Prucha v Town of Babylon
2015 NY Slip Op 32541(U)
January 8, 2015
Supreme Court, Suffolk County
Docket Number: 10-41176
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 10-41176 *
CAL. No. 14-00130OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PUBLISH

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - MD
002 - XMG

ELISE PRUCHA, Plaintiff, - against - TOWN OF BABYLON, Defendant.	DELL, LITTLE, TROVATO & VECERE, L.L.P. Attorney for Plaintiff 5 Orville Drive, Suite 100 Bohemia, New York 11716 JOSEPH WILSON, ESQ., Town Attorney Attorney for Defendant 200 E. Sunrise Highway Lindenhurst, New York 11757

Upon the following papers numbered 1 to 1 - 19 read on this motion for summary judgment; and or this cross motion to amend pleadings ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers 20 - 25 ; Answering Affidavits and supporting papers 26 - 29; 30 - 33 ; Replying Affidavits and supporting papers 34 - 35; 36 - 37; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment in its favor is denied; and it is further

ORDERED that the cross motion by plaintiff for leave to serve an amended notice of claim, an amended complaint, and an amended bill of particulars is granted; and it is further

ORDERED that plaintiff shall file the proposed amended notice of claim, amended complaint and amended bill of particulars with the Clerk of the Court and shall serve copies of the same upon defendant within 20 days after service of a copy of this order with notice of its entry.

Plaintiff Elisa Prucha commenced this action to recover damages for personal injuries she allegedly sustained on December 12, 2009, when she tripped and fell on a raised slab of concrete sidewalk in front of her residence at 239 Old Country Road, Deer Park. It is undisputed that in cember 2009, a portion of the sidewalk in front of plaintiff's residence was lifted, such condition rently caused by the roots of an adjacent tree. The notice of claim and the complaint allege

defendant Town of Babylon breached a duty to keep the sidewalk in front of her residence in a reasonably safe condition. By her bill of particulars, plaintiff alleges the proximate cause of her accident was the "raised, uneven and unlevel portion of the sidewalk" in front of 239 Old Country Road, that such condition constituted a trap, that the Town's employees created such condition, and that the Town had actual and constructive notice of such condition. She further alleges the Town was negligent, among other things, in failing to maintain and repair the sidewalk, in allowing the alleged dangerous condition to exist on the sidewalk, and in failing to warn of such condition. According to the Court's computerized records, a certification conference was held in this action on December 18, 2013, and the note of issue and certificate of readiness were filed on January 24, 2014.

The Town now moves for summary judgment dismissing the claim against it on the ground that it did not receive prior written notice of the alleged dangerous condition. The Town's submissions in support of the motion include copies of the pleadings and the bill of particulars, the transcript of plaintiff's testimony at a General Municipal Law § 50- hearing, the transcripts of the parties' deposition testimony, and photographs of the portion the sidewalk at issue. Also submitted in support of the motion are affidavits of Town employees Thomas Stay and Jennifer Taus.

Plaintiff opposes the motion and cross-moves for leave to serve an amended notice of claim and amended pleadings to allege the Town had prior written notice of the dangerous condition on the sidewalk. Plaintiff argues the Town's motion for summary judgment must be denied, since evidence shows a Town employee inspected the site approximately one month prior to the subject accident and indicated on an inspection report that the sidewalk was uplifted and needed to be fixed. In opposition to the Town's motion, plaintiff submits, among other things, copies of the Town's written response, dated July 9, 2012, to plaintiff's notice of discovery, a "Foreman's Inspection Report," and her own affidavit. As to the cross motion for permission to serve the amended notice of claim, amended complaint, and amended bill of particulars, plaintiff asserts the Town will not be prejudiced by the new claim that it received written notice of a dangerous condition on the sidewalk.

Plaintiff's cross motion is granted. Generally, leave to amend or supplement a pleading "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, devoid of merit, or would prejudice or surprise the opposing party (see Lariviere v New York City Tr. Auth., 82 AD3d 1165; Gitlin v Chirinkin, 60 AD3d 901; Lucido v Mancuso, 49 AD3d 220; Barnes Coy Architects, P.C. v Shamoon, 53 AD3d 466). However, when presented with an application for leave to amend made long after the case has been certified as ready for trial, judicial discretion in allowing an amendment should be "discrete, circumspect, prudent and cautious" (Clarkin v Staten Is. Univ. Hosp., 242 AD2d 552, 552). In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion is predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted from such delay (see Alrose Oceanside, LLC v Mueller, 81 AD3d 574; American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co., 68 AD3d 792).

Here, the complaint alleges the Town had actual notice of the alleged dangerous condition on the sidewalk. Plaintiff testified at the General Municipal Law § 50-h hearing and at her deposition that a Town employee had inspected the sidewalk in front of her residence prior to the accident, and that such

employee left a written report regarding his inspection in her mailbox indicating the sidewalk was lifted and needed to be replaced, and it is undisputed that the Town had a copy of such report. The Town's own witness confirmed during a deposition that a Town employee had inspected the site and had prepared the report directing the sidewalk be replaced. Moreover, the Town failed to demonstrate granting leave to amend the notice of claim and complaint will prejudice its defense to plaintiff's trip and fall claim. A defendant opposing an application for leave to amend a pleading on the ground of prejudice must demonstrate it has "been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" had the original pleading included the proposed amendment (Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18, 23; see Whalen v Kawasaki Motors Corp., 92 NY2d 288). Therefore, while plaintiff offered no explanation for waiting to make the instant cross motion, under the particular circumstances, where the case is not yet on the trial-ready calendar, and the Town knew for years that plaintiff was claiming a Town employee had prepared a written report concerning the alleged dangerous condition, leave to serve the proposed amended notice of claim, amended complaint and amended bill of particulars is granted (see Perez v City of New York, 110 AD3d 777; Sanatass v Town of N. Hempstead, 64 AD3d 695; Reyes v City of New York, 63 AD3d 615).

