

**Carlson v Town of Brookhaven**

2010 NY Slip Op 31572(U)

June 22, 2010

Supreme Court, Suffolk County

Docket Number: 35257/2008

Judge: Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 35257/2008

SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

**PRESENT:****Hon. Paul J. Baisley, Jr.** \_\_\_\_\_\_\_\_\_\_  
JEANNE CARLSON AND ROBERT CARLSON,

Plaintiff(s),

-against-

TOWN OF BROOKHAVEN AND SUFFOLK  
COUNTY WATER AUTHORITY,Defendant(s).  
\_\_\_\_\_

**ORIG. RETURN DATE:** November 7, 2008  
**FINAL RETURN DATE:** November 21, 2008  
**MTN. SEQ. #:** 001-CASEDISP  
 002-MOT D

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Upon the following papers numbered 1 to 77 read on these motions to dismiss: First Notice of Motion and supporting papers 1 - 9; Affirmation and Affidavits in Opposition 10 - 20; Reply Affirmation and supporting papers 21 - 28; Second Notice of Motion and supporting papers 29 - 46; Affirmation in Support 47 - 51; Affirmation and Affidavits in Opposition 52 - 64; Reply Affirmation 65 - 77; it is

**ORDERED** that these two motions (001 & 002) are considered together in this decision and order for purposes of judicial economy; and it is further

**ORDERED and ADJUDGED** that the motion (001) by the defendant Suffolk County Water Authority for an order dismissing the complaint as to it pursuant to CPLR 3211(a)(2) is granted; and it is further

**ORDERED and ADJUDGED** that the motion (002) by the defendant Town of Brookhaven for an order dismissing the complaint and all cross claims as to it pursuant to CPLR 3211(a)(2) and CPLR 3212 is granted; and it is further

**ORDERED** that this action shall be marked "Case disposed."

This personal injury action is based upon a claim that the plaintiff tripped and fell on a defective area of a roadway in Rocky Point, New York on August 22, 2007.

Notices of claim were purportedly served upon the respective defendants in accordance with the service provisions of GML §50-e(3)(b) on the very last day of the 90-day period within which to serve same (*see* GML §50-e[1][a]). According to the notices of claim (which are virtually identical), the accident took place “on Forest Road in the Town [sic] of Rocky Point....”

Furthermore, according to the notices of claim, the plaintiff Jeanne Carlson was injured,

“when she tripped and fell in a depression and/or pot hole in the roadway consisting of among other things, sand, rocks, gravel and debris from a repair without any warning or notice to pedestrians.”

The defendant Suffolk County Water District (hereinafter SCWA) conducted a municipal hearing pursuant to GML §50-h on March 18, 2008 at which both plaintiffs gave sworn testimony. (The defendant Town of Brookhaven [hereinafter the Town]) did not conduct a municipal hearing.) At the municipal hearing held by SCWA, the plaintiffs did not provide any greater specificity as to the precise location on Forest Road of the “depression and/or pot hole” but they did submit three photographs upon which they indicated the exact location of the defective area. These indications were in the context of the photographs themselves and not in the context of the roadway in its entirety (which plaintiffs’ counsel submits is less than a quarter of a mile in length).

At the municipal hearing, the plaintiffs were asked if the signatures on the SCWA notice of claim (which appear to be identical with the signatures on the Town’s notice of claim) were their signatures. Both of the plaintiffs unequivocally said “no” (Transcript, pp. 48, 49, 64, 65).

Six days after the municipal hearing, on March 24, 2008, SCWA sent a letter rejecting the notice of claim on the basis of the notice of claim being jurisdictionally defective as it was not sworn to or on behalf of the claimants as required by GML §50-e(2).

Subsequently, on or about April 6, 2008, the claimants sent an “Errata Sheet” with regard to the transcript of the municipal hearing to SCWA which indicated, *inter alia*, that the “no” answers with regard to their purported signatures on the notice of claim should be changed to “yes”; and the reason for the error at the municipal hearing was “Nervous/confused.”

SCWA now brings this pre-answer motion (001) to dismiss based upon the grounds that there is no jurisdiction over the subject matter as there is no properly sworn to notice of claim and, as a matter of law, there is an insufficient description of where the accident took place (*see* CPLR 3211[a][2]).

