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| Murtha v Town of Huntington |
| 2013 NY Slip Op 33822(U) |
| October 22, 2013 |
| Supreme Court, Suffolk County |
| Docket Number: 60613-13 |
| Judge: Denise F. Molia |
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Index No.: 60613-13

**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA**,
Justice

ANNE MARIE MURTHA,

Plaintiff,

- against -

TOWN OF HUNTINGTON, COUNTY OF
SUFFOLK, and KINGS PARK INDUSTRIES, INC.,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 7/31/13
SUBMISSION DATE: 8/2/13
MOTION SEQUENCE No.: 001 MG

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Upon the following papers filed and considered relative to this matter:

Order to Show Cause dated July 17, 2013; Affirmation dated July 11, 2013; Exhibits A through D annexed thereto; Affirmation in Opposition dated July 26, 2013; Exhibits A through D annexed thereto; Reply Affirmation dated July 31, 2013; Exhibits A through D annexed thereto; and upon due deliberation; it is

ORDERED, that the motion by plaintiff, pursuant to General Municipal Law §50-e(6), for an Order, granting leave to plaintiff to serve an Amended Notice of Claim dated July 10,

2013, as to the defendants, Town of Huntington and County of Suffolk, is granted; and it is further

ORDERED, that within ten (10) days from receipt of a copy of this Order, with notice of entry, the plaintiff shall serve an Amended Notice of Claim upon the defendants, Town of Huntington and County of Suffolk.

The underlying action was brought to recover for personal injuries sustained by the plaintiff, Anne Marie Murtha, on June 3, 2012, when she is alleged to have tripped and fallen on a circular defect located within the easternmost crosswalk of Pulaski Road at its intersection with Larkfield Road, East Northport, New York.

A Notice of Claim was filed with the Town of Huntington ("Town") and County of Suffolk ("County") on August 16, 2012, within ninety (90) days following the alleged accident. The site of the accident was identified as the "north crosswalk which bisects Larkfield Road at the intersection of Pulaski Road (County Route 11) in the Village of East Northport, Town of Huntington and County of Suffolk." The Notice was accompanied by six color photographs depicting the claimed defect and the surrounding location. On September 19, 2012, the plaintiff testified at a General Municipal Law §50-h hearing taken by the Town. The County waived its right to conduct a statutory hearing.

At her hearing, Murtha testified that while she was walking on Larkfield Road and crossing Pulaski Road, she was injured when she stepped in a defect in the crosswalk. However, her testimony regarding the exact location of the alleged defect became confused, creating some ambiguity as to the exact location of the alleged defect. The plaintiff testified that she was not familiar with the subject crosswalk at the time of the accident, and had never walked that way prior to her accident. A Summons and Complaint was thereafter served on May 3, 2013 with issue being joined by the service of Verified Answers by each of the defendants. The plaintiff has since determined that the alleged defect, in fact, existed on Pulaski Road at its intersection with Larkfield Road in the easternmost crosswalk of the intersection, which runs parallel to Larkfield Road in a north-south direction and crosses Pulaski Road. Murtha has now brought the instant application to serve an Amended Notice of Claim, to more accurately reflect the location of the crosswalk containing the alleged defect.

A plaintiff may correct a mistake, omission, irregularity or defect in a notice of claim provided that the mistake was made in good faith, and did not cause prejudice to the defendant. See, General Municipal Law §50-e(6); see also, Streletskaya v. New York City Trans. Auth., 27 A.D.3d 640, 641. In determining whether a defendant has been prejudiced, the court may consider any evidence that it properly before it. Barrios v. City of New York, 300 A.D.2d 480, 481. The defendant is not entitled to a presumption of prejudice. See, Ming v. City of New York, 54 A.D.3d 1011. No allegation has been made that the plaintiff's mistake was other than one made in good faith. The analysis will therefore be limited to the issue of prejudice to the defendant.

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The purpose of the statutory notice of claim requirement is to afford a public corporation the opportunity to investigate the merits of a claim while information is still readily available. Vallejo-Bayas, 103 A.D.3d 881, 881 (citing Teresta v. City of New York, 304 N.Y. 440, 443). The mere lapse of time is not a sufficient ground for denial of leave to amend a notice of claim. Yerdon v. Baldwinville Academy, 39 A.D.2d 824, 824. However, whether the alleged defect has changed over time is a relevant consideration in determining whether the defendant has been prejudiced. Chechelnskaya v. City of New York, 293 A.D.2d 700, 701. Courts have also granted leave to amend a notice of claim where the amended notice does not substantially alter the plaintiff's theories of liability. See, Streletskaya v. New York City Trans. Auth., 27 A.D.3d 640, 641-642; LaRocco v. City of New York, 37 A.D.2d 529.

Pursuant to statute, under certain circumstances, a notice of claim may be amended to correct a mistake, omission, irregularity, or defect. Such relief is not automatic, but "in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby." General Municipal Law §50-e(6). Leave to correct the misidentification of a fall has been denied under circumstances where the defendant has been deprived of the opportunity to conduct a meaningful investigation (see, Charleston v. Incorporated Village of Cedarhurst, 62 A.D.3d 641, 878 N.Y.S.2d 407).

In opposition to the motion, the County asserts that between August 22, 2012 and August 30, 2012, Paul Morano from the County's Department of Public Works conducted an investigation to determine whether the County had any involvement with the location of the accident as set forth in the Notice of Claim. Based on Morano's inspection, the County determined that the north crosswalk on Larkfield Road is owned, operated and maintained by the Town of Huntington. On that basis, the County did not pursue its rights to conduct a municipal hearing or a preliminary physical examination of the plaintiff. The County maintains that the transitory nature of sidewalk defects, together with the delay in identifying the actual accident location, denied it the opportunity to investigate the facts while the incident was still fresh. The moving defendant further maintains that permitting amendment of the Notice of Claim at this time would be prejudicial to the County.

Although the plaintiff misidentified the written physical location of the accident, she annexed to her Notice of Claim six color photographs of the actual location where she fell. These photos were available to the County's investigator at the time he undertook a site inspection. It is not unreasonable to assume that a comparison could be made between the written description of the accident site and the identification as noted in the photographs. Any discrepancy between the two could have been noted in the investigator's findings and further explored and clarified by the County at a municipal hearing. In addition, a comparison between the state of the accident site at the time it occurred as appears in the photographs and what it looks like today upon visual inspection, can be readily made. The photographs depicted the precise location of the alleged defect and show landmarks unique to individual corners of the intersection of Pulaski Road and Larkfield Road. In light of the previously submitted photographic evidence, the movant was afforded sufficient opportunity to make an adequate inspection of the correct accident location. If it chose not to consider all evidence available during its investigation, that determination was

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solely the County's.

Upon a review of the circumstances of the instant action, the County has failed to establish that the defective written notice impeded its ability to investigate the plaintiff's claim, and in the absence of prejudice to the moving defendant, the plaintiff's application is granted. See, Barrios v. City of New York, 300 A.D.2d 480, 751 N.Y.S.2d 562; Santarpia v. City of New York, 231 A.D.2d 726, 647 N.Y.S.2d 861.

The foregoing constitutes the Order of this Court.

Dated: October 22, 2013


HON. DENISE F. MOLIA A.J.S.C.