As to the motion for summary judgment, a town has a continuing, nondelegable duty to maintain its sidewalks in a reasonably safe condition for pedestrians (see Amabile v City of Buffalo, 93 NY2d 471; Kiernan v Thompson, 73 NY2d 840; D'Ambrosio v City of New York, 55 NY2d 454). However, where a municipality has enacted a prior written notice statute, it will not be subjected to liability for injuries caused by a defective or dangerous condition on a sidewalk or roadway unless it has received prior written notice of such condition or an exception to the prior written notice requirement applies (see Amabile v City of Buffalo, 93 NY2d 471; Hannibal v Incorporated Vil. of Hempstead, 110 AD3d 960; Cimino v County of Nassau, 105 AD3d 883; Braver v Village of Cedarhurst, 94 AD3d 933). As relevant to the instant action, pursuant to Town of Babylon Code §158-2, the Town will not be held liable for a defective or hazardous condition on a public sidewalk unless prior written notice of the condition that caused the plaintiff's injury was given to the Town Clerk or the Commissioner of Department of Public Works, and the Town failed to correct such condition within a reasonable time after the notice was received (see Giarraffa v Town of Babylon, 84 AD3d 1162). However, there are two recognized exceptions to the statutory prior written notice rule: (1) if the municipality created the defective or hazardous condition through an affirmative act of negligence, and (2) if the municipality derived a special benefit from the sidewalk or roadway unrelated to the public use (Amabile v City of Buffalo, 93 NY2d 471, 474; see Kiernan v Thompson, 73 NY2d 840; Barnes v Incorporated Vil. of Port Jefferson, 120 AD3d 528; Miller v Town of E. Hampton, 98 AD3d 1007; Braver v Village of Cedarhurst, 94 AD3d 933).

The Town's submissions in support of its motion are insufficient to establish a prima facie case that it had no prior written notice of the alleged dangerous condition on the sidewalk (see Harrington v City of Plattsburgh, 216 AD2d 724). Prior written notice of a defective or dangerous condition on a sidewalk or roadway does not have to emanate from a private citizen (see Harrington v City of Plattsburgh, 216 AD2d 724; Shiebler v City of New York, 208 AD3d 709; Schuster v Town of Hempstead, 130 AD2d 481; Brooks v City of Binghamton, 55 AD2d 482; Scherm v Town of N. Hempstead, 45 AD2d 886). While the affidavits of Thomas Stay, Commissioner of the Town's

Department of Public Works, and Jennifer Taus, a clerk-typist in the Town Clerk's office, aver the Town had not received any prior written notice of the uneven condition of the sidewalk in front of plaintiff's residence, it is clear from the deposition testimony that the Town, particularly the Department of Public Works, did, in fact, have written notice of the alleged dangerous condition. Plaintiff testified at her deposition that she began calling the Town to complain about the condition of the sidewalk soon after she moved into her residence. She testified that approximately one month before her accident, following repeated phone calls to the Town, a Town employee came to the property to inspect the sidewalk. Plaintiff testified that while she did not actually witness the Town employee's inspection of the site, a Town form was left inside her mailbox indicating the tree alongside the sidewalk was going to be removed and the sidewalk was going to be replaced. Plaintiff testified that the Town did, in fact, remove the tree before her accident, but did not work on the sidewalk until sometime after her accident occurred.

Robert Prager, a Town employee assigned to the Department of Public Works, also testified that an inspection of the tree in front of plaintiff's property was conducted by a foreman on November 13, 2009, in response to a phone complaint received in July 2009 that the sidewalk was uplifted more than two inches. Mr. Prager explained that the inspection report consists of two parts, one which is kept by the foreman and returned to the Department of Public Works for entry into the Town's computer system, and the other which is left with the Town resident who made the complaint. Mr. Prager testified that the inspection report for the property at 239 Old Country Road was entered into the Town's system on November 17, 2010, and that the tree was cut down on November 20, 2009, but that removal of the tree stump and work on the sidewalk did not begin until late January 2009.

In any event, plaintiff raised a triable issue as to whether the Town had the requisite written notice of the alleged dangerous condition (see Shiebler v City of New York, 208 AD2d 709). As mentioned above, plaintiff's opposition papers include a copy of the foreman's inspection report allegedly left in her mailbox prior to the accident. Prepared by a Town employee assigned to the Department of Public Works, the report states that a Town inspection of the sidewalk in front of 239 Old County Road was conducted on November 13, 2010; that such inspection showed a tree "half dead" and an "uplifted sidewalk"; and that the Town's plan of action was to "take down [the] tree" and "replace [the] sidewalk." Further, plaintiff avers in her affidavit that she repeatedly called the Town to complain that the sidewalk in front of her property was uneven and lifted approximately two inches in height, and that a Town employee inspected the sidewalk one month before her accident and left a report indicating it would be replaced. She further asserts that after the tree was cut down, the condition of the sidewalk worsened, with the height differential increasing by one-half to three-quarters of an inch.

Thus, despite the affidavits of Mr. Stay and Ms. Taus attesting the Town did not receive prior written notice of the alleged dangerous condition, the evidence in the record shows the Town, as a result of its November 2010 inspection of the sidewalk in front of plaintiff's residence, had prior written notice of the dangerous condition that allegedly caused plaintiff to fall. Accordingly, the Town's motion for summary judgment in its favor is denied.

Dated: January 8, 2015

HON. JOSEPH C. PASTORESSA, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**