SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

PAULA DUTKA and BROOKE DUTKA an infant by her mother and natural guardian, PAULA DUTKA,

Plaintiffs,

-against-

MOTION SEQ. NO.: 003
MOTION DATE: 12/20/11

NIKOLETTE DANDRA ODIERNO, JOSEPH J. ODIERNO, MICHAEL DUTKA, RICHARD HERLICH, BARBARA HERLICH, BERNARD SHENKMAN, BARBARA SHENKMAN, COUNTY OF NASSAU, TOWN OF OYSTER BAY, INC. VILLAGE OF MASSAPEQUA PARK,

INDEX NO.: 26/11

Defendants.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....1
Supplemental Affirmation in Opposition.....2
Affirmation in Opposition.....3
Reply Affirmation.....4

Motion by defendant Town of Oyster Bay, Inc. (the "Town") for an order: 1) pursuant to CPLR 3211 (a)(1) and (7) dismissing the complaint and/or portions thereof on the grounds of defenses based on documentary evidence and the failure to state causes of action; and 2) to strike the plaintiffs' bill of particulars and/or portions thereof that allege theories of liability that were not alleged in the notice of claim is determined as follows.

The facts of this case have been adequately set forth in our order dated September 16, 2011 and include the following:

> This action to recover for personal injuries sustained by plaintiff in a motor vehicle accident (the "Accident") that occurred on June 6, 2010, at the intersection of Beaumont Avenue and Park Boulevard in the Town of Oyster Bay, Nassau County, New York, Plaintiffs Brooke Dutka and Paula Dutka allege that they were passengers in a motor vehicle driven by defendant Michael Dutka, which was traveling

southbound on Park Boulevard, when their vehicle came into contact with a motor vehicle driven by defendant Nikolette Dandra Odierno and owned by defendant Joseph J. Odierno, which was traveling eastbound on Beaumont Avenue. Plaintiffs' allege, among other things, that (i) the failure of Nikolette Dandra Odierno to stop at the stop sign on Beaumont Avenue was the precipitating cause of the Accident; (ii) the stop sign located on Beaumont Avenue at its intersection with Park Boulevard was obstructed by overgrown vegetation; and (iii) the Village had a duty to maintain that location in a reasonably safe condition, and negligently failed to do so.

Paragraph 2 of the notice of claim dated August 9, 2010, states:

> This claim seeks money damages for personal injuries. The claim is one for money damages due to the personal injuries and damages incurred by the plaintiffs as a result of the carelessness, recklessness, and negligence of the County of Nassau, Town of Oyster Bay, Inc. and Village of Massapequa Park, including its agents, servants and/or employees with regard to the manner in which it owned, operated, maintained and controlled the roadways and the road signage in and around the intersection located at Park Boulevard and Beaumont Avenue in the Incorporated Village of Massapequa Park.

Paragraph 3 thereof states:

> The claim arose on June 6, 2010 at approximately 4:05 PM when a vehicle driven by Nikolette Odierno was caused to impact with the plaintiffs' vehicle after failing to stop at a stop sign located at the subject intersection. It is alleged that the defendants created a dangerous condition and/or had actual and constructive notice of the dangerous condition existing at the subject intersection and involving the signage located thereat, to wit, overgrown vegetation impeding the view of the stop sign on Beaumont Avenue.

In the summer of 2011, the Village moved for summary judgment pursuant to CPLR 3212 dismissing plaintiffs' cause of action and all cross-claims asserted against it on the grounds that it cannot be held liable because it did not own, maintain or control the portion of the roadway or the stop sign where the accident occurred and it did not receive prior written notice, as required by CPLR 9804, of any defect involving the stop sign or overgrown vegetation obscuring the stop sign on Beaumont Avenue.

In denying summary judgment, we found that the prior written notice laws are inapplicable here as they do apply to claims of defective stop signs. *Doremus v Incorporated Village of Lynbrook*, 18 NY2d 362, 366 (1966); *see Torres v Calvin*, 189 AD2d 870 (2nd Dept 1993). As to the lack of ownership or control of the area in question, we found that "[t]he parties opposing the motion present[ed] evidence that the overgrown vegetation that obstructed the stop sign on Beaumont Avenue extended from a tree located on Park Boulevard, which is within the jurisdiction of the Village." In particular, the Town argued that "the Village was responsible for maintaining the tree on Park Boulevard to assure the visibility of stop signs on Park Boulevard and the roadways that intersect it."

In support of the instant motion, the Town asserts that the "allegations in the complaint (¶ 35) and the bill of particulars (¶ 3[a]), except for subsection 'd' should be dismissed from the complaint and stricken from the bill of particulars in that they attempt to introduce new theories of liability as against the Town and, to the extent that they are deemed to relate to the alleged obstruction of the stop sign on Beaumont Avenue, they are vague, repetitive and confusing surplusage, given the clear and unambiguous statement of that allegation in subsection 'd'." (¶ 44 of John Pieret's Affirmation).

Here, the first notice of claim made a single and specific factual claim against the Town, namely, that it negligently caused or permitted foliage to block the stop sign at the southwest corner of the intersection. Further, since plaintiffs' complaint and bill of particulars do not allege that the Town received prior written notice of any obstructed sight lines, plaintiffs have failed to allege the condition precedent to bringing this action and therefore, failed to state a cause of action.

Hence, the Town concludes that those portions of the complaint that allege theories of liability not factually supported in the notice of claim requiring prior written notice should be dismissed and those portions of the bill of particulars that allege theories of liability not factually supported in the notice of claim should likewise be stricken.

In opposition to the motion, plaintiff submits a supplemental affirmation in opposition wherein he annexes a second notice of claim dated August 23, 2010.

Paragraphs 2 and 3 of plaintiff's notice of claim dated August, 23, 2010 provide that:

> The nature of the claim:
>
> This claim seeks money damages for personal injuries. The claim is one for money damages due to the personal injuries and damages incurred by the plaintiffs as a result of the carelessness, recklessness, and negligence of the County of Nassau, Town of Oyster Bay, and Incorporated Village of Massapequa Park, including its agents, servants and/or employees with regard to the manner in which it owned, operated, maintained and controlled the roadways and the road signage in and around the intersection located at Park Boulevard and Beaumont Avenue in the Incorporated Village of Massapequa Park.
>
> The time when, the place where and the manner in which the claim arose:
>
> The claim arose on June 6, 2010 at approximately 4:05 PM when a vehicle driven by Nikolette Odierno was caused to impact with the plaintiffs' vehicle after failing to stop at a stop sign located at the subject intersection. It is alleged that the defendants created a dangerous condition and/or had actual and constructive notice of the dangerous condition existing at the subject intersection and involving the sinage located thereat, as well as overgrown vegetation impeding the view of traffic on Park Boulevard."

Relying upon the two notices of claim, plaintiffs allege that they both set forth sufficient information about the time, the location, and the manner in which the subject claim arose so to put the defendants on proper and sufficient notice to proceed with whatever investigation they deemed proper. Further, the allegations within the notices of claim, dated August 9, 2010 and August 23, 2010, alleged a failure by the defendants herein to

maintain and control the roadways at the subject intersection as a whole.

In sum, plaintiffs contend that "the Town has failed to demonstrate that plaintiffs' pleadings set forth anything more than simply amplifications of the allegations set forth in their two notices of claim, and has failed to demonstrate how it was prejudiced in conducting its investigation of the subject location at the time the notices of claim were filed and served." (¶ 8 aof Jinan Monique Arafat's Affirmation).

To succeed on a motion pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" *(Goshen v Mutual Life Ins. Co., of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83 [1994]; *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 11 NY3d 146 [2008]; *Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110 [2nd Dept 2011]; *1191 Richmond Ave. Associates, LLC v G.L.G. Capital, LLC*, 60 AD3d 1021 [2nd Dept 2009]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must determine whether from the four corners of the pleading "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Salvatore v Kumar,* 45 AD3d 560 [2nd Dept 2007], *lv to app den.* 10 NY3d 703 [2008], quoting *Morad v Morad*, 27 AD3d 626, 627 [2nd Dept 2006]). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]; *Leon v Martinez, supra*; *Kats v East 13th Street Tifereth, Place, LLC*, 73 AD3d 706, 707 [2nd Dept. 2010]). Notably, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Ginsburg Development Companies, LLC v Carbone, supra*; *Farber v Breslin*, 47 AD3d 873 [2nd Dept 2008]).

Timely and proper service of a notice of claim which, *inter alia*, sufficiently identifies the claimant, states the nature of the claim and describes "the time when, the place where and the manner in which the claim arose," is a condition precedent to the commencement of a common-law tort action against a municipality (*see* General Municipal Law § 50-e[2]; *Brown v City of New York*, 95 NY2d 389, 392-393 [2000];

Santoro v Town of Smithtown, 40 AD3d 736 [2nd Dept 2007]; *see Hendrickson-Brown v City of White Plains*, 2012 NY Slip Op 00930).

The purpose of the statutory notice of claim requirement (General Municipal Law § 50-e) is to afford the public corporation "an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available" *(Teresta v City of New York*, 304 NY440, 443 [1952]; *see O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]; *Salesian Socy. v Village of Ellenville*, 41 NY2d 521, 524 [1977]). To that end, the statute requires that the notice set forth "the time when, the place where and the manner in which the claim arose" (General Municipal Law § 50-e[2]; *see Brown v City of New York, supra*).

"The requirements of the statute are met when the notice describes the accident with sufficient particularity so as to enable the defendant to conduct a proper investigation thereof and to assess the merits of the claim" *(see Palmer v Society for Seamen's Children,* 88 AD3d 970 [2nd Dept 2011]; *O'Brien v City of Syracuse, supra; Ingle v New York City Tr. Auth.*, 7 AD3d 574 [2nd Dept 2004]; *Cyprien v New York City Tr. Auth.*, 243 AD2d 673, 674 [2nd Dept 1997]; *Levine v City of New York*, 111 AD2d 785, 786 [2nd Dept 1985]). Further, "[w]hether the notice of claim substantially complies with the requirements of the statute depends on the circumstances of each case" (*Id.*; *see Schwartz v City of New York*, 250 NY 332, 335 [1929]; *Ingle v New York City Tr. Auth., supra; Cyprien v New York City Tr. Auth., supra; Levine v City of New York, supra*).

Applying these principles to the case at bar, we find that the notices of claim substantially comply with General Municipal Law § 50-e[2].

In view of the foregoing, the motion is **denied.**

This constitutes the Order of the Court.

Dated: March 29, 2012

J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE