Curry v County of Suffolk
2021 NY Slip Op 33522(U)
April 16, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 609596/2018
Judge: Joseph A. Santorelli

ORIGINAL

SHORT FORM ORDER

INDEX No. 609596/2018
CAL. No. 202000284MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 11/12/20 (006)
MOTION DATE 12/17/20 (007)
MOTION DATE 1/28/21 (008)
ADJ. DATE 3/4/21
Mot. Seq. # 006 MD
007 MD
008 MD

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MICHELLE CURRY,

Plaintiff,

- against -

COUNTY OF SUFFOLK, TOWN OF BABYLON, GMOS LIMITED PARTNERSHIP, WINTERS BROS. WASTE SYSTEMS OF LONG ISLAND, LLC., and WINTERS BROS. RECYCLING CORP.,

Defendants.

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Upon the following papers read on these e-filed motions for summary judgment, to amend answer, and for leave to reargue : Notice of Motion/Order to Show Cause and supporting papers by defendant County, dated October 16, 2020; by defendant Winter Bros., dated December 2, 2020; by defendant Town, dated December 30, 2020 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers by defendant Winter Bros., dated January 6, 2021; by plaintiff, dated January 8, 2021, and dated January 18, 2021; by defendant Town, dated January 21, 2021 ; Replying Affidavits and supporting papers by defendant Winter Bros., dated January 27, 2021; by defendant Town, dated January 27, 2021, and dated January 27, 2021; by defendant County, dated March 4, 2021 ; Other ___; it is

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

ORDERED that the motion by defendant County of Suffolk for summary judgment dismissing the complaint and the cross claims against it is denied; and it is further

ORDERED that the motion by defendants Winters Bros. Waste Systems of Long Island, LLC and Winters Bros. Recycling Corp. for an order pursuant to CPLR 3025 (b) granting them leave to amend their answer is denied; and it is further

ORDERED that the motion by defendant Town of Babylon for leave to reargue its prior motion for summary judgment, which was denied by an order dated November 30, 2020, is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff arising out of a single-vehicle accident which occurred on July 11, 2017, at approximately 9:15 p.m., in front of a building located at 513 Acorn Street in defendant Town of Babylon. Acorn Street is a two-way street with one lane in each direction, running east and west. Plaintiff alleges in her complaint that her vehicle collided with a dumpster on the side of the road. The dumpster was placed at the location by defendants Winters Bros. Waste Systems of Long Island, LLC and Winters Bros. Recycling Corp. (Winters Bros. defendants). On the morning of the accident, Ronald Saager, a deputy sheriff in the Suffolk County Sheriff's office, executed the warrant of eviction at the building located at 513 Acorn Street, removing the tenant's properties from the premises and into the dumpster.

Defendant County of Suffolk (County) moves for summary judgment dismissing the complaint and cross claims against it on the ground that it is entitled to the protection of the governmental function immunity defense, because the conduct of the deputy sheriff who executed the eviction warrant was a governmental function. In support, the County submits, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the parties' testimony.

At his deposition, Raoul Castaneda testified that he is the solid waste administrator of the Town of Babylon. He testified that the Town entered into a waste collection service agreement with Winters Bros., which was effective at the time of the subject accident. According to the agreement, the Town has Winters Bros. place dumpsters at commercial eviction sites. The dumpsters are owned by the Town. Castaneda testified that the sheriff in charge of the eviction determines how many dumpsters are needed, when they are needed, where they are placed, and whether any cones, barricades, or signs are needed around them. The sheriff also determines when the dumpsters are removed from the site. Castaneda testified that on the day of the accident, an eviction took place on 513 Acorn Street, and that he observed

two dumpsters on the side of the road when he arrived at the location. He testified that the sheriff decided that the dumpsters would be kept overnight.

At his deposition, John Vodola testified that he is a driver employed by Winters Bros. He testified that under the contract with the Town of Babylon, Winters Bros. delivers roll-off containers for eviction. Those containers are owned by the Town. On every eviction, the sheriff in charge of the eviction would direct him "exactly where to put" the dumpster. On the day of the accident, he dropped two roll-off containers on Acorn Street and placed them at the direction of the sheriff.

At his deposition, Saager testified that on the day before the subject accident, he called the Town of Babylon to order a container to be placed on the site of the eviction on the following day. Although he had no recollection as to whether he instructed Winters Bros. where to leave the containers, he testified he would have instructed that the containers be left alongside the roadway because that was the only place the containers could have been placed. He testified that the container could not have been left in the parking lot of the building where the eviction was executed, because the eviction court ordered to remove the tenant's property to the nearest public roadway. Saager testified that two containers were delivered on the day of the eviction, and that it is not his job to place any warning signs, such as cones, around containers on the road. He testified that the eviction at 513 Acorn Street was completed at around 2:30 p.m. Saager explained that when an eviction is completed he typically brings a copy of the warrant of eviction to the Town. He testified that he does not know when the containers are picked up by Winter Bros.

When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose (*see* ***Turturro v City of New York***, 28 NY3d 469, 477, 45 NYS3d 874 [2016]; ***Marks-Barcia v Village of Sleepy Hollow Ambulance Corps***, 183 AD3d 883, 125 NYS3d 116 [2d Dept 2020]; ***Halberstam v Port Auth. of N.Y. & N.J.***, 175 AD3d 1264, 109 NYS3d 111 [2d Dept 2019]). "A government entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises" (***Applewhite v Accuhealth, Inc.***, 21 NY3d 420, 972 NYS2d 169 [2013]; *see* ***Watts v City of New York***, 2020 NY Slip Op 05084, 2020 NY App. Div. Lexis 5187 [2d Dept 2020]; ***Granata v City of White Plains***, 120 AD3d 1187, 1188, 993 NYS2d 47 [2d Dept 2014]). In that instance, the government entity is subject to suit under the ordinary rules of negligence (*see* ***Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.***, 28 NY3d 709, 713, 49 NYS3d 362 [2017]). In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers (*see* ***Applewhite v Accuhealth, Inc.***, *supra*). Police and fire protection are examples of long-recognized, quintessential governmental functions (*see* ***Valdez v City of New York***, 18 NY3d 69, 75, 936 NYS2d 587 [2011]; ***Santaiti v Town of Ramapo***, 162 AD3d 921, 80 NYS3d 288 [2d Dept 2018]). If the action challenged in the litigation is governmental, the existence of a special duty is an element of plaintiff's negligence cause of action (*see* ***Connolly v Long Is. Power Auth.***, 30 NY3d 719, 70 NYS3d 909 [2018]; ***Lauer v City of New York***, 95 NY2d 95, 733 NE2d 184, 711 NYS2d 112 [2000]).

First, given the allegations of negligence contained in the complaint, the Court concludes that the County was acting in its proprietary capacity when the deputy sheriff executed the warrant of eviction in

the area of the accident. The County's assistance to the landlord in evicting tenant is not within the governmental function for the protection and safety of the public pursuant to the general police powers (*cf.* ***Applewhite v Accuhealth, Inc.***, *supra*). Given that the County was acting in its proprietary capacity at the time of the accident, the next question is whether the County was negligent in placing the dumpster on the side of the roadway. Here, the County has failed to establish its entitlement to judgment as a matter of law. There are several issues of fact as to whether the deputy sheriff determined the subject dumpster would be left on the road over night after an eviction, whether the deputy sheriff created an allegedly dangerous condition by placing the dumpster on the side of the road, whether the deputy sheriff was negligent in not placing any warning signs near the dumpster, and whether the accident was caused solely by the negligence of plaintiff in failing to operate her vehicle in a safe and lawful manner. Thus, the County's motion for summary judgment is denied.