The Town brings its post-answer motion (002) to dismiss upon the same grounds as SCWA pursuant to CPLR 3211(a)(2) as well the additional grounds, pursuant to CPLR 3212, of there being no prior written notice and that the notice of claim was filed too late.

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In support of its motion (001), SCWA argues that despite the notice of claim purportedly being signed by the injured plaintiff, Jeanne Carlson, and her husband, Robert Carlson (who has a derivative claim), both plaintiffs unequivocally said at the municipal hearing that the purported signatures were not theirs. The Carlsons subsequently submitted an errata sheet with the transcript of the hearing in which they indicated that the “no” answers they made with regard to their purported signature should be “yes” answers; and, the reason for the error was that they were “nervous” and “confused.”

In their affidavits submitted in opposition to this motion, the Carlsons reiterated that the signatures on the notice of claim were theirs and that they said otherwise at the hearing because of the stress of the procedure and their being nervous and confused.

Other submissions on this motion contain signatures purportedly of the plaintiffs, to wit; the verified complaint, their affidavits in opposition to the motion and their signatures on the errata sheet. Without ruling on the matter of the signatures, the Court notes that the respective Carlson signatures on the non-notice of claim documents all appear to be consistent. When compared with the notice of claim, however, Jeanne’s purported signature is definitely different. Robert’s signature is not clearly different and, indeed, has similarities with the other “Robert Carlson” signatures to be consistent with it being done by the same hand.

As to Jeanne’s purported signatures, assuming the notice of claim was done by someone other than the signer of the other documents, there is nothing in the record to indicate which, if any, is Jeanne’s actual signature.

SCWA also contends that the notarizations on the notice of claim are improper because they do not comply with Executive Law §137. This section provides that a notarization must include, in addition to the notary public’s signature, a printed version of his or her name, the words “Notary Public of the State of New York” or, if appropriate, “Attorney and Counselor at Law,” the county in which he/she was qualified, the date the commission expires and the assigned notary public commission number.

The notarizations of the purported Carlson signatures, which appear to be by the Carlsons’ attorney, have none of the required information other than the signature. Notwithstanding this failure to comply with Executive Law §137, that section also provides that, “No official act of such notary public shall be held invalid on account of the failure to comply with any of the provisions of this section.”

In short, SCWA argues that there is no subject matter jurisdiction because the plaintiffs failed to comply with GML §50-e(2) which requires the notice of claim to be “sworn to or on behalf of the claimant.”

SCWA also contends that the plaintiffs failed to comply with GML §50-e(2) which requires that the claimant set forth “the place where . . . the claim arose.” The notice of claim describes “where” the accident occurred as follows: “on Forest Road in the Town [sic] of Rocky Point, Township of Brookhaven, County of Suffolk, State of New York.” The notice of claim provides no further specificity such as what address it was in front of or behind, which side of the street it was on, the distances and directions from any intersections or any other reference points, or any other specifying factors.

Nor was such information provided at the municipal hearing. At the hearing, however, some pictures of the immediate location of the depression or pot hole were introduced and while the spot of the accident was identified on the photographs, the photographs (not submitted on these motions) apparently did not provide any other indicia of exactly where on Forest Road the accident occurred.

Counsel for the plaintiffs states in his affirmation that he walked the length of Forest Road and that it was less than one-quarter of a mile long and, therefore, he contends, SCWA did not have a large area to inspect in order to find the depression or pothole in question. Of course, this assumes that there was only one depression or pot hole within the entire length of the road and/or that the same depression or pothole still existed on or shortly after the date of the municipal hearing (March 18, 2008) which was seven months after the trip and fall.

In opposition to this motion (001), the plaintiffs further contend that the defect in the roadway was caused by repairs made by SCWA but submit no evidentiary support for this contention. Nevertheless, the plaintiffs argue that since SCWA allegedly performed the repair on Forest Road, SCWA would know or should know where the repair was done and, thus, SCWA cannot legitimately contend that it did not know where the repair was done.

Counsel for the plaintiffs as well as the plaintiffs themselves state in their respective affirmation and affidavits in opposition to this motion that the plaintiffs read the contents of the notice of claim and, notwithstanding their answers at the municipal hearing, they did actually sign the notice of claim themselves. The plaintiffs, however, do not address or explain the apparent discrepancies in the signatures of Jeanne Carlson or the alleged discrepancies in the signatures of Robert Carlson. Nor is there any explanation for the deficient notarizations of the signatures.

As to the description in the notice of claim of where the accident occurred, the plaintiffs contend that they provided “as much particularity as possible.” The Court finds this self-serving declaration to be without merit. On a roadway which is less than one quarter of a mile in length, which runs from one cross street to another with a third cross street in between, which is in a residential area with homes with street numbers, to claim that more specificity could not be provided defies logic.

The test for sufficiency with regard to the location of an accident is whether the public entity is able to “locate the place” (*Canelos v City of New York*, 37 AD3d 637, 638, 830 NYS2d NYS2d 334 [2d Dept 2007]). In addition, any additional information provided at the municipal hearing with regard to oral descriptions of the location as well as photographs may be considered and may make up for such deficiencies in the notice of claim (*see Matter of DeVerna v Inc. Vil. Of Lynbrook*, 67 AD3d 1009, 888 NYS2d 770 [2d Dept 2009]; *Atwater v County of Suffolk*, 50 AD3d 713, 715, 855 NYS2d 226 [2d Dept], *lv denied* 11 NY3d 702, 864 NYS2d 389 [2008]; *Canelos v City of New York*, 37 AD3d 637, 638, 830 NYS2d NYS2d 334 [2d Dept 2007]).

Indeed, cases have held that even stating that an accident occurred at a specific intersection is not sufficient to give proper notice to the public entity without providing more information (*see e.g. Lauro v County of Nassau*, 6 AD3d 394, 774 NYS2d 371 [2d Dept 2004]; *Wai Man Hui v Town of Oyster Bay*, 267 AD2d 233, 699 NYS2d 485 [2d Dept 1999], *lv denied* 94 NY2d 764, 708 NYS2d 52 [2000]; *Yankana v City of New York*, 246 AD2d 645, 668 NYS2d 241 [2d Dept 1998]; *Caselli v New York*, 105 AD2d 251, 483 NYS2d 401 [2d Dept 1984]).

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In this case, the description in the notice of claim is woefully deficient. At the municipal hearing, the claimants did not provide testimony providing any additional description of the location. The claimants did point out, however, on photographs of the area where the fall took place, where the defect was located but there is nothing in this record to support the contention that the photographs provided any specificity as to where along the entire length of Forest Road the defect identified in the photographs was located (*see also Yankana v City of New York*, 246 AD2d 645, 668 NYS2d 241 [2d Dept 1998]).

To merely say the claimant fell due to a defect in the roadway without providing anything more specific as to its location is insufficient to comply with GML §50-e(2) especially where such a defect is transitory in nature (*see Ryan v County of Nassau*, 271 AD2d 428, 705 NYS2d 398 [2d Dept 2000] [*citing Caselli v New York*, 105 AD2d 251, 253, 483 NYS2d 401 [2d Dept 1984]]).

In conclusion, dismissal of the complaint is granted to the defendant SCWA pursuant to CPLR 3211(a)(2) for the plaintiffs' failure to sufficiently describe the location of the accident in their notice of claim. Furthermore, this deficiency was not corrected at the municipal hearing and, the Court notes, no amended notice of claim was submitted in response to the SCWA's rejection of same and no motion or cross motion was made for leave to file a corrected notice of claim.

As to SCWA's other contention in support of dismissal, to wit; the failure to submit a notice of claim sworn to or on behalf of the claimants (that is, the alleged lack of bona fide signatures by the claimants), this contention is not addressed and is moot in light of the dismissal based upon failure to sufficiently describe the location of the accident.

Turning now to the Town's motion (002) to dismiss the complaint and any cross claims, in view of the dismissal of the complaint as to SCWA, any cross claims asserted on behalf of SCWA against the Town are dismissed as moot.

