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MUNICIPAL LAW UPDATE

A Gap Between the Metal Portion and the Concrete Portion of a Curb Is Not a "Sidewalk" For Purposes of Imposing Liability On a Property Owner.

Garris v. City of New York, 2009 N.Y. Slip Op. 06649 (1d. Dept. 2009)

After the Plaintiff tripped and fell on a "gap" between the metal portion and the concrete portion of the curb, the Defendant landowner moved for summary judgment dismissing the complaint on the grounds that the area where the Plaintiff fell was not a sidewalk and therefore, New York City Administrative Code §7-210, which requires abutting property owners to properly maintain sidewalks or face personal injury claims by pedestrians, did not apply.

The lower court denied the Defendant's motion for summary judgment but the First Department reversed and granted the motion, agreeing with the Defendant that the Plaintiff did not fall on a "sidewalk."

The New York City Administrative Code §7-210 defines a sidewalk as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, *but not including the curb*, intended for the use of pedestrians" (emphasis added).

The First Department held that the "gap" was not a sidewalk as defined by the code. Accordingly, the Defendant landowner had no obligation to maintain the area where the Plaintiff fell and could not be held liable.

A Village Could Potentially Be Held Liable For an Excessive Amount of Gravel On a Roadway Which Allegedly Caused the Plaintiff's Motorcycle to Slip From Under Him.

Crawford v. Vill. of Millbrook, 878 N.Y.S.2d 149 (2d Dept. 2009)

Plaintiff motorcyclist sued the Village of Millbrook for negligence after his motorcycle slipped from underneath him while he was traveling on Route 343 at its intersection with Church Street. While the City of New York was responsible for maintaining Route 343, the Village of Millbrook was responsible for Church Street. The Plaintiff sued the Village as opposed to the City claiming that his motorcycle slipped from under him because of excessive gravel on Route 343, which had come loose from Church Street and subsequently piled up onto Route 343.

At trial, while the Plaintiff could not remember much about the accident due to the injuries that he sustained, he produced both an eye witness and an asphalt paving expert to testify. The eye witness had been driving her vehicle right behind the Plaintiff's motorcycle at the time of the accident and had traveled Route 343 past the accident site every workday for 15 years. She testified that on the day of the accident there was "a lot more gravel than usual"at the scene where the accident occurred.

The Plaintiff's expert then testified that the negligent resurfacing of Church street caused loose material, primarily gravel, to separate from the roadway at Church Street and spill onto the adjacent Route 343.

The Defense produced the Officer who responded to and reported the accident. The Officer had listed "sun glare" and "driver inexperience" as factors contributing to the accident and claimed that the road site contained "nothing out of the ordinary."

At the close of the Defense's case, the court granted the Defendant's motion for a judgment as a matter of law pursuant to C.P.L.R. 4401, which dictates that such a motion should only be granted if there is no rational process by which a trier of fact could base a finding of liability.

On appeal, the Appellate Division Second Department reversed and held that the Plaintiff had

presented legally sufficient evidence to sustain liability against the Village. The Second Department remanded the case for a new trial.

In remanding the case for trial, the Court opined that the Officer's observations were too vague and conclusory because he had not examined the specific area where the Plaintiff slipped and he had not testified about viewing the general site of the accident any time prior to the date of the accident itself. Thus, the Court found that the motion was improperly granted in part because the Officer had no basis to testify as to what constituted "ordinary."

Further, the Court gave significant weight to the Plaintiff's expert and eye witness testimony because, unlike the officer, both witnesses had observed the site as it looked prior to, on and after the date of the accident. The Second Department found that the testimony of the Plaintiff's witnesses along with the photographs of the site which were admitted into evidence, established legally sufficient evidence to hold the Town liable and thus, dismissal of the case was improper.

Where a Village Had No Prior Written Notice of an Icy Condition in a Municipal Parking Lot, the Village's Failure to Remove All the Snow From the Lot Was Not an Affirmative Act of Negligence that Would Qualify as an Exception to the Prior Written Notice Rule.

Groninger v. Vill. of Mamaroneck, 888 N.Y.S.2d 205 (2d Dept. 2009).

Plaintiff brought suit after she was injured from a slip and fall on a patch of ice in a Municipal parking lot. The lower court granted defendant's motion for summary judgment finding that the Village did not have prior written notice of the defect that allegedly caused the plaintiff to fall.

On appeal, the plaintiff re-argued two points. First, that the rule requiring prior written notice did not apply to a Municipal parking lot and second, that the Village's actions fell under the exception to the prior written notice rule, namely, that the Village's actions constituted an affirmative act of negligence which immediately resulted in a dangerous condition. The Second Department rejected both arguments.