The Winters Bros. defendants move for an order pursuant to CPLR 3025 (b) granting them leave to amend their answer to include the allegation that the subject dumpster was owned and maintained by the Town. The Winters Bros. defendants allege that the parties' testimony revealed that the Town owned the dumpster. In opposition, the Town contends that pursuant to the waste collection service agreement between the Town and Winters Bros., the subject dumpster was owned and maintained by the Winters Bros. defendants.

Section 2.2.6 of the agreement provides, in pertinent part:

> "Within eighteen months of the Commencement Date, all Containers for CII Refuse shall be new and mobilized. Initially, the Town will provide containers for use by the Contractor to service the accounts under the Contract. Thereafter, however, every six (6) months, the Contractor shall replace one-third (1/3) of the Containers with new Containers, with raised welded account numbers, identical to the numbers on the Containers being replaced, but with the numbers on the upper right comer of the Containers. At the end of the Contract, the Containers shall become the property of the Town. All Containers must be maintained in excellent condition by the Contractor during the entire term of the Contract. All Containers shall be maintained in proper working order by the Contractor. Containers shall be steam cleaned and maintained (oiled, re-welded, painted, etc.) as needed and, at a minimum, annually, and Contractor shall submit on an annual basis, a sworn certification in a format acceptable to the Solid Waste Administrator certifying that this cleaning and maintaining has been performed, including a list of all equipment so cleaned or maintained."

Generally, leave to amend 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* ***Maldonado v Newport Gardens, Inc.***, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; ***Lariviere v New York City Tr. Auth.***, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011];

Gitlin v Chirinkin, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]). However, where the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious (*see* ***Alter v Quality Choice Healthcare, Inc.***, 184 AD3d 612, 123 NYS3d 840 [2d Dept 2020]; ***Morris v Queens Long Is. Med. Group, P.C.***, 49 AD3d 827, 828, 854 N.Y.S.2d 222 [2d Dept 2008]). "The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (***Sample v Levada***, 8 AD3d 465, 467-468, 779 NYS2d 96 [2d Dept 2004]). "Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment" (***Whalen v Kawasaki Motors Corp., U.S.A.***, 92 NY2d 288, 680 NYS2d 435 [1998]; ***Burke, Albright, Harter & Rzepka LLP v Sills***, 187 AD3d 1507, 133 NYS3d 130 [4th Dept 2020]).

The Court notes that the Winters Bros. defendants have failed to offer any excuse for the delay in attempting to amend their answer to include their allegation that the dumpster was owned and maintained by the Town (*see* ***Campbell v Dwyer***, 185 AD3d 777, 125 NYS3d 300 [2d Dept 2020]). Although the Winters Bros. defendants indicate that the parties' deposition testimony revealed that the dumpster was owned by the Town, the motion to amend their answer to reflect the ownership of the dumpster was filed approximately 10 months after the note of issue was filed and more than 16 months after Castaneda testified in July 2019 that the dumpsters are owned by the Town. Moreover, in their prior motion to amend their answer to include a "derivative immunity" affirmative defense, the Winters Bros. defendants did not include the claim regarding the Town's ownership of the dumpster. Where, as here, there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay (see ***Burke, Albright, Harter & Rzepka LLP v Sills***, *supra*; ***Alter v Quality Choice Healthcare, Inc.***, 184 AD3d 612, 123 AD3d 840 [2d Dept 2020]). Furthermore, the Winters Bros. defendants failed to demonstrate that their application for leave to amend their answer to include the allegation that the dumpster was owned and maintained by the Town has any merit, because pursuant to service agreement between the Town and Winters Bros., the dumpster was owned and maintained by Winters Bros. at the time of the subject accident (*see* ***Campbell v Dwyer***, *supra*; ***Canals v Lai***, 132 AD3d 626, 17 NYS3d 311 [2d Dept 2015]). Accordingly, the motion by the Winters Bros. defendants for leave to amend their answer is denied.

Finally, the request by defendant Town of Babylon for leave to reargue is denied, as its submissions fail to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in reaching its determination (*see* ***Mooney v Vecchio***, 305 AD2d 415, 758 NYS2d 506 [2d Dept 2003]).

Dated: APR 16 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION