SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ANNE ACHENBACH and ARTHUR J. ACHENBACH,

Petitioners,

-against-

TOWN OF OYSTER BAY,

Respondent.

----------x

MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 18
Index No.: 10514/07
Motion Seq. No.: 01

DECISION & ORDER

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The Petitioners, Anne Achenbach and Arthur J. Achenbach move by Order to Show Cause for leave, pursuant to General Municipal Law § 50-e, to serve an amended Notice of Claim.

Petitioners reside at 5 Northwest Drive, North Massapequa, N.Y. (the "premises"). Petitioners received a notice dated October 6, 2005, from the respondent Town of Oyster Bay ("the Town")(see Exhibit A annexed to petition) wherein the Town stated its inspection revealed the sidewalk in front of the premises was hazardous to pedestrians. The Town noted one tree had been marked for removal. The Town noted two additional trees needed to be removed. The Town stated all three trees needed to be removed at the same time at a cost of $800.00 to replace 128 square feet of sidewalk. Thus, The town required petitioners to request all three trees to removed and stated petitioners had to pay the $800.00 sidewalk replacement cost. The Town indicated the

sidewalk condition was caused by the tree roots raising the sidewalk slabs (see Exhibit B annexed to petition, letter from Town dated November 14, 2005).

On September 22, 2006, petitioner Anne Achenbach (the "petitioner") tripped and fell on broken, crooked or uneven sidewalk located adjacent to her property.

On November 22, 2006, petitioner Arthur Achenbach notified Town that Anne Achenbach had sustained a serious fall on the broken sidewalk on the side of the premises on September 22, 2006. Petitioners noted they had sent the $800 requested by Town for the repair of the sidewalk in November, 2005 but no repairs were ever made (see Exhibit C annexed to petition).

The Town acknowledged receipt of petitioners' November 22, 2006 letter (see Exhibit C annexed to petition). The letter was signed by petitioner Arthur J. Achenbach. Petitioners sent a Notice of Claim to petitioners. The Town acknowledged receiving same on December 12, 2006 (see Exhibit D annexed to petition). At the General Municipal Law § 50-h held in May, 2007, petitioner testified she fell on the public sidewalk on the side of her premises due to the same conditions the Town was aware of in its prior inspection of the premises and its October, 2005 and November, 2005 correspondence to petitioners.

Petitioners now seek to amend their original notice of claim to indicate petitioner fell on the side of the premises' sidewalk, not the front.

The Town alleges it would be prejudiced since it was not able to conduct a "prompt," meaningful investigation when the facts were "fresh." The Town contends it took until May 21, 2007 for the Town to learn the real location of the fall some eight months after the fall and five months after the original notice of claim was sent to the Town. The Town also contends the

petitioners have not established that one of the sidewalk slabs inspected before the October 4, 2005 letter was drafted was one of the slabs petitioner fell on.

A court may, in its discretion, grant an application for leave to serve an amended notice of claim where a mistake was made in good faith and the municipality has not been prejudiced thereby (*D'Alessandro v New York City Transit Authority*, 83 NY2d 891 [1994]).

Also, more current Appellate Division, Second Department case law allows the 50-h hearing to clarify any failure of the original claim to describe with sufficient particularity the place where and the manner in which the claim arose.

The Appellate Division, Second Department, has recently held that refusal to allow a claimant to amend a defective notice of claim to state the location and cause of the claimant's fall was an abuse of discretion, where the omissions were not made in bad faith, the amended notice did not change the theories of liability, the omitted information was provided at a municipal hearing on a claim some months after the accident (*Dowd v City of New York,* 40 AD3d 908 [2d Dept 2007]); *Gatewood v Poughkeepsie Housing Authority*, 28 AD3d 515 [2d Dept 2006]; *Oschepkova v New York City Transit Authority,* 24 AD3d 523 [2d Dept 2005].

The court cannot let the Town's objection to an amended notice of claim stand on the naked invocation of the word "prejudiced."

For the court to reject the amended notice of claim, the respondent must demonstrate actual prejudice (*Puzio v City of New York*, 24 AD3d 679 [2d Dept 2005]). Here the record discloses no basis to presume the existence of prejudice to the Town, the Respondent. The Town's employees had inspected the premises and found the roots of trees had caused some of the sidewalk slabs to become hazardous to pedestrians, hence the October 6, 2005 letter to the

petitioners (Exhibit A annexed to the petition). According to the petitioners' counsel, at the 50-h hearing, petitioner contends her trip and fall on the side of the premises was caused by the same dangerous and defective condition set forth in the Town's October 6, 2005 letter. The letter (dated November 22, 2006) from petitioner Arthur J. Achenbach clearly stated the petitioner fell on the side of the premises on the "side" sidewalk, not the front sidewalk.

Here, was there a failure to make a prompt and adequate investigation based on the original notice of claim's failure to specify the exact location of petitioner's fall? The record does not reflect this. Has the original location in some way been disturbed? The record fails to address this also.

The proposed Amended Notice of Claim sought herein does not substantially alter the plaintiff's theories of liability (*Streletskaya v New York City Transit Authority*, 27 AD3d 640 [2d Dept 2006]). It seeks only to slightly correct the location of the incident set forth in the original notice of claim.

The Town has failed to show that the defective notice prejudiced it by impeding its ability to investigate the claim (*see Barrios v City of New York*, 300 AD2d 480 [2d Dept 2002]).

As to the Town's claim that the Notice of Claim was not verified, a party's failure to verify his or her Notice of Claim was purely inadvertent and not fatal to the validity of the notice of claim (*Creary v Village of Mamaroneck*, 110 AD2d 870 [2d Dept 1985]).

Finally, the court shall set a date for a conference to resolve the issues, to its satisfaction, as to the lack of a deposition of or an affidavit by petitioner Arthur J. Achenbach and the existence of some photographs in petitioners' possession that allegedly have not been given to the Town.

Based upon the foregoing, the Petitioner's application is **Granted.** Thus, it is

ORDERED, that the Notice of Claim, as proposed (Exhibit E including the side location rider) will be deemed served on The Town upon service of a copy of this Order on Respondent Town. It is further

ORDERED, that the parties are directed to appear for a Preliminary Conference on Wednesday, October 17, 2007 in DCM.

This constitutes the **DECISION** and **ORDER** of this Court.

DATED: September 25, 2007
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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