With respect to the first argument, plaintiff relied heavily on *Walker v. Town of Hempstead*, which held that the requirement of prior written notice under General Obligation Law § 50 - (e) (4) cannot be extended by an inconsistent local statute. The *Walker* Court opined that because § 50 - (e) (4) only requires prior written notice for "streets, highways, bridges, culverts, sidewalks or crosswalks," a local ordinance could not expand the prior written notice requirement to areas not enumerated in the statute, such as a parking lot. While the Court found some logical appeal in the plaintiff's reliance on *Walker* since the plaintiff had fallen in a parking lot and not one of the enumerated § 50 - (e) (4) locations, it would not abandon long standing precedents that neither actual nor constrictive notice of an icy condition suffices to impose liability upon a Municipality without prior written notice.

With respect to the second argument, the Court held that the Village's failure to remove all the snow from the Municipal parking lot did not constitute an affirmative act of negligence so as to fall under the exception of the prior written notice rule (and that the speculative testimony of the plaintiff's expert was insufficient to raise a triable issue).

Two Teachers Alleging Wrongful Retaliation and Violation of Free Speech Rights in the Course of their Employment Stated a Claim Sufficient to Survive a Motion to Dismiss.

Kelly v. Huntington Union Free Sch. Dist., 2009 WL 4981182 (E.D.N.Y. 2009).

The Court denied the defendant Huntington School District's motions to dismiss for failure to state a cause of action against the plaintiffs' claim for violation of First Amendment rights and wrongful retaliation during their employment as teachers in the defendant's school district.

Plaintiffs Anne Kelly and Christine Lofaro were both teachers who also taught in the SEARCH program, created to stimulate and challenge gifted

children. Maryann Daly was the chairperson of the program. Both plaintiffs had received glowing evaluations for their performance as teachers and Lofaro had been the head of the union for over six years at the time the SEARCH program was created. In 2007, the plaintiffs began complaining to the Assistant Superintendent of the School District about Daly's behavior with respect to the program, namely that she had failed to attend meetings and perform her duties and engaged in misconduct. The plaintiffs claim that Superintendent merely told them to "play nice in the sandbox" and that, overall, he was indifferent to the situation despite their repeated complaints about Daly.

On February 26, 2009, both plaintiffs met with the Assistant Superintendent of Curriculum and the same Superintendent they met with in 2007. The Superintendent informed them that their two positions in the SEARCH program would be eliminated in the drafted budget for 2009-2010. No one had told either plaintiff that this information was confidential or should be kept secret. Accordingly, that same day the plaintiffs told the children in the SEARCH program that significant changes were being made to it (about which Lofaro expressed her sadness), told their parents that significant changes would be made to SEARCH that "directly affected the children's education," and urged the parents to attend the next Board of Education meeting to speak out against eliminating the plaintiffs' positions. Allegedly, the plaintiffs spoke to the parents and children after dismissal time.

The parents did attend the meeting and did speak out against eliminating the plaintiffs' positions. While the SEARCH program was restored, the plaintiffs were still removed from their positions.

In early March, Lofaro's principal reprimanded her for the several complaints that he received from the SEARCH parents about eliminating their positions. The Principal told Lofaro that her actions were "political," and that he would discipline and "make an example of her" because she had "crossed the line." Kelly too, was questioned by her own principal and was informed for the first time that this information should not have been disclosed.

Both plaintiffs were subsequently threatened with "3020a" disciplinary proceedings for "behavior unbecoming of a teacher, neglect of duty, and insubordination." The defendant ultimately brought proceedings against the plaintiffs despite the plaintiffs telling them that they had retained counsel and would proceed with a lawsuit if a resolution could not be reached.

Plaintiffs in turn brought suit under 42 U.S.C.§ 1983, alleging that the 3020a proceedings brought against them constituted wrongful retaliation for Lofaro's "protected union activities, " their speeches to the SEARCH kids and parents, their complaints regarding Daly and their statement that they had retained counsel and intended to sue the defendants.

Because the plaintiffs were both public employees, in order to have a cause of action they had to allege first, that their speech was constitutionally protected because they spoke as citizens on a matter of public concern; second, that they suffered adverse employment action; and third, that their speech was a motivating factor in the adverse employment decision. The defendant moved to dismiss for failure to state a cause of action, arguing that the plaintiffs' speech was not protected because it was made in their official capacity and did not involve a matter of public concern, that there was no adverse retaliation and that there was no causal connection between the complaints about Daly and the alleged retaliation. Finally the defendants urged that under a *Pickering* balancing test, an employee can still prevail in a First Amendment suit when its interest in regulating protected speech by means of adverse action outweighs the speaker's interest in expression.

