3d 933, 934 [2d Dept 2012]; *Cimino v County of Nassau*, 105 AD3d at 884).

Here, the Village established its prima facie entitlement to judgment as a matter of law by submitting sufficient evidence to demonstrate that it did not have prior written notice of the alleged sidewalk defect or create the condition through an affirmative act of negligence (see Village/Town of Mount Kisco Code § 93-47; see also *Monopoli v County of Nassau*, 292 AD2d 356,357 [2d Dept 2003] [holding that defendant made a prime facie showing of its entitlement to summary judgment by submitting an affidavit to the effect that the County had no prior written notice of the existence of a defect in the sidewalk]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's argument that the yellow spray paint indicates that the Town/Village may have conducted a repair or had notice of the defect is conclusory and speculative (see *Patti v Town of N. Hempstead*, 23 AD3d 362, 363 [2d Dept 2005] [holding that the plaintiff's speculative and unsupported contention that one of the defendants must have repaired the sidewalk where the accident occurred and therefore created the allegedly dangerous condition was insufficient to raise a triable issue of fact]). The Village demonstrated that it uses white spray paint, not yellow spray paint, to make markings on sidewalks. Further, even if the Village had actual or constructive notice of the allegedly defective condition, that "does not override the statutory requirement of prior written notice" (see *Wolin v Town of N. Hempstead*, 129 AD3d 833, 836 [2d Dept 2015]).

## II. The United Methodist Church's Motion for Summary Judgment

"Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality and not the abutting landowner" (*Biondi v County of Nassau*, 49 AD3d 580 [2d Dept 2008]).

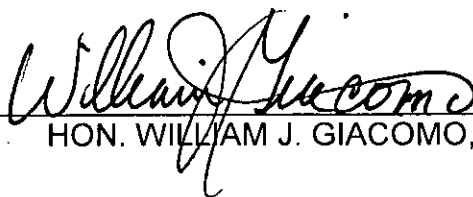
Here, the United Methodist Church demonstrate entitlement to judgment as a matter of law. Pursuant to the Town/Village of Mount Kisco Code § 93-3, it is the Village's responsibility to repair any defects in the sidewalk (see Village/Town of Mount Kisco Code § 93-3). In opposition, plaintiff failed to raise a triable issue of fact. Although exceptions to the general rule do exist, they are not applicable to the present case as there is no evidence that the church repaired the sidewalk, caused a defect to the sidewalk from special use, or breach a specific ordinance or statute (*Biondi*, 49 AD3d at 580-81). Plaintiffs' argument that spray-painting the sidewalk constitutes a repair is without any merit. The affidavits of individuals working at the church reveal that the church did not spray-paint the sidewalk. Inasmuch as the United Methodist Church did not have a duty to repair the sidewalk, the motion for summary judgment is granted.

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**Conclusion**

Based upon the foregoing, the motion of the defendant Village/Town of Mount Kisco for summary judgment dismissing the complaint is GRANTED (motion sequence #1); and the motion of the defendant The United Methodist Church of Mount Kisco for summary judgment dismissing the complaint is GRANTED (motion sequence #2); and the complaint is dismissed in its entirety.

Dated: White Plains, New York  
July 21, 2017



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HON. WILLIAM J. GIACOMO, J.S.C.