

<b>Christie v Town of Islip</b>
2021 NY Slip Op 33185(U)
March 22, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 613945/2018
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 613945/2018  
CAL. No. 202000204OT

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

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 8/13/20 (003)  
MOTION DATE 11/2/20 (004)  
ADJ. DATE 12/2/20  
Mot. Seq. # 003 MG  
Mot. Seq. # 004 MG

-----X  
TIMOTHY CHRISTIE & SAMANTHA  
CHRISTIE,  
  
Plaintiffs,

ZALMAN SCHNURMAN & MINER  
Attorney for Plaintiffs  
1430 Broadway, Suite 1802  
New York, New York 10018

- against -

MCGIFF HALVERSON DOOLEY, LLP  
Attorney for Defendant Town of Islip  
96 South Ocean Avenue  
Patchogue, New York 11772

TOWN OF ISLIP and WESTVUE PROPERTY I  
LLC,  
  
Defendants.

SANTAMARINA & ASSOCIATES  
Attorney for Defendant Westvue Property I  
260 Madison Avenue, 17<sup>th</sup> Floor  
New York, New York 10016  
-----X

Upon the following papers read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers (mot. seq. 003) by plaintiffs, dated August 31, 2020; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers by Town of Islip, dated October 20, 2020; Replying Affidavits and supporting papers by plaintiffs, dated October 26, 2020; Other \_\_\_\_; Notice of Motion/ Order to Show Cause and supporting papers (mot. seq. 004) by plaintiffs, dated November 2, 2020; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers by the Town, dated November 24, 2020; Replying Affidavits and supporting papers by plaintiffs, dated November 30, 2020; Other \_\_\_\_; it is

**ORDERED** that the motion by plaintiffs pursuant to CPLR 3212 for summary judgment on the issue of liability against the defendant Town of Islip and to strike certain affirmative defenses is granted; and it further

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**ORDERED** that the motion by plaintiffs for leave to amend the notice of claim and to amend the complaint is granted.

The plaintiff Timothy Christie and his wife, derivatively, commenced this action to recover damages for personal injuries that he allegedly sustained as a result of a trip and fall accident on February 24, 2018. The incident occurred on a sidewalk abutting property located at 1367 Lombardy Boulevard in Bay Shore, New York. Plaintiffs allege that the sidewalk was owned by defendant the Town of Islip (the “Town”), and that the Town negligently maintained the sidewalk. Furthermore, plaintiffs claim that the Town had prior written notice of the defective condition since 2009, and that it failed to remedy the condition.

Plaintiffs now move for summary judgment on the issue of the Town’s liability, and to strike certain affirmative defenses that it has asserted. Plaintiffs argue that the Town received prior written notice concerning the condition of the sidewalk when it received the notice of claim from a non-party who tripped and fell at the same location some years prior to his accident. In opposition, the Town contends that there is an issue of fact whether it received prior written notice, and that there is a dispute concerning the location of the alleged defect; therefore, summary judgment is not warranted.

Under New York law, 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, 693 NYS2d 77 [1999]; *Delgado v County of Suffolk*, 40 AD3d 575, 835 NYS2d 379 [2d Dept 2007]; *Wilkie v Town of Huntington*, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]). Nevertheless, where a town 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 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, 961, 973 NYS2d 742 [2d Dept 2013]; *Cimino v County of Nassau*, 105 AD3d 883, 884, 963 NYS2d 698 [2d Dept 2013]; *Braver v Village of Cedarhurst*, 94 AD3d 933, 934, 942 NYS2d 178 [2d Dept 2012]). There are only two exceptions to the prior written notice rule, namely, where the locality created the defect or hazard through an affirmative act of negligence, and where a special use confers a special benefit upon the locality (*see Amabile v City of Buffalo*, *supra*; *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008, 951 NYS2d 171, 173 [2d Dept 2012]; *Sollowen v Town of Brookhaven*, 43 AD3d 816, 841 NYS2d 351 [2d Dept 2007]). The affirmative negligence exception is limited to work that the municipality performs that immediately results in the existence of a dangerous condition (*see Yarborough v City of New York*, 10 NY3d 726, 728, 853 NYS2d 261 [2008]).