Looking solely to the face of the pleadings, the Court denied the defendant's motion in its entirety, finding that it could not yet conclude that any of the defendant's arguments were definitively correct.

With respect to the issue of whether the speech was in an official capacity and a matter of

public concern, the court emphasized the rule that the inquiry is a "practical one" that considers various factors, none of which are dispositive. The Court opined that deeming the plaintiffs' conversations with the Superintendent as part of their official duties without more would be to hold that any complaints to a supervisor about a co worker's misconduct are unprotected, an approach the Court rejected as overly broad. Because the defendant did not claim that the plaintiffs' conversation with the SEARCH kids and parents were within the plaintiffs' official duties, the court did not address this issue.

As to the speech being a public concern, the Court noted that while the speech here was also motivated by the plaintiffs' own dissatisfaction with the changes to SEARCH, this did not conclusively remove their speech from being a public concern. Rather, the court opined that the conversations with both the superintendent and the parents touched upon changes in the quality of education, which *is* a matter of public concern.

As to the adverse action and causation argument, the Court held that the 3020a proceedings and ultimate removal of the plaintiffs from the SEARCH program were sufficient to plead adverse action against them. Causation had also been properly pleaded despite the time delay between the complaints about Daly and the Superintendent's decision to remove the plaintiffs' positions because the Court found that if Daly's misconduct increased after each complaint, as the plaintiffs claimed, this was itself retaliatory.

Finally, as to *Pickering* balancing test, the Court held that factual issues existed before it could conclude that a disruption to the school environment warranted the defendant's actions as it was disputed whether the plaintiffs spoke to parents before or after dismissal time. The Court noted that even if the defendant had prevailed on the balancing test, the plaintiffs could still proceed with their claim if they could make an adequate showing that the defendant's actions were motivated by retaliation and not any concern to cease or prevent disruption.

A New York City Public School Did Not Have a Duty or Special Relationship with its Teacher Such That It Could be Liable for Personal Injuries that the Teacher Sustained from a Child that the School Administration Failed to Remove from the Classroom.

Dinardo v. City of New York, 2009 N.Y. Slip Op. 08853 (N.Y. 2009).

A New York City special education teacher was injured when she sought to prevent one of her students from attacking another. She subsequently sued the City and the City Board of Education for negligence in failing to remove the student that injured her from the class despite her repeated complaints about his dangerous behavior. Among the complaints that the plaintiff had previously made to her principal about the student was how he brought a knife to class, kicked and threw various items and even threatened to kill the plaintiff. Both the School Supervisor of Special Education and the Principal told the plaintiff that "things were being worked on, things were happening," and to "hang in there because something was being done." Plaintiff claimed that the school assumed an affirmative duty to remove the child from the classroom by making these assurances and that her reliance on those assurances was justified.

At the close of plaintiff's case at trial, the City moved for a judgment as a matter of law and after a jury rendered a verdict for the plaintiff, the defendant then moved to set aside the verdict. The Supreme Court denied both motions and the Appellate Division affirmed. Upon appeal, the Court of Appeals reversed, finding that no special relationship existed between the teacher and the school upon which a negligence claim could be based.

In a negligence case based on a special relationship between the plaintiff and municipality, the municipality must affirmatively assume a special duty to act and this voluntary undertaking must then "lull" the injured party to relax his or her own villigance or "forego other available avenues of protection" in justified reliance.

The Majority found that no reasonable juror could conclude that the municipality's "vague"

assurances that "something" would be done lulled the plaintiff into a false sense of security and justified reliance because plaintiff knew that the administrative process to remove a child from a particular program could take up to 60 days and was still ongoing when the incident occurred. The Majority relied upon the *McLean* precedent, which refuses to impose tort liability on a municipality even with the existence of a special relationship, where the municipality's action is discretionary. The Court deemed the municipality's act of doing "something" to be discretionary.

The concurring opinion "reluctantly" abided by *McLean*, but opined that it "too broadly insulates" public officials and allows them to "unjustifiably hide behind the shield of discretionary immunity even where their actions have induced a plaintiff to change his or her behavior in the face of a known threat." The concurring opinion asserted that this was exactly the case with Dinardo because she chose to endure the student's dangerous and worsening behavior based on the school's assurances that the situation would be rectified. Nonetheless, the concurring opinion adhered to *McLean*.