

Verlizzo v Laudano

2010 NY Slip Op 32859(U)

September 28, 2010

Supreme Court, Suffolk County

Docket Number: 03-24760

Judge: Robert W. Doyle

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(012) to renew motion (009), which motions were previously denied without prejudice to renewal upon the lifting of the stay in this action is granted, and upon renewal, the motions are consolidated for determination and decided as follows, and it is

ORDERED that motion (#007) by defendants Mary Santos Ventura and Jose Morales for summary judgment dismissing the complaint of Lauren Verlizzo and cross claims asserted against them by the co-defendants is denied; and it is further

ORDERED that motion (#009) by third-party defendant Town of Islip for summary judgment against the third-party plaintiff Christina Laudano dismissing all claims and cross claims asserted against them is denied; and it is further

ORDERED that motion (#010) by plaintiff Lauren Verlizzo pursuant to CPLR 3025(b) for leave to file a direct claim against the Town is granted and the proposed amended complaint is deemed served nunc pro tunc and the defendant may serve an answer, if so advised, within thirty days of the date of this order; and it is further

ORDERED that motion (#012) by the defendant, Town of Islip, pursuant to CPLR 2221 to renew motion (009) which was brought pursuant to CPLR 3212 for summary judgment, and which motion is denied upon the oral application to renew, has been rendered academic and is denied as moot.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Lauren Verlizzo (Verlizzo), when she was involved in a motor vehicle accident on July 4, 2003 at the intersection of Flick Place and Washington Avenue, Brentwood, County of Suffolk, State of New York. Verlizzo was a passenger in the vehicle operated by Christina Laudano (Laudano) when the Laudano vehicle became involved in a collision with the vehicle owned by Maria Ventura and operated by Jose Morales. David Crocco and Brian McKay were also passengers in the Laudano vehicle and have commenced separate actions. In addition to the causes of action for negligence pleaded against the respective operators/owners of the motor vehicles involved in this multi-vehicle collision, there are allegations that the Town of Islip was negligent in causing and permitting, inter alia, a stop sign at the intersection to become obstructed, thereby creating a dangerous and hazardous condition, the basis for which Laudano, as third-party plaintiff, commenced the third-party action against the third-party defendant in Action No. 1, the Town of Islip.

There are other actions pending arising out of this accident, but none are the subject of the motions currently before this court for consideration at this time. During the pendency of this action, Eagle Insurance Company, the carrier for the defendant/third-party defendants, Maria Santos Ventura and Jose Morales, went into liquidation resulting in a stay of these actions. By order dated February 24, 2009, the Bankruptcy Court appointed the Superintendent of Insurance for the State of New York as the Ancillary Receiver of Eagle Insurance Company, thereby effectively lifting the stay of the actions after passage of 180 days from the lifting of the stay. The instant motions are now considered upon renewal.

In motion (007), the defendants/second third-party defendants, Maria Santos Ventura (Ventura) and Jose Morales (Morales) seek summary judgment dismissing the complaint of the plaintiff Lauren Verlizzo (Verlizzo), and any and all cross claims asserted against them.

It is determined that motion (007) fails to comport with the requirements of CPLR 3212. The transcript of the examination before trial of Jose Morales is unsigned and is therefore not in admissible form. Further, the moving defendants have failed to submit to this court a copy of the answers and cross-claims which it seeks to dismiss.

Accordingly, upon renewal, motion (007) is denied.

In motion (009), the third-party defendant Town of Islip seeks an order granting summary judgment dismissing the third-party complaint of Christine Laudano, and further dismissing any cross-claims.

The copies of the supporting transcripts of the examinations before trial of Peter Kletchka and Robert Hilman submitted on behalf of the moving party, Town of Islip, are not signed and therefore fail to comport with the requirements of CPLR 3212 and are not considered on this motion. The Town of Islip has failed to submit an affidavit attesting to the reason that the other transcripts are unsigned (see, CPLR 3116). It is further noted that the Town of Islip has failed to provide a complete copy of the pleadings as required by CPLR 3212, in that the Laudano verified bill of particulars has not been provided to this court for determination of the claims made by Laudano. However, even if the evidentiary submissions were signed and the verified bill of particulars provided to this court, it is determined that there are factual issues which preclude summary judgment. There are factual issues concerning whether or not the Town of Islip created the condition complained of, whether the stop sign was placed in a location where it was obstructed from view by a tree and foliage, and whether Laudano's failure to stop at the stop sign was the sole proximate cause of the accident.

The Town of Islip asserts it received no prior notice concerning the visibility of the stop sign at the intersection of Flick Place and Washington Avenue where the accident occurred and that there was no indication of any problems with the visibility of the stop sign. The Town further claims that the sole proximate cause of the accident was Laudano's failure to stop at the stop sign and yield the right of way to oncoming traffic. However, the Town has failed to submit any evidentiary proof in admissible form in support of this claim that it did not receive prior written notice of any claimed defect and has not demonstrated prima facie entitlement to summary judgment on the basis that there was no problem with visibility of the stop sign or the signs placement, and that Laudano's own actions were the proximate cause of the accident.

Pursuant to N.Y. Town Law §65-a and Islip Town Code §47A-3, as a precondition to commencing a civil action against the town to recover damages for personal injuries sustained as a result of a defect in town property, the town must be given prior written notice of the defect and must fail to repair it within a reasonable time thereafter. Exceptions to those requirements exist where the municipality acted affirmatively to create the dangerous condition, or where there was a special use of the property and a special benefit was derived by the municipality (*Nixdorf v East Islip School District et al*, 275 AD2d 759, 715 NYS2d 432 [2nd Dept 2000]). While the Town of Islip claims that it did not receive prior written notice of the claimed obstruction of the stop sign as a basis for dismissal of the complaint, prior written notice is not necessary where the Town created the dangerous condition. Here there are factual issues concerning the visibility of the stop sign on the date of the accident and whether or not the Town of Islip created the dangerous condition by failing to properly place and maintain the stop sign.

Laudano avers in her affidavit submitted in opposition to this complaint that she had not previously approached this intersection from the direction she did on the night of the accident and that the stop sign was obstructed by the foliage and tree trunk by the stop sign. The affidavit of Paul N. Summerfield, P.E. submitted by the Town of Islip is conclusory and does not address the condition of foliage at the intersection. Mr. Summerfield does not opine as to whether or not foliage obstructed the stop sign at the time of the accident or whether the placement of the stop sign in proximity to the tree obstructed view of the stop sign. Further, Mr. Summerfield merely asserts in a conclusory manner that the location of the stop sign for westbound Flick Place was in conformance with the Manual of Uniform Traffic Control Devices, but he does not state the section referred to or how compliance regarding placement was determined. It is additionally noted that P.O. Timothy Drake testified at his examination before trial that when he responded to the scene, he walked what he believed

to be the path the Laudano vehicle traveled on the roadway just before the accident for to help him determine if he was able to see the stop sign. As he headed westbound on the Flick Place roadway, he found the stop sign to be half obstructed by the trees in front of the stop sign. Such factual issues further preclude summary judgment.

Accordingly, motion (009) by the Town of Islip is denied.

In motion (012) the Town of Islip (Islip) seeks an order granting summary judgment dismissing the Laudano complaint and all cross claims asserted against it. The Town of Islip sets forth that it previously submitted motion (009) for summary judgment, and now seeks to renew that application. However, motion (009) has been decided above upon renewal granted upon oral application of the parties, rendering motion (012) academic.

Accordingly, motion (012) is denied as moot.

In motion (#010), the plaintiff Lauren Verlizzo, seeks leave pursuant to CPLR 3025(b) to file a direct claim against the Town of Islip by amending the complaint in action No.1 to name the Town of Islip as a direct defendant.

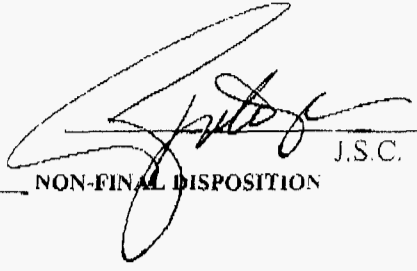
Pursuant to CPLR 3025(b), "a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

While leave to amend pleadings should be freely granted, such a decision lies within the discretion of the trial court and the exercise of that discretion should not be lightly set aside. Lateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion (*Thibeault v Palma*, 266 AD2d 616, 697 NYS2d 404 [3rd Dept 1999]). Where a note of issue and certificate of readiness has been filed, prejudice is a less significant criterion since the court must also consider how long the amending party was aware of the facts upon which the motion was predicated and whether a reasonable excuse was offered for the delay (*Murray-Gardner Mgt. v Iroquois Gas Transmission Sys.*, 251 AD2d 954, 674 NYS2d 820 [3rd Dept 1998]). Leave to amend a pleading should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party (*Rodriguez et al v Paramount Development Associates, LLC et al*, 67 AD3d 767, 888 NYS2d 595 [2nd Dept 2009]). Here it is determined that the amendment to the complaint to add the Town of Islip as a defendant is not palpably insufficient, it is not devoid of merit, and will not prejudice or surprise the Town of Islip.

In opposing this motion, the defendant Town of Islip has not articulated substantial prejudice or actual prejudice if such amendment is permitted (*see, Wiesel and Rosenweig v Rubinstein a/k/a Kalmen Rubinstein*, 2006 NY Slip Op 51107U, 12 Misc3d 1168A, 820 NYS2d 847 [Nassau County 2006]). In *Cucuzza v Vaccaro, P.E.*, 109 AD2d 101, 490 NYS2d 518 [2nd Dept 1985], the court held that CPLR 203 should be construed as to allow a plaintiff's claim against a third-party defendant to relate back to the date of the service of the third-party complaint. Here the Notice of Claim was served by Verlizzo on the Town of Islip on August 9, 2002, effectively apprising the Town of the date and time and location of the accident and that the stop sign was obstructed by a tree. She set forth the injuries she sustained consisting of paralysis affecting her arms and legs. The Town of Islip thereafter conducted a hearing pursuant to GML 50-h on June 25, 2003. It is noted that the Laudano third-party complaint, impleaded against the Town within one year of the accident and within the one-year and ninety day statute of limitations, alleged that the Town had failed to prevent trees from hanging over and obstructing the visibility of the stop sign. Here, the submissions support a meritorious cause of action against the Town of Islip.

Accordingly, motion (010) is granted and the proposed amended complaint is deemed served nunc pro tunc and the defendant may serve an answer, if so advised, within thirty days of the date of this order.

Dated: 28 September 2010



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION