

<b>Mayer v Roc-Kisco Assoc. LLC</b>
2017 NY Slip Op 33490(U)
May 24, 2017
Supreme Court, Westchester County
Docket Number: Index No. 59963/2015
Judge: Lawrence H. Ecker
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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  
DOLORES MAYER,

Plaintiff,

-against-

ROC-KISCO ASSOCIATES, LLC and  
VILLAGE/TOWN OF MOUNT KISCO,

Defendants.

**INDEX NO. 59963/2015  
DECISION/ORDER**

**Mot. Seq. 1  
Submission Date: 4/12/17**

-----X  
ECKER, J.

The following papers numbered 1 through 16 were considered on the motion of VILLAGE/TOWN OF MOUNT KISCO ("the Village/Town"), made pursuant to CPLR 3212, for an order granting summary judgment and dismissing the complaint brought by DOLORES MAYER ("plaintiff") and all cross-claims asserted by ROC-KISCO ASSOCIATES, LLC ("Roc-Kisco"):

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion, Affirmation, Affidavit, Exhibits A-G, Memorandum of Law	1 - 11
Affirmation in Opposition [Plaintiff], Exhibits A-B <sup>1</sup>	12 - 14
Affirmation in Opposition [Roc-Kisco]	15
Reply Affirmation	16

Upon the foregoing papers, the court determines as follows:

Plaintiff alleges she sustained physical injuries when she tripped and fell on May 28, 2014 while traversing the sidewalk in front of premises known as 359 East Main Street, Mt.

<sup>1</sup> Court rules direct that plaintiff use external, numbered exhibit tabs.

Kisco, New York owned by Roc-Kisco, after she had visited her dentist, who maintained an office at that location. The issues raised are the location of the height differential which plaintiff testified in her deposition caused her to trip, and whether that height differential was on the part of the sidewalk owned and controlled by the Village/Town or Roc-Kisco.

It is not disputed by the parties that the Village/Town did not receive prior written notice of the alleged defect, as required pursuant to Village Law § 6-628 and Village Code § 93-47. Rather, plaintiff relies upon one of the two exceptions to the prior written notice law, namely that the defect in the sidewalk was caused by the Village/Town's repair of same. Plaintiff contends the height differential between that part of the sidewalk that appears to be owned and controlled by Roc-Kisco was uneven where it meets with that part of the sidewalk that was owned and maintained by the Village/Town. The Town/Village's foreman, Giuseppe Luppino, in his deposition, testified the records show the sidewalk was last worked on by the Village/Town in 1990, and that the location where plaintiff testified she fell is not on the Village/Town portion of the sidewalk. Joe Pizzimenti testified in his deposition that he was employed by C-Clean Corporation, which does property maintenance for the managing agent for Roc-Kisco, and that in 2010, blacktop work was done by Arrow Blacktop, as shown in the photograph identified by plaintiff as the location of her fall [Village/Town Ex. C].

"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 applies." *Abreu-Lopez v Incorporated Vil. of Freeport*, 142 AD3d 515 [2d Dept 2016]. "Recognized exceptions to the prior written notice requirement exist 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." *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Lopez v Calderone v Lang-Viscogliosi*, 127 AD3d 1143, 1145 [2d Dept 2015]

Given there is no issue of the lack of prior written notice, and no argument that the Village/Town used its portion of the public sidewalk for a "special use" (which is the other exception to the prior written notice rule (See *Schleif v City of New York*, 60 AD3d 926 [2d Dept 2009]), the only manner in which plaintiff, or Roc-Kisco, may affix liability to the Village/Town is if it can be shown that the Village/Town caused the differential in the sidewalk due to its affirmative act of negligence in its repair of same. Here, the evidence, not rebutted, is that the Village/Town performed the last repair to the sidewalk in 1990. As such, this repair is too remote in time to the date of plaintiff's trip and fall.

The affirmative act exception, the only exception at issue here, "is limited to work by the [municipality] that immediately results in the existence of a dangerous condition" *Yarborough v City of New York*, 19 NY3d 726, 728 [2008], quoting *Oboler v City of New York*, 8 NY3d 888, 889 [2007]; *Beiner v Village of Scarsdale*, 149 AD3d 1051 [2d Dept 2017]; *Loghry v Village of Scarsdale*, 149 AD3d 714 [2d Dept 2017].

In *Bielecki v City of New York*, 14 AD3d 301, 302 [1<sup>st</sup> Dept 2005], cited with approval in *Oboler v City of New York*, supra, the Court stated that the affirmative negligence exception to the notice requirement (in that case the New York City Pothole Law) is to be limited to work by the City that "(I)mmediately results in the existence of a dangerous condition. As the Court stated, "If we were to extend the affirmative negligence exception to cases like this one, where it is alleged that a dangerous condition developed over time from an allegedly negligent municipal repair, the exception notice requirement would swallow up the requirement itself, thereby defeating the purpose of the Pothole Law." *Bielecki*, supra at 302. That reasoning is likewise applicable here. *Yarborough v City of New York*, supra; *Lewak v Town of Hempstead*, 147 AD3d 919 [2d Dept 2017]; *Walker v County of Nassau*, 147 AD3d 806 [2d Dept 2017].

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

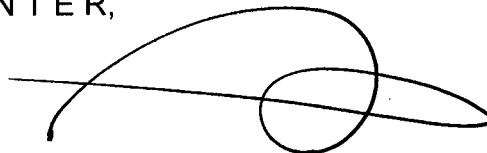
ORDERED that the motion of defendant VILLAGE/TOWN OF MOUNT KISCO, made pursuant to CPLR 3212, for summary judgment and dismissal of the complaint, and all cross-claims, is granted, and the complaint is dismissed, as against it; and it is further

ORDERED that the remaining parties shall appear at the Settlement Conference Part of the Court, Room 1600, on June 27, 2017, at 9:15 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York  
May 24, 2017

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

**Appearances**

Michael Fuller Sirignano, Esq.  
Attorney for Plaintiff  
Via NYSCEF

Thomas M. Bona, P.C.  
Attorneys for Defendant Roc-Kisco Associates, LLC  
Via NYSCEF

Henderson & Brennan  
Attorneys for Defendant Village/Town of Mt. Kisco  
Via NYSCEF