

<b>Bierce v Shoreham-Wading River High Sch.</b>
2013 NY Slip Op 30042(U)
January 3, 2013
Supreme Court, Suffolk County
Docket Number: 24153/2010
Judge: William B. Rebolini
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

COPY

Short Form Order

## SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

## PRESENT:

**WILLIAM B. REBOLINI**  
Justice

---

 Jehanne Bierce,

Index No.: 24153/2010

Plaintiff,

Attorneys [See Rider Annexed]

-against-

Motion Sequence No.: 001; MD ✓Motion Date: 2/29/12Submitted: 9/28/12
 Shoreham-Wading River High School,  
 Shoreham-Wading River School District  
 and North Shore Public Library,
Motion Sequence No.: 002; MG ✓Motion Date: 5/30/12Submitted: 9/28/12

Defendants.

Motion Sequence No.: 003; XMOT.D ✓Motion Date: 6/20/12Submitted: 9/28/12Motion Sequence No.: 004; MD ✓Motion Date: 8/17/12Submitted: 9/28/12

Upon the following papers numbered 1 to 69 read upon these motions for summary judgment, to amend the bill of particulars and to strike the note of issue: Notice of Motion and supporting papers, 1 - 11; 29 - 43; 51 - 63; Notice of Cross Motion and Supporting papers, 49 - 50; Answering Affidavits and supporting papers, 12 - 26; 44 - 45; 67 - 84; Replying Affidavits and supporting papers, 27 - 28; 46 - 48; 67 - 69; Other, 64 - 66; it is

**ORDERED** that these motions are consolidated for purposes of this determination; and it is further

**ORDERED** that the motion by defendant North Shore Public Library for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

Bierce v. Shoreham-Wading River H.S., et al.  
Index No.: 24153/2010  
Page No. 2

**ORDERED** that the motion by the plaintiff for leave to serve an amended bill of particulars is granted; and it is further

**ORDERED** that the cross motion by defendant Shoreham-Wading River Central School District s/h/a Shoreham-Wading River High School and Shoreham-Wading River Central School District for an order pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (e) vacating the note of issue and certificate of readiness and compelling additional discovery with respect to the new allegations set forth in the plaintiff's amended bill of particulars, or, in the alternative, compelling discovery and extending its time to make a motion for summary judgment, is granted to the extent that the plaintiff is directed to appear for a continued deposition within 90 days of the date of this order at a time and place mutually agreeable to the parties, and is otherwise denied; and it is further

**ORDERED** that the motion by defendant Shoreham-Wading River Central School District for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on December 7, 2009 at approximately 9:30 a.m., when she slipped and fell on ice on the stairs located in front of the Shoreham-Wading River High School/Public Library located at 250B Route 25A, Shoreham, New York. In her complaint and the bill of particulars, the plaintiff alleged that the defendants were negligent in, *inter alia*, failing to maintain the premises in a safe and suitable condition for patrons and by permitting a dangerous condition to exist and persist on the premises. In its answer, defendant Shoreham-Wading River Central School District ("the School District") asserts cross claims against defendant North Shore Public Library ("Public Library") for contribution and indemnification. The Public Library does not assert any cross claims against the School District.

The School District and the Public Library now separately move for summary judgment dismissing the complaint, the plaintiff moves to amend her bill of particulars, and the School District cross-moves to vacate the note of issue and certificate of readiness and to compel additional discovery with respect to the new allegations set forth in plaintiff's amended bill of particulars.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v*

**Bierce v. Shoreham-Wading River H.S., et al.**  
**Index No.: 24153/2010**  
**Page No. 3**

*Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (see *Alvarez v Prospect Hosp., supra*).

