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STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-19-048

SUSAN GOLDING,

Plaintiff

v.

ORDER

HI-WAY SAFETY SYSTEMS,
INC., et al.,

Defendants

Before the court is defendant City of Portland's motion for summary judgment and plaintiff Susan Golding's motion to file a second amended complaint.

This is a case where Golding is suing the City of Portland and two contractors, Hi-Way Safety Systems and Zebra Striping Inc.¹ Golding alleges that she was injured when she stepped into a pothole that was not readily visible or apparent at the crosswalk at the intersection of Fore and Hancock Streets.

In her amended complaint Golding alleges that the defendants, including the City, knew or should have known of the dangerous condition at the intersection and created or allowed a dangerous condition to exist (Count I). She also alleges that the City breached a duty to provide a safe premises (Count V), that the City breached a duty to warn of a dangerous condition (Count VI), and that the City breached a duty to inspect its premises to discover dangerous latent conditions (Count VII).

In her proposed second amended complaint, Golding specifically asserts that the City is also liable under 23 M.R.S. § 2355, which provides for recovery for injuries suffered through

¹Zebra Striping was added in Golding's first amendment to the complaint. Hi-Way Safety Systems has also filed a motion for summary judgment, which the court received from the clerk and took under advisement on November 1, 2019.

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defects in town ways if the appropriate municipal officers had 24 hours actual notice of the defect. It appears that recovery under this statute may be limited to \$6,000.

The court will first address Golding's motion to amend and will grant that motion. The deadlines in the scheduling order have been extended, and plaintiff's motion was made within the deadlines in the last two scheduling orders. Moreover, the City has had notice of the potential claim under 23 M.R.S. § 2355 through a notice served on the City shortly after Golding suffered the alleged injuries.

That leaves, however, the City's motion for summary judgment as to the claims against the City in Counts I, V, VI, and VII in both the first and second amended complaints. These claims allege general negligence and premises liability. As the City has demonstrated in its motion for summary judgment, it is a municipal entity entitled to sovereign immunity on those claims unless there is a statutory waiver of sovereign immunity. 14 M.R.S. § 8103.

Apart from 23 M.R.S. § 2355, there are only two potential waivers of sovereign immunity applicable in this case. The first is set forth in 14 M.R.S. § 8104-A(4), which applies to negligent acts and omissions "arising out of and occurring during the performance of construction, street cleaning or repair operations on any . . . town way" (emphasis added). Notably, that same section states that governmental entities are not liable "for defect [or] lack or repair" in any town way.

Golding has stated that her injuries were suffered on July 27, 2018, and that there was an unfilled pothole that had been painted over in the crosswalk that made it difficult to see. City SMF ¶¶ 4, 7 (admitted). The City has offered sworn evidence that there were no contemporaneous construction, street cleaning, or repair operations being performed by the City at the crosswalk in issue at that time. City SMF ¶ 8.²

Summary judgment should be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. In considering a motion for summary

² This paragraph was qualified in Golding's SMF ¶ 8 but only on the ground that some repair and maintenance were scheduled to begin a month after Golding's injury. This does not create a material issue of disputed fact because the waiver of sovereign immunity only applies to negligence during the performance of street repairs.

might generate a factual dispute as to whether the City was performing street cleaning, repair or construction on July 27, 2018. The mere assertion that discovery is ongoing is not enough; otherwise summary judgment could never be granted before all discovery has been completed. This is contrary to Rule 56(b), which provides that a party may “at any time” file a motion for summary judgment.

The second possible waiver of sovereign immunity that could conceivably be applicable in this case would be if the City has insurance providing coverage notwithstanding its immunity. 14 M.R.S. § 8116. The City has demonstrated that its own insurance is limited to the specific categories where immunity has been statutorily waived. City SMF ¶ 9. Golding does not dispute that showing, but she suggests that insurance naming the City as an additional insured may have been procured by Zebra Striping and further states that discovery as to Zebra Striping’s insurance has been propounded. Golding SMF ¶ 9; Golding Statement of Additional Facts ¶¶ 1, 6.

As noted above, Golding never actually filed a Rule 56(f) motion. Even overlooking that issue, it may be questioned whether there is a plausible basis to believe that Zebra Striping would have any insurance coverage benefiting the City.³ Nevertheless, while the court is inclined to grant the City’s motion for summary judgment as to Counts I, V, VI, and VII, the court will stay a ruling on that motion until November 22, 2019.

Golding’s opposition to the City’s summary judgment, which included the assertion that discovery had been undertaken with respect to Zebra Striping insurance, was filed on July 1, 2019. Golding has now had four months to obtain any discovery that could generate a disputed issue of fact as to whether the City has any applicable insurance coverage.

Unless by November 22, 2019 Golding files a further statement of material facts demonstrating that there is a disputed issue of fact as to whether the City has applicable insurance

³ Zebra Striping appears to have been a subcontractor on a hotel construction project rather than a contractor or subcontractor employed by the City. *See* City Response to ¶ 5 of Golding’s Interrogatories, annexed to the City’s SMF.

coverage, the court will grant the City's motion for summary judgment as to Counts I, V, VI, and VII. If Golding files such a statement, the City shall have until December 6, 2019 to respond.

In any event, the City will remain in the action as a defendant on the claim under 23 M.R.S. § 2355 in Count XI.


The entry shall be:

1. Plaintiff's motion for leave to file a second amended complaint adding, as Count XI, a claim against the City of Portland under 23 M.R.S. § 2355 is granted.

2. Unless by November 22, 2019 Golding files a further statement of material facts demonstrating that there is a disputed issue of fact as to whether the City has applicable insurance coverage, the court will grant the City's motion for summary judgment as to Counts I, V, VI, and VII.

3. The clerk shall incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: November 8, 2019



Thomas D. Warren
Justice, Superior Court

Entered on the Docket: 11/08/19 *me*

Plaintiff-Christian Lewis, Esq.
Defendant City-Russell Pierce, Esq.
Defendant Hi-Way-Tracy Hill, Esq.
Defendant Zebra-John Topchik, Esq.