As to dismissal of the complaint, the Town reiterates the arguments made by SCWA as its notice of claim is identical to the notice of claim signed, notarized and served at the same time as SCWA's. For these reasons alone, the complaint is dismissed as to the Town pursuant to CPLR 3211(a)(2).

In addition, dismissal is also merited pursuant to CPLR 3212 on the basis of there being no prior written notification to the Town with regard to the pertinent defect in the roadway.

The Town of Brookhaven has a prior written notice law (Brookhaven Town Code §84-1) which requires a prior written notice to have been served upon the Town before it can be found liable for any accident due to a defect in a roadway.

Under these circumstances, it is well settled that a municipality is not liable for accidents caused by a depression or pothole unless there is a prior written notice properly on file. The only exceptions to this rule are if the municipality affirmatively created the defect or if there is a special use which confers a special benefit on the municipality (*see Amabile v City of Buffalo*, 93 NY2d 471, 474, 693 NYS2d 77, 79 [1999]; *Ferreira v County of Orange*, 34 AD3d 724, 825 NYS2d 122 [2d Dept 2006]; *Berner v Town of Huntington*, 304 AD2d 513, 757 NYS2d 585 [2d Dept 2003]).

In this case, there is no contention that the Town either created the defect or that there was a special use.

In support of this motion (002), the Town submits affidavits from Town employees in the Town Clerk's office and in the Town's Highway Department. Both of these employees are responsible for logging in notices of defects received by their respective departments as well as searching files for any such notices of defects with regard to specific locations. The Highway Department employee is also responsible for notifying the "labor crew chief" assigned to the area in question to conduct an inspection to see if a repair is needed.

In this case, neither employee located any prior written notices or Notices of Claim with regard to any part of Forest Road. In addition, the Highway Department crew which went to Forest Road inspected the entire length of the road ("since no specific location provided") and found no evidence of any such defect.

The submission of these Town affidavits is sufficient to support the Town's entitlement to summary judgment since its liability is contingent upon there being a prior written notice (*see* Brookhaven Town Code §84-1) unless the opposing party, in its opposition, can show that the Town created the defect or hazard or that the special use doctrine applies (*see Amabile v City of Buffalo*, 93 NY2d 471, 474, 693 NYS2d 77, 79 [1999]; *Linder v Babylon*, 187 AD2d 568, 591 NYS2d 332 [2d Dept 1992]).

The burden on this part of the motion which seeks summary judgment now shifts to the plaintiffs to establish the existence of material issues of fact requiring a trial. In opposition, the plaintiffs, by way of her attorney's affirmation and an affidavit from Jeanne Carlson, argue that the Town knew or should have known where, on any particular Town road, the SCWA performs a repair. Furthermore, since the SCWA did perform such a repair here, they allege, there is an inference that the Town knew where the work was done. In support of this argument, the plaintiffs provide no evidence that any repair was performed on Forest Road by SCWA and provide no legal authority for the contention that if SCWA had done such work that there is an inference that the Town knew the location of such work.

Mere speculation that SCWA performed a repair at the site of the accident is not evidence of same and is insufficient to oppose that part of the Town's motion which seeks summary judgment. Accordingly, the plaintiffs have failed in their burden to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

Lastly, the Town also argues that the notice of claim was served untimely. This argument is based upon the plaintiffs clearly stating in error that they served their notice of claim on the Town nine days later than they actually served it. Indeed, the documentary evidence clearly shows that the notice of claim was timely served on the town on the last day permitted to do so; November 20, 2007 (*see* GML §50[1][a]).

In conclusion, the Town has satisfied the Court that it is entitled to dismissal of the complaint as to it and any cross claims against it based upon the failure to sufficiently describe the location of the accident in a manner designed to provide the Town with information sufficient to conduct an investigation (*see* CPLR 3211[a][2]) and also based upon there being no prior written notice to the Town as to the road defect in question as well as there being no showing that the Town created the defect or that there was a special use (*see* CPLR 3212).

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Accordingly, in view of the granting of the respective motions to dismiss, this action is dismissed in its entirety.

This constitutes the decision and order of the court.

Dated: 6/22/10

**HON. PAUL J. BAISLEY, JR.**  

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**HON. PAUL J. BAISLEY, JR., J.S.C.**