

Vnuk v City of Albany
2017 NY Slip Op 33106(U)
April 12, 2017
Supreme Court, Albany County
Docket Number: 5249-16
Judge: Richard M. Platkin
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

DONNA VNUK and STEPHEN VNUK,
Plaintiffs,

-against-

DECISION & ORDER

CITY OF ALBANY and COUNTY OF ALBANY,
Defendants.

Index No. 5249-16

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

DEGRAFF FOY & KUNZ, LLP
Attorneys for Plaintiffs
(George J. Szary, of counsel)
41 State Street
Albany, New York 12207

LAW OFFICES OF DANIEL L. DOHERTY
Attorneys for Plaintiffs
(Daniel L. Doherty, of counsel)
41 State Street
Albany, New York 12207

WILLIAM G. KELLY, JR., INTERIM CORPORATION COUNSEL
Attorney for City of Albany
(Valerie A. Lubanko, of counsel)
City Hall, Room 106
24 Eagle Street
Albany, New York 12207

GOLDBERG SEGALLA LLP
Attorneys for County of Albany
(Jonathan M. Bernstein, of counsel)
8 Southwoods Boulevard, Suite 300
Albany, New York 12211

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Hon. Richard M. Platkin, A.J.S.C.

By this action, plaintiff Donna M. Vnuk and her husband, Stephen J. Vnuk, seek to recover from defendants City of Albany (“City”) and County of Albany (“County”) for personal injuries allegedly sustained by Donna Vnuk when she tripped and fell. The City moves, pre-answer, for dismissal of the complaint and the County’s cross claim. Plaintiffs and the County oppose the motion, and plaintiffs cross-move for leave to amend the complaint.

At about 7:00 a.m. on March 2, 2016, plaintiff Donna Vnuk (“plaintiff”)¹ was injured when she tripped and fell on “exposed and unguarded footing and bolts” – allegedly the remnants of some sort of utility pole – while walking on the sidewalk along Beaver Street in the City of Albany. The complaint alleges that the City and/or the County were negligent by: (a) creating and/or allowing the existence of a tripping hazard in an area known to be a pedestrian walkway, despite having actual and/or constructive knowledge of such hazard; (b) failing to remove and/or cover the remnants, which created a hazardous condition; and (c) failing to warn pedestrians of the tripping hazard. The County answered the complaint and asserted a cross claim against the City for indemnification and/or contribution.

ANALYSIS

A. Cross Motion to Amend

Pursuant to Albany City Code (“Code”) § 24-1, a claim “for damages or injuries to a person or property sustained in consequence of any street . . . being . . . dangerous or obstructed” may not be maintained unless prior written notice of the allegedly dangerous or obstructed condition was given to the City (*see Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]);

¹ The claims alleged by Stephen Vnuk are purely derivative.

Friedland v County of Warren, 61 AD3d 1138, 1139 [3d Dept 2009]).

In response to the City's contention that the complaint is deficient because it fails to plead compliance with the prior written notice requirement of Code § 24-1, plaintiffs seek to amend the complaint to include such an allegation. Specifically, plaintiffs seek to allege that the City "is charged with the duty to maintain and retain written records of all removals of utility poles or pedestrian traffic signals or security light poles within the City of Albany" (Proposed Amended Complaint, ¶ 9) and, as such, the City "had, or should have had, prior written notice that [pole] remnants were located [on] Beaver Street . . . from its own internal records or other prior written notice, as the City of Albany, by its Traffic Engineering Services Department, removed the said traffic signal or security light pole" (*id.*, ¶ 10).

In opposition to the cross motion, the City argues that the proposed amendment should be denied because it improperly "attempts to assert a new theory of liability which [was] not alleged or even alluded to in the notice of claim", namely that "plaintiffs complied with the Albany City Code § 24-1" (City's Memorandum of Law in Opposition to Plaintiffs' Cross Motion, at 9). Contrary to the City's contention, however, the amendment proposed by plaintiffs does not add a new theory of liability. Rather, the amendment consists of factual allegations related to an existing theory of liability: negligence based upon the City's failure to remediate a dangerous condition of which it had legally sufficient notice.

A motion for leave to amend a pleading should be freely granted, provided that there is no prejudice or surprise to the nonmoving party and the amendment is not plainly lacking in merit (CPLR 3025 [b]; *Pansini Stone Setting, Inc. v Crow & Sutton Assoc., Inc.*, 46 AD3d 784, 786 [2d Dept 2007]; *Smith v Haggerty*, 16 AD3d 967, 967-968 [3d Dept 2005]). The non-movants have

failed to identify any cognizable prejudice or surprise, and the alleged insufficiency or lack of merit of plaintiffs' new allegations is not so clear and free from doubt as to warrant denial of leave to amend at this early stage of the litigation. Accordingly, the Court will exercise its discretion to allow plaintiffs to amend the complaint to add the proposed factual allegations.

B. Motion to Dismiss

When considering a motion to dismiss for failure to state a cause of action, the Court must liberally construe the pleadings, accept the facts alleged therein as true, grant the plaintiff the benefit of every favorable inference, and limit its review to a determination as to whether the facts alleged fall within a cognizable legal theory (*see* CPLR 3211 [a] [7]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Slezak v Stewart's Shops Corp.*, 133 AD3d 1179, 1179 [3d Dept 2015]). While the Court may consider “[a]ffidavits and other evidentiary material” to determine if the movant has “‘establish[ed] conclusively that [the] plaintiff has no cause of action’” (*Allen v City of New York*, 49 AD3d 1126, 1127 [3d Dept 2008], quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]), “a complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists” (*Rovello*, 40 NY2d at 634).

In moving for dismissal under CPLR 3211 (a) (7), the City argues that the affidavits of Daniel W. DiLillo and William E. Trudeau, Jr. conclusively establish that the City did not create the allegedly defective condition of which plaintiffs complain, nor did it receive prior written notice of such condition. DiLillo, the Deputy Commissioner of the City's Department of General Services (“DGS”), avers that DGS is the agency designated by the Code to be given written notice of allegedly dangerous or hazardous conditions. DiLillo avers that his agency “maintains

records in the ordinary course of business of all notices of defective conditions sent to [DGS]”, and the agency has no record that written notice of a defective or dangerous condition related to the area of plaintiff’s fall ever was given to the City. In addition, DiLillo found no record of the City “having removed a utility pole” in that area.

For his part, Trudeau, the Chief Supervisor of the Traffic Engineering Unit (“TEU”) of the Albany Police Department, avers that the TEU is the entity responsible for the maintenance and repair of “all posts and/or poles related” to traffic signage and signals owned by the City. According to Trudeau, TEU has “no record of . . . having removed any traffic signage posts and/or traffic signal poles in the area” where plaintiff fell.

While these affidavits may establish, *prima facie*, that the City did not receive prior written notice in compliance with the Code, a summary judgment standard is not to be applied on this motion to dismiss. Indeed, in opposing this motion to dismiss, plaintiffs are not required to produce evidentiary support for the complaint, nor are they required to lay bare their proof (*see Rovello*, 40 NY2d at 635).

In any event, the City’s argument fails to address the fact that the requirement of prior written notice is obviated “where the plaintiff demonstrates that the municipality ‘created the defect or hazard through an affirmative act of negligence’” (*Groninger v Village of Mamaroneck*, 17 NY3d 125, 127-128 [2011], quoting *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). The complaint filed in this action and the proposed amended complaint allege that the City is responsible for the maintenance of the sidewalk on Beaver Street, as well as any utility or other poles located thereon, and that the City affirmatively created “a tripping hazard” on the sidewalk by failing to remove the “footing and fasteners” or otherwise cover them after the removal of a

utility pole. The City's affidavits do not conclusively establish to the contrary.

In addition, plaintiffs have submitted the affidavit of Theodore DeLucia, Jr., an individual with experience and knowledge of "state and municipal building codes, code enforcement, and similar matters regarding structures present on, among other things, municipal-owned property". He avers that "the footing and bolts protruding from the pavement [on which plaintiff tripped] are the remnants of a pole removed from the area, which was either a pedestrian traffic control device or a security light pole". DeLucia further avers that, whatever it was, the "structure[] would have been under the control of the City of Albany" and that such device "would have to have been removed by the [TEU]".

Under the circumstances, the City has failed to establish its entitlement to dismissal of the complaint.

CONCLUSION

Accordingly, it is

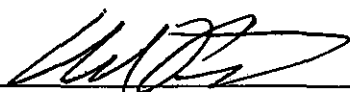
ORDERED that the City's motion to dismiss the complaint is denied; and it is further

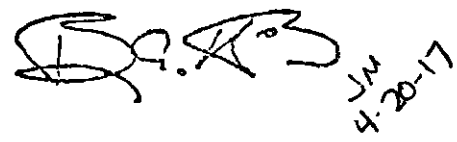
ORDERED that plaintiffs' cross motion to amend the complaint is granted, and plaintiffs shall file and serve their mended complaint within twenty (20) days from the date of this Decision & Order; and it is further

ORDERED that counsel shall confer and, within twenty (20) days following joinder of issue, either: (i) stipulate to a scheduling order, which shall be submitted to the Court for approval; or (ii) request a conference with the Court for the purpose of establishing a scheduling order.

This constitutes the Decision and Order of the Court. This Decision and Order is being transmitted to counsel for plaintiffs; all other papers are being transmitted to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York
April 12, 2017


RICHARD M. PLATKIN
A.J.S.C.


JW
4-20-17

Papers Considered:

- Notice of Motion, dated October 24, 2016;
- Affirmation of Valerie A. Lubanko, Esq., dated October 24, 2016, with exhibits A-B;
- Defendant City's Memorandum of Law, dated October 24, 2016;
- Affidavit of William E. Trudeau, Jr., sworn to October 24, 2016;
- Affidavit of Daniel W. DiLillo, sworn to October 21, 2016;
- Affirmation in Opposition of Jonathan M. Bernstein, Esq., dated January 12, 2017, with exhibits A-C;
- Notice of Cross Motion, dated January 13, 2017;
- Affidavit of George J. Szary, Esq., sworn to January 13, 2017, with exhibits A-D;
- Affidavit of Theodore DeLucia, Jr., sworn to January 13, 2017, with exhibits A-C;
- Plaintiffs' Memorandum of Law, dated January 13, 2017;
- Affirmation of Valerie A. Lubanko, Esq., dated January 19, 2017, with exhibits A-E;
- Defendant City's Memorandum of Law, dated January 10, 2017;
- Defendant City's Memorandum of Law, dated January 19, 2017.