SHORT FORM ORDER

INDEX NO. 14572/2010

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

PRESENT:
Hon. Paul J. Baisley, Jr.

HASSAN OULJIHATE,

Plaintiff(s),

-against-

COMMACK UNION FREE SCHOOL DISTRICT AND ROSEMAR CONSTRUCTION, INC.,

Defendant(s).

ORIG. RETURN DATE: June 21, 2010
FINAL RETURN DATE: October 1, 2010
MTN. SEQ. #: 001-MG

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Upon the following papers numbered 1 to 26 read on this motion to dismiss: Notice of Motion and supporting papers 1 - 8; Affirmation in Opposition and supporting papers 9 - 17; Reply Affirmation and supporting papers 18 - 26; it is

ORDERED and ADJUDGED that the motion (001) by the defendant Commack Union Free School District for an order dismissing the complaint as to it is granted pursuant to CPLR 3211(a)(2), with costs, and the complaint herein is dismissed as to said defendant; and it is further

ORDERED that the defendant Commack Union Free School District is hereby severed from the caption and this action shall continue only as against the remaining defendant, Rosemar Construction, Inc.; and it is further

ORDERED that pursuant to 22 NYCRR 202.8(f) the remaining parties appearing in this action are directed to appear for a preliminary conference on October 21, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

This personal injury action is based upon a claim that the plaintiff tripped and fell due to a defect in the running track at Commack High School. The named defendants are Commack Union Free School District (hereinafter the District) and a private construction company allegedly responsible for the installation of the "rubber foam track." The accident allegedly occurred on May 24, 2009. A notice of claim was timely filed on August 17, 2009 which included three photographs purportedly of the area where the defect was located.

The notice of claim described the location of the defect and the accident as follows:

> "...at 1 Scholar Lane, Commack, New York 11725 and more particularly track oval shape with football field (lane #3)."

This presumably was describing the location as somewhere in lane "3" of the school's quarter mile oval track. But the notice of claim also states, "While claimant, Hassan Ouljihate was jogging along the inside track closest to the field...." This now seems to be describing somewhere along what would be lane "1" of the quarter mile track.

Three grainy, black and white pictures of portions of the track are included with the notice of claim. The first picture (hereinafter picture #1) shows the beginning of what later becomes apparent is the western beginning of the southern straightaway of the oval track. Picture #2 shows an easterly view of essentially the entire length of the southern straightaway. Picture #3 is facing northwesterly and shows the curve of the track as it leads into the straightaway.

Nowhere in any of these three photographs is there any indication of the precise location of the alleged defect or the area of the fall. Indeed, the area covered by the three pictures encompasses about half the track (1/8 mile). In short, the photographs fail to clarify the ambiguity and the lack of specificity in the notice of claim as to the actual location of the defect or the site of the fall. Nevertheless, the District's Operations of Facilities Administrator, who regularly uses the track himself, walked the entire quarter mile track six times, once in each of the six racing lanes, and could find no defects whatsoever let alone the one described in the notice of claim as a "ripped/raised section" (Affidavit; ¶ 7).

On October 18, 2009 - almost five months after the incident - a hearing pursuant to GML § 50-h was held at which the plaintiff was questioned under oath. According to the plaintiff, he stated that after jogging around the track 22 times (5.5 miles) in the lane closest to the infield (Transcript, pp. 20-21), he began to do sprints of about 100 yards down the straightaway (whether it was the northside or southside straightaway was not indicated). According to the plaintiff he was sprinting on the "sprint track . . . . located . . . to the side. They're straight, it is not round like . . . . on the straightaway portion" (Transcript, p. 24-25). At that point, it was after 9:00 pm and the lighting conditions were "very poor" (Transcript, p. 26). During his fourth sprint, he tripped over "a bubble, the rubber was like a bump" (Transcript, p. 28-29).

The Court notes that there is no disagreement that the straightaway referred to is the one on the south side of the track. Also, on that side, there are "chutes" at either end of that straightaway which allow runners to start or finish the straightaway in areas beyond the curves of the oval track.

Insofar as describing the actual location of the defect and the fall, the plaintiff stated that he returned to the track with an investigator about a week after he was released from the hospital and the investigator took photographs (Transcript, pp. 47-48). Counsel for the District then requested that he "be provided with laser quality or comparable quality photographs" which he would be willing to pay for (Transcript, p. 48). Counsel for the plaintiff said, "I will take it under advisement" (*id.*).

Despite three written follow-ups from counsel for the District to plaintiff's counsel for the photographs - to which there were no responses whatsoever - the photographs were not produced until July 15, 2010 which was after this motion to dismiss was served. At that point, almost 14 months had gone by since the accident. The plaintiff sent seven photographs to the District. The first three were merely color versions of the three black and white photographs attached to the notice of claim.

Picture #4 is a much closer view of the purported area in question, facing northwest into the curve as it approaches the straightaway. Aside from the fact that it depicts a curved area which can only be at the southwestern part of the track, it in no way indicates which lane is depicted in the photograph or which specific area of the closeup is the area of the defect.

Picture #5 is centered upon the same area as in picture #4 but is from a little further away. While it too suffers from a lack of any indication specifying exactly where the defect is, the Court is of a mind that it depicts lane "6" as it curves around into the straightaway.

Pictures #6 and #7 have the plaintiff standing in the photographs. These photographs are facing west from the straightaway into the chute at the western end. In each of these two photographs, one closer than the other, the plaintiff is standing in the same spot which is on the curve of the track, pointing toward the west chute but it is not clear which lane in the chute the plaintiff is pointing to.

In addition, the general area where the plaintiff is standing and pointing to in pictures #6 and #7 does not appear to be included in pictures #2, #4 and #5. This adds to the ambiguity regarding the location rather than clarifying it.

While it would have been easy to mark the spot or even bend down and touch the site for a photo, none of pictures otherwise clarifies just where the defect is. Moreover, these latter photographs were not produced until over a year after the incident despite the numerous requests for same beginning nine months before. Nor has the plaintiff ever submitted a map or diagram showing the precise location of the defect and accident.

Under these facts and circumstances, the District brings this pre-answer motion to dismiss for the plaintiff's failure to specify the "place where . . . the claim arose" sufficiently to permit the District to locate the site of the defect and accident in order to allow a timely and effective investigation of the matter and to prepare a defense to the claim (*see* GML §50-e[2]; *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, 830 NYS2d NYS2d 334 [2d Dept 2007 NYS2d]).

Indeed, based upon the description in the notice of claim, it appeared that the defect was somewhere along the entire quarter mile length of the track and either in lane "1" ("the inside lane") or lane "3." A search of the two lanes, alone, each of which is 3 ½ feet wide, would encompass and area of 9,240 square feet (.21 acre). In addition, if the western and eastern chutes are taken into consideration with the regular straightaway on the south side of the track, there is an elongated straightaway of 521 feet (173.7 yards) which is 21 feet wide (Affidavit of Operations of Facilities Administrator, ¶ 9).

If further specificity is provided at a 50-h hearing (e.g. by testimony or photographs), the description deficiency can be cured (*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]).

In this case, no additional photographs were offered at the 50-h hearing and the plaintiff's testimony regarding the location only served to further confuse the issue rather than to clarify it.

Here, the description in the notice of claim is woefully deficient. The lack of specificity in the notice of claim as to the location of the defect did not allow the District to properly investigate the facts surrounding the incident while they were still fresh and while the alleged defect was as close as possible to the condition existing at the time of the accident (*see Williams v City of White Plains,* 288 AD2d 307, 733 NYS2d 119 [2d Dept 2001]). At the municipal hearing, the plaintiff did not provide testimony providing any clarification as to the location. The photographs provided with the notice of claim and over a year later after this motion was served failed to provide the needed specificity as to where the defect and the fall were located (*see also Yankana v City of New York,* 246 AD2d 645, 668 NYS2d 241 [2d Dept 1998]).

To the degree that the eventual submissions of the other photographs over a year after the accident were more specific, they certainly did not allow for a timely investigation of the defect and the District was prejudiced thereby. In any event, those photographs were still lacking in specificity. As such, the plaintiff failed 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, in view of the failure of the notice of claim to comply with the provisions of GML §50-e(2), the Court does not have jurisdiction of the subject matter of the causes of action in the underlying complaint (*see* CPLR 3211[a][2]). Accordingly, dismissal of the complaint is granted to the defendant District for the plaintiffs' failure to sufficiently describe the location of the accident in his notice of claim. Furthermore, the Court finds that this deficiency was not corrected at the municipal hearing or thereafter.

This constitutes the decision and order of the court.

Dated: Oct 7, 2010

HON. PAUL J. BAISLEY, JR.

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