“A property owner will be held liable for a slip and fall involving snow and ice on its property only when it created the dangerous condition that caused the accident . . . or had actual or constructive notice thereof” (*Medina v La Fiura Dev. Corp.*, 69 AD3d 686, 686, 895 NYS2d 98, 99 [2d Dept 2010]). To constitute constructive notice, the “condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it” (*Bolloli v Waldbaum, Inc.*, 71 AD3d 618, 619, 896 NYS2d 400, 402 [2d Dept 2010] [internal quotation marks omitted]). On a motion for summary judgment dismissing a complaint, the defendant bears the burden of proving the absence of notice as a matter of law (see *Alston v Starrett City Assoc.*, 72 AD3d 711, 898 NYS2d 859 [2d Dept 2010]).

Here, both the School District and the Public Library failed to establish *prima facie* that they did not have constructive notice of the ice on the top step of the staircase located outside of the library, since they did not offer any evidence as to when the staircase was last inspected, shoveled or salted (see *Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 928 NYS2d 9 [1st Dept 2011]; *Mignogna v 7-Eleven, Inc.*, 76 AD3d 1054, 908 NYS2d 258 [2d Dept 2010]; *Totten v Cumberland Farms, Inc.*, 57 AD3d 653, 908 NYS2d 258 [2d Dept 2008]). Therefore, both motions for summary judgment dismissing the complaint are denied.

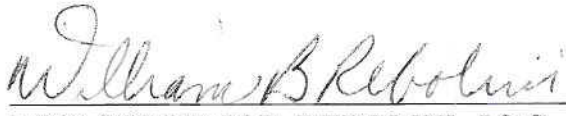
Turning to the plaintiff’s motion to amend her bill of particulars, generally leave to amend a bill of particulars should be freely granted in the absence of prejudice or surprise resulting from the delay in seeking leave, unless the amendment is sought on the eve of trial or it is palpably insufficient or devoid of merit (see *Roman v 233 Broadway Owners, LLC*, 99 AD3d 882, \_\_\_ NYS2d \_\_\_ [2d Dept 2012]; *Alvarado v Beth Israel Med. Ctr.*, 78 AD3d 873, 911 NYS2d 174 [2d Dept 2010]; *Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]). Here, the plaintiff’s motion was made only two and one-half months after the note of issue was filed. Thus, contrary to the defendants’ contentions, the plaintiff did not need to assert a reasonable excuse for her delay. The plaintiff seeks to amend her bill of particulars to specify more particulars with respect to both defendants’ negligence, to wit, that the defendants were negligent in that the steps upon which the plaintiff fell were uneven and did not have a handrail. The proposed amendments are not palpably insufficient or devoid of merit, and the defendants would not be prejudiced or surprised by them. The notice of claim served upon the defendants specifically stated that “[t]he stairs were not reasonably safe (existence of ice and/or snow) (no handrails)” and Robert Woolsey, the plant facilities administrator for the high school, testified at his deposition that the stairs did not have a handrail and were not level. Accordingly, the plaintiff’s motion is granted.

As to the separate motion by the School District which seeks, *inter alia*, to strike the note of issue and compel additional discovery, the motion is granted to the extent that the plaintiff is directed to appear for a continued deposition limited to the amendment to the bill of particulars within 90

Bierce v. Shoreham-Wading River H.S., et al.  
Index No.: 24153/2010  
Page No. 4

days of the date of this order at a time and place mutually agreeable to the parties, and such motion is otherwise denied.

Dated: 1/3/2013

  
HON. WILLIAM B. REBOLINI, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION \_\_\_X\_\_\_ NON-FINAL DISPOSITION

RIDER

Attorney for Plaintiff:

Cellino & Barnes, P.C.  
600 Old Country Road, Suite 500  
Garden City, NY 11530

Clerk of the Court

Attorney for Defendants  
Shorcham-Wading River High School,  
Shorcham-Wading River School District:

Congdon, Flaherty, O'Callaghan,  
Reid, Donlon, Travis and Fishlinger  
333 Earle Ovington Boulevard, Suite 502  
Uniondale, NY 11553-3625

Attorney for Defendant  
North Shore Public Library:

Hammill, O'Brien, Croutier,  
Dempsey, Pender & Kochler, P.C.  
6851 Jericho Turnpike, Suite 1306  
P.O. Box 1306  
Syosset, NY 11791