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## New York's Highest Court Requires Strict Compliance with Prior Written Notice Statute

In *Gorman v. Town of Huntington*, the New York Court of Appeals reversed the Appellate Division and granted summary judgment to the defendant Town of Huntington ("Town") dismissing personal injury claims on the basis of the Town's "prior written notice" statute where the record demonstrated that written notice was provided to an agency within the Town, but not to the individuals designated to receive notice in the statute.

The plaintiff commenced an action against the Town, among others, asserting that she was injured when she allegedly tripped and fell on an uneven sidewalk in front of a local church. The Town moved for summary judgment to dismiss the complaint on the grounds that plaintiff did not satisfy the requirements of Town's "prior written notice" statute.

The Town's prior written notice law (Huntington Town Code § 174-3, which is similar in effect to New York Town Law § 65-a(2)) provides that a civil action may not be maintained against the Town for personal injuries "sustained by reason of any . . . sidewalk. . . operated or maintained by the town. . . being defective. . . unless written notice of the specific location and nature of such defective. . . condition by a person with first-hand knowledge was actually given to the Town Clerk or the Town Superintendent of Highways." Another section of the Town Code (§174-5) states that notice to any person other than those two individuals designated in the statute "shall invalidate the notice."

The record showed that four months prior to the plaintiff's incident, the pastor of the church had written to the Town's Department of Engineering Services ("DES") to complain that the sidewalk at issue needed repair. The pastor was apparently instructed to file his written complaint with the DES by an employee of the Town. The DES was the department responsible for the actual maintenance and repair of sidewalks in the Town. Testimony from a DES employee established that the DES maintained an index and file regarding complaints received relating to sidewalk defects and that several prior complaints regarding the sidewalk at issue were lodged in addition to the pastor's complaint.

In support of its motion under the prior written notice statute, the Town submitted affidavits from employees of the Town Clerk and Town Superintendent of Highways stating that neither of those individuals received prior written notice of the defect in the sidewalk claimed by the plaintiff to have caused her injuries.

The trial court and Appellate Division both denied the Town's motion and granted a cross-motion dismissing the Town's affirmative defenses based on the prior written notice law. These courts concluded that the Town had delegated its statutorily-imposed duty of record keeping pertaining to complaints of sidewalk defects from the Town Clerk and Superintendent of Highways to the DES. The Court of Appeals reversed.

In a narrow 4-3 decision, the majority of the Court concluded that prior written notice provisions must be strictly construed. The Court recognized that the purpose of notice provisions are to "place a municipality on notice that there is a defective condition on publicly-owned property which, if left unattended, could result in injury" and that the policy behind the rule is to "limit a municipality's duty of care over its streets and sidewalks by imposing liability only for those defects or hazardous

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conditions which its officials have been actually notified exist at a specific location.”

However, New York’s Highest Court went on to state that not every written complaint to a municipal agency necessarily satisfies the requirements of prior written notice. Moreover, written notice to the municipal agency responsible for repairing any defects, even where that agency keeps records regarding prior complaints, does not necessarily satisfy the statute.

The Court held that where written notice of defect is a condition precedent to suit, a written request to any municipal agent other than a statutory designee is not sufficient. Accordingly, based on the affidavits from the Town Clerk’s employee and Superintendent of Highway’s employee that there was not prior written notice of the alleged defective sidewalk to either of those individuals, the Court found that the plaintiff could not meet the prior written notice requirement to maintain a lawsuit and granted summary judgment to the Town.

The Court was unpersuaded by the evidence with respect to the DES’ role in recording and record-keeping regarding sidewalk complaints. The Court stated “as the entity charged with repairing Town sidewalks, it is to be expected that the [DES] would keep a record of needed repairs and complaints but it cannot be inferred from that conduct that the Town was attempting to circumvent its own prior written notice provision.”

In two separate dissenting opinions, Judge Cipatrick (joined by Chief Judge Lippman) and Judge Smith argued that the case should have been remitted for further fact-finding. Both dissenting opinions argued, in essence, that there were questions of fact regarding whether the Town had supplanted the Town Clerk and Highway Superintendent’s statutory record-keeping duties by instituting a system in which the DES was the sole-repository for such record-keeping. Judge Cipatrick stated that the affidavits submitted by the Town Clerk and Highway Superintendent did not contain sufficient detail to determine whether those individuals had performed their statutory duties of maintaining an index of complaints. Judge Smith, agreeing with the substance of Judge Cipatrick’s argument, stated that “if plaintiffs prove that the Town’s unlawful conduct [i.e. its record keeping system] prevented the giving of notice pursuant to [the Town’s prior written notice statute], the Town should be estopped from relying on the code provision to defend this case.”

Note, the Court has previously recognized two exceptions to strict compliance with a prior written notice requirement (neither of which were argued in the Gorman case): (1) where the municipality created the defect or hazard through an affirmative act of negligence and (2) where a “special use” confers a special benefit upon the municipality. See, e.g., *Amabile v. City of Buffalo*, 93 N.Y.2d 471 (1999). In *Gorman*, the majority did not rule out a possible estoppel argument as a third exception to excuse lack of prior written notice, but avoided the issue by holding that there was “no evidence that these plaintiffs relied on the correspondence sent by the pastor to the [DES] or on any alleged assurances by [the DES] that it would repair the condition.” The majority’s position with respect to the estoppel argument is not necessarily consistent with the dissents’ expression of a potential “estoppel exception” to strict compliance with a prior written notice statute - whereas the majority focused on a plaintiff’s reliance, the dissenting opinions focused on a Town’s conduct (or potential misconduct). In either case, *Gorman* does allow for a further assertion of an estoppel exception, and municipalities would be wise to ensure their own compliance with record-keeping requirements to avoid any assertion of that potential exception. ■

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