Pursuant to Town Law § 65-a and Town of Islip Code § 47A-3, as a precondition to commencing a civil action against the Town to recover damages for personal injuries sustained as a result of a defect in Town property, the Town must have been given prior written notice of the defect and failed to repair it within a reasonable time thereafter (*see Nixdorf v East Islip School Dist.*, 276 AD2d 759, 715 NYS2d 432 [2d Dept 2000]). The Code provides, in part, that “[n]o civil action shall be maintained against the Town ... for damages or injuries ... sustained by reason of any ... sidewalk ... owned or maintained by the Town ... being defective ... unless written notice of such defective ... sidewalk ... was actually given to

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the Town Clerk or Commissioner of Public Works” (Code of Town of Islip § 47A-3[A]; see *Otto v Miller*, 177 AD3d 895, 896, 113 NYS3d 228 [2d Dept 2019]).

Here, plaintiffs submit evidence that in 2009 the Town received a notice of claim concerning a trip and fall on the sidewalk in front of 1367 Lombardy Boulevard. The notice of claim stated that the defect in the sidewalk was located approximately 24 feet south of the roadway’s intersection with Huron Road. A letter dated July 14, 2009 was sent to the Department of Public Works (DPW) and the executive assistant to the commissioner of the DPW, which included the notice of claim and photographs of the area. In addition, the record shows that a DPW service notice dated August 14, 2009, listed the service location as 1367 “Lombardy Blvd.” and included a note which stated “received a notice of complaint that someone tripped on the sidewalk ifo [sic] above approx’ [sic] five feet from a tree pls [sic] check thanks.” Another DPW service notice dated August 25, 2014 included a note stating “tree-to be removed near the driveway, states the tree is breaking up sidewalk.” Although that notice listed the service location as 1365 Lombardy Boulevard, Quintal Contracting Corp, a private company, was commissioned to remove the tree and issued an invoice to the DPW indicating that the tree was removed from in front of 1367 Lombardy Boulevard. Quintal also noted that the “sidewalk [was] uplifting.”

Based on this evidence, plaintiffs made a prima facie showing that the Town had prior written notice of the defective condition and failed to address the condition (see *Prucha v Town of Babylon*, 138 AD3d 1083, 1084-1085, 30 NYS3d 671 [2d Dept 2016]; see also *Bochner v Town of Monroe*, 169 AD3d 631, 632, 93 NYS3d 136 [2d Dept 2019]). In opposition, the Town contends that plaintiffs failed to show that the notice of claim was actually given to the Commissioner of Public Works in accordance with the statutory requirement. However, the evidence demonstrates that the notice of claim was mailed to the DPW and received by the agency. The Town has failed to submit an affidavit or any other evidence disputing that the notice of claim was actually received by the appropriate entity. In addition, Peter Kletcha, the Town’s DPW representative, testified that the department performed work in the area where the accident occurred prior to the accident, and that a tree was removed from the front of 1367 Lombardy Boulevard in January 2015. He testified that, based on the 2014 service notice, a “high employee” would have been required to visit the location in order to recommend removal of the tree. Kletcha further testified that although general maintenance of the sidewalk was the obligation of the adjacent property owner, it appeared that the Town’s tree caused the damage and that the Town was responsible for any repair of the sidewalk. After receiving plaintiff’s complaint in 2018, Kletcha visited the area and observed that the sidewalk flags were broken, uneven, and in need of repair. The Town submitted no evidence that repairs were made to the sidewalk after the tree was removed. Under these circumstances, the Town has failed to demonstrate the existence of a triable issue of fact.

The Town also contends that an issue of fact exists as to whether the 2009 notice of claim identified the same defect that gave rise to plaintiff’s injury in 2018. The Town asserts that the descriptive language of the location of the defect in plaintiff’s notice of claim is different from the language in the 2009 notice of claim. The 2009 notice of claim states that the defect was located “approximately 24 feet south the intersection of Huron Rd and Lombardy Blvd, more specifically, on the sidewalk flag which is approximately 5 feet south of the tree in front of 1367 Lombardy Blvd and approximately 12.5 feet south of the stop line at the intersection of Huron and Lombardy which is in front of 1367 Lombardy Blvd and approximately 4 feet east of the street ledge.” In his notice of claim,

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plaintiff states that he was injured on the sidewalk “in front of 1367 Lombardy Boulevard . . . south of the intersection of Lombardy Avenue and Huron Road, and south of the stop sign in front of 1367 Lombardy Avenue.” At his General Municipal Law § 50-h hearing, and in his pleadings, plaintiff specified that he resided on Lombardy Boulevard and that the accident happened on the sidewalk located on the southeast corner of the intersection of Lombardy Boulevard and Huron Drive. Although plaintiff’s description of the location was not as detailed as in the 2009 notice of claim, the record demonstrates that both claims arose in front of 1367 Lombardy Blvd and the Town has failed to submit any evidence to support its contention that the defect was in a different location.

Plaintiffs also move to strike certain affirmative defenses that the Town has asserted as it relates to prior written notice, the Town’s liability, and the culpability of plaintiff. Specifically, plaintiffs seek to strike the first affirmative defense, failure to state a claim; the third, that defendants are not liable for any negligent act or omission, which was a proximate cause of plaintiff’s injuries; the fourth, that plaintiff was culpable for his own injuries; the fifth, that plaintiff’s damages were sustained as a result of intervening causes; the seventh, that no prior written notice of the defect was alleged; the eighth, which is the same as the fourth affirmative defense; and the ninth, that plaintiff assumed the risk of the activity. When moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is “without merit as a matter of law” (*Vita v New York Waste Services, LLC*, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]).

Plaintiff has demonstrated that the Town was liable for his injuries and that he was not culpable, and the Town failed to rebut this showing with any competent proof. The record establishes that plaintiff was merely jogging on the sidewalk when he tripped over the elevated and broken sidewalk flag and the Town has acknowledged that it was its responsibility to repair that condition. Additionally, nothing in the record supports the affirmative defense that plaintiff’s injuries were a result of intervening causes and the record is clear that plaintiff stated a valid cause of action. Furthermore, the Town failed to rebut plaintiffs’ showing that it had prior written notice of the defective condition. Accordingly, the motion for summary judgment on the issue of liability and to dismiss certain affirmative defenses is granted.

Plaintiffs also move for leave to amend the notice of claim and complaint to clarify the suffix of the street name where the accident occurred. Although the notice of claim states that the accident occurred in front of 1367 Lombardy Boulevard, it also refers to the street as Lombardy Avenue. “General Municipal Law § 50–e (6) authorizes a court, in its discretion, to grant leave to serve an amended notice of claim where the error in the original notice of claim was made in good faith, and where the other party has not been prejudiced thereby” (*Matter of Puzio v City of New York*, 24 AD3d 679, 808 NYS2d 314 [2d Dept 2005]; *Matter of Figgs v County of Suffolk*, 54 AD3d 671, 672, 863 NYS2d 258 [2d Dept 2008]). “The test of the sufficiency of a notice of claim is whether it includes information sufficient to enable the municipal agency to investigate the allegations contained in the notice of claim” (*Canelos v City of New York*, 37 AD3d 637, 637-638, 830 NYS2d 334 [2d Dept 2007]). Furthermore, “[l]eave to amend pleadings should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit” (*Sanatass v Town of N. Hempstead*, 64 AD3d 695, 881 NYS2d 901 [2d Dept 2009]).

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Here, the notice of claim included the correct address and pictures of the location were attached. Plaintiff also testified as to the location during his 50-h hearing as the record indicates that plaintiff resided on Lombardy Boulevard. In opposition, the Town submitted no evidence that it was prejudiced by the error. The Town acknowledges that there is no street in the Town named Lombardy Avenue, its employees investigated the incident and visited the area that plaintiff described, and there is no allegation by the Town that the error affected its ability to defend the action (*see Avery v New York City Tr. Auth.*, 138 AD3d 770, 771, 29 NYS3d 499 [2d Dept 2016]). Accordingly, the motion by plaintiffs for leave to amend the notice of claim and complaint is granted.

Dated: March 22, 2021



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

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION