

Dobbs v Village of Patchogue
2024 NY Slip Op 35279(U)
March 20, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 609991/2020
Judge: C. Stephen Hackeling
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SHORT FORM ORDER

INDEX No. 609991/2020
 CAL. No. 202300246OT

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. C. STEPHEN HACKELING
 Justice of the Supreme Court

MOTION DATE 7/20/23 (002)
 MOTION DATE 7/24/23 (003)
 MOTION DATE 9/20/23 (004)
 ADJ. DATE 11/15/23
 Mot. Seq. # 002 MD
 Mot. Seq. # 003 MG
 Mot. Seq. # 004 MD

-----X
 BARBARA DOBBS,

Plaintiff,

- against -

VILLAGE OF PATCHOGUE and SUFFOLK
 COUNTY WATER AUTHORITY,

Defendants.
 -----X

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Upon the following papers read on this e-filed motion for summary judgment and cross-motion to amend: Notice of Motion/Order to Show Cause and supporting papers by defendant Village of Patchogue, filed June 22, 2023; Notice of Motion/Order to Show Cause and supporting papers by defendant Suffolk County Water Authority, filed June 22, 2023; Notice of Cross-Motion and supporting papers by plaintiff, filed September 8, 2023; Answering Affidavits and supporting papers by plaintiff, filed September 8, 2023; Answering Affidavits and supporting papers by defendant Suffolk County Water Authority, filed September 8, 2023; Answering Affidavits and supporting papers by plaintiff, filed September 8, 2023; Answering Affidavits and supporting papers by defendant Village of Patchogue, filed October 30, 2023; Answering Affidavits and supporting papers by defendant Suffolk County Water Authority, filed October 16, 2023; Answering Affidavits and supporting papers by defendant Village of Patchogue, filed October 30, 2023; Replying Affidavits and supporting papers by defendant Village of Patchogue, filed October 30, 2023; Replying Affidavits and supporting papers by defendant Suffolk County Water Authority, filed October 16, 2023 and November 14, 2023; Replying Affidavits and supporting papers by plaintiff, filed November 12, 2023; Other ; it is

Dobbs v Village of Patchogue
Index No. 609991/2020
Page 2

ORDERED that this motion (002) by defendant Village of Patchogue for summary judgment, the motion (003) by defendant Suffolk County Water Authority for summary judgment, and the cross motion (004) by plaintiff are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Village of Patchogue for summary judgment dismissing the complaint and all cross-claims against it is denied; and it is further

ORDERED that the motion by defendant Suffolk County Water Authority for summary judgment dismissing the complaint and all cross-claims against it is granted; and it is further

ORDERED that the cross-motion by plaintiff for leave serve the proposed amended notice of claim, amended complaint, and amended bill of particulars is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Barbara Dobbs on March 31, 2020, when she tripped over a water meter cover that was protruding from a broken and cracked sidewalk located on the eastern side of South Ocean Avenue, adjacent to Shorefront Park at or near the entrance to Mascot Dock and Marina, in the Village of Patchogue, New York. Plaintiff alleges, among other things, that defendant Suffolk County Water Authority ("SCWA") and defendant Village of Patchogue ("Village") were negligent in the ownership, operation, maintenance, and repair of the subject sidewalk and the water device located within such sidewalk, and that each defendant negligently allowed the subject sidewalk and parts thereof, including the subject water device, to be, become, and remain in a dangerous and defective condition. Plaintiff further alleges that each defendant created the dangerous condition.

The Village now moves for summary judgment dismissing the complaint and any cross-claims against it on the ground that it did not receive prior written notice of the claimed defect and that no recognized exception of such requirement is applicable in this case. In support of its motion, the Village submits, among other things, the pleadings, the transcripts of plaintiff's General Municipal Law § 50-h hearing and deposition testimony, the transcripts of the deposition testimony of Joseph Dean, Superintendent of Public Works for the Village, and Christopher Given, Deputy Director of Construction and Maintenance for SCWA, and an affidavit of Lori Devlin, the Village Clerk. SCWA opposes this motion, arguing that the Village failed to meet its burden by showing that it did not receive prior written notice of the alleged defective condition. Plaintiff also opposes the motion, arguing that issues of fact exist as to whether the Village derived a special benefit from the water meter installed in the sidewalk.

SCWA moves for summary judgment dismissing the complaint and any cross-claims against it on the ground that it had no duty to maintain the sidewalk absent evidence it created the defective condition or made special use of the sidewalk, and that no such evidence exists. In support of its motion, SCWA submits, among other things, the pleadings, various discovery responses, the transcripts of plaintiff's General Municipal Law § 50-h hearing and deposition, and the deposition transcripts of Joseph Dean and Christopher Given. The Village opposes this motion, arguing that SCWA derives a special use from the utility cap, and that it failed to establish that it did not cause or create the subject defect. Plaintiff opposes SCWA's motion, arguing that issues of fact exist as to whether SCWA derived

Dobbs v Village of Patchogue
Index No. 609991/2020
Page 3

a special benefit from the water meter installed in the sidewalk, and, if so, whether it breached a duty to maintain the subject sidewalk surrounding the water meter cover.

Plaintiff cross-moves for leave to serve an amended notice of claim, complaint and bill of particulars which assert a “special use” exception to the prior written notice rule, arguing that the proposed amendment does not allege new facts and will not prejudice defendants. In support of her cross-motion plaintiff submits a proposed amended notice of claim, a proposed amended complaint and a proposed amended bill of particulars, as well as several Google street view images of the subject sidewalk. The Village opposes the cross-motion, arguing that plaintiff raises a new theory of liability, has known the relevant facts since the inception of this case, and fails to provide an excuse for her failure to timely amend the pleadings. The Village further argues that granting the proposed amendment will be prejudicial to its defense, and that the special use theory is palpably insufficient and devoid of merit. SCWA opposes the cross-motion, arguing that plaintiff relies on facts and issues known to her since the time the accident occurred, and has failed to set forth any excuse for her delay in seeking to amend the pleadings. SCWA argues, *inter alia*, that it did not make special use of the sidewalk, that the proposed claims are time-barred, and that granting plaintiff’s cross-motion would be prejudicial to SCWA as it necessitates the re-opening of discovery, which is of particular concern here since plaintiff has been granted a special trial preference.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant must demonstrate a *prima facie* case of entitlement to summary judgment in its favor, and the failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Once such proof has been offered, the burden then shifts to the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Where a municipality has enacted or is protected by a prior written notice law, it may not be subjected to liability for injuries caused by a defect which comes within the ambit of the law unless it has received prior written notice of the alleged defect, or an exception to the prior written notice requirement applies (*see Vaisman v Village of Croton-on-Hudson*, 209 AD3d 920, 177 NYS3d 73 [2d Dept 2022]; *Joyce v Village of Saltaire*, 126 AD3d 760, 5 NYS3d 490 [2d Dept 2015]; *Palka v Village of Ossining*, 120 AD3d 641, 992 NYS2d 273 [2d Dept 2014]; *Miller v Village of E. Hampton*, 98 AD3d 1007, 951 NYS2d 171, 173 [2012]). “The purpose of a prior written notice provision is to place a municipality on notice that there is a defective condition on publicly-owned property which, if left unattended, could result in injury. This ensures that a municipality, which is not expected to be cognizant of every crack or defect within its borders, will not be held responsible for injury from such defect unless given an opportunity to repair it” (*Vaisman v Village of Croton-on-Hudson*, 209 AD3d

Dobbs v Village of Patchogue
Index No. 609991/2020
Page 4

920, 921, 177 NYS3d 73, quoting *Gorman v Town of Huntington*, 12 NY3d 275, 279, 879 NYS2d 379 [2009]; see *Poirier v. City of Schenectady*, 85 NY2d 310, 314, 624 NYS2d 555 [1995]).

Village Law § 6-628 provides, in relevant part, that no civil action shall be maintained against a village for personal injuries sustained as a consequence of a defective condition on a sidewalk “unless written notice of [such condition] was actually given to the village clerk.” To establish prima facie entitlement to judgment as a matter of law, the defendant municipality must show, prima facie, the lack of prior written notice; once the defendant establishes that it lacks prior written notice, the burden then shifts to the plaintiff to demonstrate either that a question of fact exists in that regard or that one of the exceptions applies (see *Groninger v Village of Mamaroneck*, 17 NY3d 125, 129, 927 NYS2d 304 [2011]; *Smith v City of New York*, 210 AD3d 53, 175 NYS3d 529 [2d Dept 2022]; *Vaisman v Village of Croton-on-Hudson*, 209 AD3d 920, 177 NYS3d 73).

Here, the Village failed to show, prima facie, that it lacked prior written notice of the alleged defect in the sidewalk (see *Vaisman v Village of Croton-on-Hudson*, 209 AD3d 920, 177 NYS3d 73). Joseph Dean, Superintendent for the Department of Public Works (“DPW”) for the Village since 2009, testified that his duties included generating work orders for repairs throughout the Village. Dean testified that one circumstance in which a work order would be generated is following receipt of a complaint from the Village Clerk, which he would receive in the form of an email, a text message or a phone call. His testimony was unclear as to how the Village Clerk receives each complaint prior to forwarding it. Dean provided testimony regarding a specific work order for his department, dated March 3, 2011, referencing a damaged sidewalk located at Shorefront Park that included a note, which read “repair damaged sidewalk at the end of South Ocean adjacent to Shorefront Park.” Dean testified that he believes he generated the work order, and that he does not know why he included the note or whether it was based on his own personal observation. Dean’s testimony is silent as to what prompted the work order to be generated. He testified that the area described in the work order could refer to any portion of the sidewalk adjacent to the park. He testified that he does not know when the work order was completed, that the status of the work order is “pending,” and that he knows the sidewalk was repaired in 2021, but does not know if repairs were completed in the interim. As such Dean’s testimony fails to eliminate questions of fact as to the genesis of the work order, dated March 3, 2011, including whether it was the result of a written complaint received by the Village Clerk and whether such work order was completed prior to plaintiff’s accident. While the affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by a village is sufficient to establish that no prior written notice was filed, the affidavit from the Village Clerk submitted with the instant motion fails to resolve the issues posed by Dean’s testimony as it states only that she searched the records for five years prior to the accident (see *Scafidi v Town of Islip*, 34 AD3d 669, 824 NYS2d 410 [2d Dept 2006]; *Cruz v City of New York*, 218 AD2d 546, 630 NYS2d 523 [1st Dept 1995]). Accordingly, questions of fact remain regarding whether the Village received prior written notice of the subject sidewalk defect.

Turning to SCWA’s motion, as a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property (see *Misa v Town of Brookhaven*, 212 AD3d 804, 181 NYS3d 654 [2d Dept 2023]; *Arshinov v GR 10-40, LLC*, 176 AD3d 1019, 108 NYS3d 892 [2d Dept 2019]; *Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 97

Dobbs v Village of Patchogue

Index No. 609991/2020

Page 5

NYS3d 278 [2d Dept 2019]; *Futter v Hewlett Sta. Yogurt, Inc.*, 149 AD3d 912, 52 NYS3d 432 [2d Dept 2017]). Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (see *Seaman v Three Vil. Garden Club*, 67 AD3d 889, 889 NYS2d 231 [2d Dept 2009]; *Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 884 NYS2d 143 [2d Dept 2009]; *Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 865 NYS2d 674 [2d Dept 2008]). Therefore, SCWA must establish that it did not own the sidewalk on which plaintiff was injured, create or contribute to the complained-of defect thereon, or make special use of the portion of the sidewalk where the water meter vault was located (see *Flom v United Water New York, Inc.*, 172 AD3d 1326, 98 NYS3d 902 [2d Dept 2019]).

SCWA has established, prima facie, entitlement to summary judgment (see *Flom v United Water New York, Inc.*, 172 AD3d 1326, 98 NYS3d 902 [2d Dept 2019]; *Giffords v Water Auth. Of Great Neck North*, 40 AD 695, 836 NYS2d 629 [2d Dept 2007]; *Pierre v City of New York*, 273 AD2d 368, 709 NYS2d 206 [2d Dept 2000]; *Delano v Consolidated Edison Co. of New York*, 231 AD2d 671, 647 NYS2d 849 [2d Dept 1996]). SCWA's submissions demonstrate that it does not own the subject sidewalk, that it owns the water meter vault, and that an inspection of the meter vault upon receipt of plaintiff's notice of claim confirmed nothing was broken, cracked or defective with the meter vault or the manner in which it was installed. Christopher Given, who appeared on behalf of SCWA, testified that the water meter is for the Village of Patchogue for service to the park. Given testified that SCWA is responsible for maintenance and repair of the vault only. He testified that he conducted a search of SCWA's records upon the notice of claim of the database that would contain all records maintained by SCWA relative to this notice of claim. Given explained that his search revealed that the service was installed in the 1950s and replaced in the 1980s. He testified that the search further revealed several work orders, but they related only to consumption at the meter and to replace the meter, not to repair the vault. He testified that no construction was done by SCWA on the vault in the five years prior to plaintiff's accident. Given testified that no employees have ever brought to his attention an issue regarding the vault at this location and that SCWA has received no complaints regarding the condition of the vault. Accordingly, SCWA established that it did not create or contribute to the alleged defect. SCWA's submissions further establish that it did not make special use of the sidewalk where the meter vault was located, by showing there is no evidence that the area was constructed in a special manner for SCWA's use. Neither the Village nor plaintiff raise a question of fact in opposition.

As to plaintiff's cross-motion seeking leave to amend the notice of claim, complaint and bill of particulars, "[u]nder General Municipal Law § 50-e (6), '[a] notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim or the theory of liability' " (*Congero v City of Glen Cove*, 193 AD3d 679, 681, 141 NYS3d 909 [2d Dept 2021], citing *I.T.K. v Nassau Boces Educ. Found., Inc.*, 177 AD3d 962, 963, 113 NYS3d 726 [2d Dept 2019] [internal citations omitted]; see General Municipal Law § 50-e [6]; *Matter of Johnson v County of Suffolk*, 167 AD3d 742, 90 NYS3d 84 [2d Dept 2018]). Further, leave 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" (*Morand v Farmers New Century Ins. Co.*, 171 AD3d 1167, 1167, 99 NYS3d 346 [2d Dept 2019], quoting *Krigsman v Cyngiel*, 130 AD3d 786, 786, 14 NYS3d 94 [2d Dept 2015] [internal citations omitted]; *Kiaer v Gilligan*, 63 AD3d 1009, 883 NYS2d 224 [2009]). " 'In exercising its discretion, the court

Dobbs v Village of Patchogue
Index No. 609991/2020
Page 6

should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered' ” (*American Cleaners, Inc v American Intern. Speciality Lines Ins. Co.*, 68 AD3d 792, 794, 891 NYS2d 127 [2d Dept 2009], quoting *Cohen v Ho*, 38 AD3d 705, 706, 833 NYS2d 542 [2d Dept 2007] [internal citations omitted]; see *Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640, 1 NYS3d 307 [2d Dept 2015]). Once discovery is complete and the case is certified as ready for trial, a party will not be permitted to amend his or her bill of particulars except upon a showing of “special and extraordinary circumstances” (*Schreiber-Cross v State of New York*, 57 AD3d 881, 884, 870 NYS2d 438 [2008]; see *King v Marwest, LLC*, 192 AD3d 874, 143 NYS3d 673 [2d Dept 2021]).

Plaintiff has failed to demonstrate, prima facie, entitlement to amendment of the notice of claim (see *Jacobowitz v City of New York*, 222 AD3d 953, 202 NYS3d 446 [2d Dept 2023]; *Mosley v City of New York*, 217 AD3d 857, 859, 191 NYS3d 699 [2d Dept 2023]; *Aleksandrova v City of New York*, 151 AD3d 427, 52 NYS3d 866 [1st Dept 2017]; *Matter of Johnson v County of Suffolk*, 167 AD3d 742, 90 NYS3d 84). In arguing that the Village derived a special benefit, plaintiff asserts a new theory of liability and relies upon new information, not contained in the notice of claim, complaint or bill of particulars, namely that the subject water meter was installed for the benefit of the Village as an SCWA customer, and that it services Shorefront Park. As a notice of claim cannot be amended to assert a new theory of liability, especially when it involves the need for additional supporting facts, plaintiff's cross-motion to amend the notice of claim is denied. As such, plaintiff's request to amend the complaint and bill of particulars is denied as moot since “causes of action or legal theories may not be raised in the complaint or bill of particulars that were not directly or indirectly mentioned in the notice of claim” (*Mosley v City of New York*, 217 AD3d 857, 859, 191 NYS3d 699 [2d Dept 2023], quoting *Washington v City of New York*, 190 AD3d 1009, 1011, 141 NYS3d 62 [2d Dept 2021] [internal quotation marks omitted]; see *Jacobowitz v City of New York*, 222 AD3d 953, 202 NYS3d 446; *Congero v City of Glen Cove*, 193 AD3d 679, 141 NYS3d 909 [2d Dept 2021]; *Rubenstein v City of New York*, 176 AD3d 1132, 111 NYS3d 43 [2d Dept 2019]; *Semprini v Village of Southampton*, 48 AD3d 543, 852 NYS2d 208 [2d Dept 2008]).

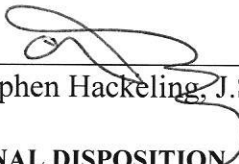
In any event, plaintiff has also failed to demonstrate, prima facie, entitlement to amendment to the complaint and bill of particulars. First, plaintiff's claim that the SCWA was a “special user” of the subject sidewalk based solely upon the fact that SCWA owned and installed the water meter is devoid of merit (see *Flom v United Water New York, Inc.*, 172 AD3d 1326, 98 NYS3d 902 [2d Dept 2019]; *Morand v Farmers New Century Ins. Co.*, 171 AD3d 1167, 1167, 99 NYS3d 346; *Kiaer v Gilligan*, 63 AD3d 1009, 883 NYS2d 224; *Giffords v Water Auth. of Great Neck North*, 40 AD 695, 836 NYS2d 629 [2d Dept 2007]; *Pierre v City of New York*, 273 AD2d 368, 709 NYS2d 206 [2d Dept 2000]; *Delano v Consolidated Edison Co. of New York*, 231 AD2d 671, 647 NYS2d 849 [2d Dept 1996]). With respect to plaintiff's proposed amendments to the complaint as against the Village, plaintiff has failed to provide any explanation or excuse for the delay in seeking to amend the complaint (*Anonymous v Gleason*, 175 AD3d 614, 106 NYS3d 353 [2d Dept 2019]; *Morand v Farmers New Century Ins. Co.*, 171 AD3d 1167, 1167, 99 NYS3d 346; *Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640, 1 NYS3d 307), and has failed to establish the special and extraordinary circumstances required to permit amendment to the bill of particulars (*King v Marwest, LLC*, 192 AD3d 874, 143 NYS3d 673; *Anonymous v Gleason*, 175 AD3d 614, 106 NYS3d 353; *Schreiber-Cross v State of New York*, 57

Dobbs v Village of Patchogue
Index No. 609991/2020
Page 7

AD3d 881, 870 NYS2d 438). In alleging a special use by the Village, plaintiff relies upon the deposition testimony of SCWA witness Christopher Given. A review of the evidence reveals that Mr. Given provided the relevant testimony on January 18, 2023. Plaintiff filed her note of issue more than one month later, certifying the case as ready for trial. Following this certification, which is dated February 22, 2023, plaintiff promptly sought a trial preference by motion filed February 28, 2023, seeking to set the action down for trial "on a day certain at an early date." Plaintiff's motion for a trial preference was granted, unopposed, by order of this court, dated May 3, 2023. Now, more than six months after seeking such preference, and four months since such preference was granted, plaintiff seeks to add new theories of liability. However, plaintiff fails to offer any explanation for her delay in seeking the instant relief and fails to set forth any special or extraordinary circumstance that would warrant leave to amend, and therefore, the requested relief is denied.

In light of the foregoing, the Village's motion for summary judgment is denied, SCWA's motion for summary judgment is granted, and plaintiff's cross-motion seeking leave to amend the notice of claim, complaint and bill of particulars is denied.

Dated: March 20, 2024



Hon. C. Stephen Hackeling, J.S.C.

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