Eberhardt v Town of Babylon
2016 NY Slip Op 32546(U)
September 8, 2016
Supreme Court, Suffolk County
Docket Number: 34557/2012
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Honey Eberhardt and Robert Eberhardt,

Plaintiffs,

-against-

Town of Babylon, Russell Hurd and Ruth Hurd,

Defendants.

Index No.: 34557/2012

Motion Sequence No.: 002; MD
Motion Date: 6/25/15
Submitted: 3/30/16

Motion Sequence No.: 003; MG
Motion Date: 8/15/15
Submitted: 3/30/16

Motion Sequence No.: 004; MG
Motion Date: 1/20/16
Submitted: 3/30/16

Attorney for Defendant Town of Babylon:

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Attorney for Defendants
Russell Hurd and Ruth Hurd:

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Clerk of the Court

Upon the following papers numbered 1 to 87 read upon this motion for summary judgment; for leave to serve a supplemental bill of particulars: Notice of Motion and supporting papers, 1 - 31; 76 - 87; Notice of Cross Motion and supporting papers, 32 - 73; Answering Affidavits and supporting papers, 74 - 75; it is

ORDERED that the motion (#002) by defendants Russell Hurd and Ruth Hurd, the motion (#003) by defendant Town of Babylon, and the cross motion (#004) by plaintiffs Honey Eberhardt and Robert Eberhardt are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants Russell Hurd and Ruth Hurd for summary judgment dismissing the complaint and the cross claim against them is denied; and it is further

ORDERED that the motion by defendant Town of Babylon for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that the cross motion by plaintiffs Honey Eberhardt and Robert Eberhardt for an order granting leave to serve a supplemental bill of particulars is granted.

On the evening of August 5, 2012, plaintiff Honey Eberhardt allegedly tripped and fell on a sidewalk in front of a residence owned by defendants Russell Hurd and Ruth Hurd, located at 497 18th Street, West Babylon, New York. Thereafter, plaintiff commenced this action to recover damages for personal injuries she allegedly sustained due to her accident and her husband brought a derivative claim for loss of services. By their complaint, as amplified by their verified bills of particulars, plaintiffs allege that there was a "certain broken, dangerous, and defective condition," namely, an extended section of cracked sidewalk, which caused the sidewalk to be uneven and depressed, and that this condition created a tripping hazard. Plaintiffs further allege that the subject accident was due to the Hurd defendants' and defendant Town of Babylon's negligence in the "ownership, operation, maintenance, and control of" the sidewalk, namely, permitting tree roots to break the sidewalk, causing it to be and remain in a dangerous condition. In their verified answers, the Hurd defendants and the Town deny plaintiffs' allegations and assert several affirmative defenses.

The Hurd defendants and the Town now separately move for summary judgment dismissing the complaint as asserted against them. The Hurd defendants argue that the sidewalk in question was owned and maintained by the Town, and that they owed no duty to plaintiff to maintain it in a safe condition. In support, the Hurd defendants submit, along other things, copies of the pleadings and the transcripts of their and the deposition testimony of Robert Prager, an employee of the Town. The Town argues that Town Law § 65 (a) and Babylon Town Code § 158-2 bar plaintiff's negligence claim as asserted against it because the Town did not have prior written notice of the alleged defect in the sidewalk. In addition, the Town asserts a cross claim against the Hurd defendants, alleging that they violated Babylon Town Code § 191-16A, which requires an abutting property owner to maintain the public sidewalk in safe repair. In support, the Town submits, among other things, transcripts of the parties' deposition testimony, an affidavit of Jennifer Taus, a Clerk-Typist employed by the Town Clerk's Office, and an affidavit of Thomas Stay, the Commissioner of the Department of Public Works for the Town.

Plaintiffs oppose the Hurd defendants' motion and cross-move for an order granting leave to serve a supplemental bill of particulars to add that the claim that the Hurd defendants violated Babylon Town Code § 191-16(A). In support, plaintiffs submit, among other things, a proposed supplemental bill of particulars, a copy of the verified bill of particulars served upon the Hurd defendants, and photographs purporting to depict the sidewalk where the subject accident allegedly

took place, authenticated by the parties at their depositions. Plaintiffs take no position as to the Town's motion for summary judgment and none of the defendants have submitted papers in opposition to plaintiffs' cross motion.

Plaintiffs' cross motion is granted. Motions to amend or supplement a bill of particulars are governed by the same standards applied to motions to amend pleadings (*see* ***Daly-Caffrey v Licausi***, 70 AD3d 884, 895 NYS2d 197 [2d Dept 2010]; ***Scarangello v State of New York***, 111 AD2d 798, 490 NYS2d 781 [2d Dept 1985]). Generally, leave to amend or supplement a bill of particulars "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient or patently devoid of merit, or where a delay in seeking the amendment would cause prejudice or surprise the opposing party (*see* ***Lynch v Baker***, 138 AD3d 695, 30 NYS3d 126 [2d Dept 2016]; ***Rodgers v New York City Tr. Auth.***, 109 AD3d 535, 970 NYS2d 572 [2d Dept 2013]; ***Trystate Mech., Inc. v Macy's Retail Holdings, Inc.***, 94 AD3d 1095, 943 NYS2d 158 [2d Dept 2012]). However, when an amendment to a bill of particulars is sought after the action has been certified as ready for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious (*see* ***Rodgers v New York City Tr. Auth.***, *supra*; ***Schwartz v Sayah***, 83 AD3d 926, 920 NYS2d 714 [2d Dept 2011]; ***Morris v Queens Long Is. Med. Group, P.C.***, 49 AD3d 827, 854 NYS2d 222 [2d Dept 2008]). While plaintiffs fail to offer any excuse for their delay in seeking to supplement their bill of particulars, nearly 9 months after the note of issue was filed, the Court finds that the proposed amendment will not prejudice or surprise the Hurd defendants (*see* ***Lynch v Baker***, *supra*; ***Rodgers v New York City Tr. Auth.***, *supra*; ***Trystate Mech., Inc. v Macy's Retail Holdings, Inc.***, *supra*). In their verified complaint and first verified bill of particulars, plaintiffs allege that "there are statutes, ordinances and/or municipal charters specifically charging the abutting owner defendants with the duty to maintain and repair the sidewalk." The proposed amendment merely amplifies this allegation by specifying which statute, ordinance, or municipal charter the Hurd defendants violated, and it does not seek to introduce a new theory of liability (*see* ***Lynch v Baker***, *supra*; ***Roman v 233 Broadway Owners, LLC***, 99 AD3d 882, 955 NYS2d 52 [2d Dept 2012]; ***Sanders v St. Vincent Hosp.***, 95 AD3d 1195, 945 NYS2d 343 [2d Dept 2012]). As the Hurd defendants have not submitted any opposition papers to plaintiffs' motion demonstrating surprise or prejudice, plaintiffs may serve the proposed supplemental bill of particulars upon the Hurd defendants (*see* ***Lynch v Baker***, *supra*; ***Roman v 233 Broadway Owners, LLC***, *supra*; ***Sanders v St. Vincent Hosp.***, *supra*).

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

A plaintiff seeking damages for personal injuries in a premises liability action must first establish, as a matter of law, that the defendant or defendants owed him or her a duty of reasonable

care in maintaining the property (*see* ***Rivera v Nelson Realty, LLC***, 7 NY3d 530, 534, 825 NYS2d 422, 424 [2006]; ***Tagle v Jakob***, 97 NY2d 165, 168, 737 NYS2d 331, 333 [2001]; ***Alnashmi v Certified Analytical Group, Inc.***, 89 AD3d 10, 13, 929 NYS2d 620, 623 [2d Dept 2011]). Without this duty of reasonable care on the part of a defendant, there can be no breach of such duty and, therefore, no proximate cause of plaintiff's injuries as a result of the breach (*see* ***Conneally v Diocese of Rockville Ctr.***, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]; ***Ortega v Liberty Holdings, LLC***, 111 AD3d 904, 976 NYS2d 147 [2d Dept 2013]; ***Nappi v Inc. Vill. of Lynbrook***, 19 AD3d 565, 796 NYS2d 537 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control, or special use of the property (*see* ***Reynolds v Avon Grove Props.***, 129 AD3d 932, 12 NYS3d 199 [2d Dept 2015]; ***Chernoguz v Mirrer Yeshiva Cent. Inst.***, 121 AD3d 737, 994 NYS2d 362 [2d Dept 2014]; ***Grover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729, 869 NYS2d 593 [2d Dept 2008]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; ***Guzman v State of New York***, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]).

Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk is placed on the municipality, and not on an owner of the abutting land (*see* ***Hausser v Giunta***, 88 NY2d 449, 452-453, 646 NYS2d 490, 491-492 [1996]; ***Metzker v City of New York***, 139 AD3d 828, 31 NYS3d 175 [2d Dept 2016]; ***Gyokchyan v City of New York***, 106 AD3d 780, 965 NYS2d 521 [2d Dept 2013]; ***Crawford v City of New York***, 98 AD3d 935, 950 NYS2d 743 [2d Dept 2012]). However, where a municipality 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 or roadway 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, 693 NYS2d 77 [1999]; ***Monaco v Hodosky***, 127 AD3d 705, 7 NYS3d 197 [2d Dept 2015]; ***Simon v Incorporated Vil. of Lynbrook***, 116 AD3d 692, 983 NYS2d 308 [2d Dept 2014]; ***Hannibal v Incorporated Vil. of Hempstead***, 110 AD3d 960, 973 NYS2d 742 [2d Dept 2013]). As relevant to the instant action, pursuant to Town of Babylon Code § 158-2, the Town will not be held liable for a defective or hazardous condition on a public sidewalk unless prior written notice of the condition that caused the plaintiff's injury was given to the Town Clerk or the Commissioner of Department of Public Works, and the Town failed to correct such condition within a reasonable time after the notice was received (*see* ***Prucha v Town of Babylon***, 138 AD3d 1083, 30 NYS3d 671 [2d Dept 2016]; ***Giarraffa v Town of Babylon***, 84 AD3d 1162, 923 NYS2d 697 [2d Dept 2011]). However, there are two recognized exceptions to the statutory prior written notice rule: (1) if the municipality created the defective or hazardous condition through an affirmative act of negligence, and (2) if the municipality derived a special benefit from the sidewalk or roadway unrelated to the public use (*see* ***Amabile v City of Buffalo***, *supra*, at 474; ***Kiernan v Thompson***, 73 NY2d 840, 537 NYS2d 122 [1988]; ***Barnes v Incorporated Vil. of Port Jefferson***, 120 AD3d 528, 990 NYS2d 841 [2d Dept 2014]; ***Miller v Town of E. Hampton***, 98 AD3d 1007, 951 NYS2d 171 [2d Dept 2012]).

Further, if a town has enacted a statute or ordinance imposing a duty upon on an abutting landowner to repair and maintain the sidewalk, such a landowner who violates the statute may be held liable for injuries caused by a dangerous or defective condition thereon (*see* ***Metzker v City of New York***, *supra*; ***Gyokchyan v City of New York***, *supra*; ***Crawford v City of New York***, *supra*). To impose tort liability on an abutting landowner, the language of such a statute or ordinance must not only charge the landowner with a duty, it must also specifically state that if the landowner breaches that duty, he or she will be liable to those who are injured (*see* ***Kilfoyle v Town of N. Hempstead***, 138 AD3d 1069, 30 NYS3d 292 [2d Dept 2016]; ***Bachvarov v Lawrence Union Free Sch. Dist.***, 131 AD3d 1182, 17 NYS3d 168 [2d Dept 2015]; ***Morelli v Starbucks Corp.***, 107 AD3d 963, 968 NYS2d 542 [2d Dept 2013]).

Here, the Hurd defendants' submissions establish, prima facie, that they did not own the sidewalk on which plaintiff allegedly tripped and fell, and therefore, they had no duty to maintain it in a reasonably safe condition (*see* ***Rivera v Nelson Realty, LLC***, *supra*; ***Peralta v Henriquez***, *supra*; ***Tagle v Jakob***, *supra*; ***Reynolds v Avon Grove Props.***, *supra*). Mr. Prager's and the Hurds' deposition testimony demonstrates that the Town owned the sidewalk, the green space between the sidewalk and the curb, and the trees growing in the green space. Plaintiffs allege that a tree growing in the green space caused the sidewalk to break and this resulting crack was the proximate cause of Mrs. Eberhardt's injuries. However, as the Hurd defendants have demonstrated, prima facie, that they had no duty to maintain the sidewalk, there was no breach of such a duty on their part and, therefore, no proximate cause of Mrs. Eberhardt's injuries as a result (*see* ***Conneally v Diocese of Rockville Ctr.***, *supra*; ***Ortega v Liberty Holdings, LLC***, *supra*; ***Nappi v Inc. Vill. of Lynbrook***, *supra*).

The Hurd defendants having met their initial burden on the motion, the burden shifted to the opposing parties to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). In opposition, a triable issue of fact has been raised as to whether the Hurd defendants had a duty imposed upon them by the Babylon Town code with regards to maintenance of the sidewalk and, if so, whether they were in compliance with the statute at the time of Mrs. Eberhardt's accident (*see* ***Zuckerman v City of New York***, *supra*; ***Shatzel v 152 Buffalo St., Ltd.***, 129 AD3d 1626, 13 NYS3d 715 [4th Dept 2015]; ***Hevia v Smithtown Auto Body of Long Is., Ltd.***, 91 AD3d 822, 937 NYS2d 284 [2d Dept 2012]; ***Sachs v County of Nassau***, 60 AD3d 1032, 876 NYS2d 454 [2d Dept 2009]). As triable issues of fact have been raised, this rebuts the Hurd defendants' prima facie showing of entitlement to summary judgment (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

The Town's submissions in support of its cross motion for summary judgment demonstrate, prima facie, that it had no prior written notice of the condition of the sidewalk (*see* ***Amabile v City of Buffalo***, *supra*; ***Monaco v Hodosky***, *supra*; ***Simon v Incorporated Vil. of Lynbrook***, *supra*; ***Hannibal v Incorporated Vil. of Hempstead***, *supra*). The affidavits of Jennifer Taus and Thomas Stay establish that the Babylon Town Clerk and the Department of Public Works do not have any written record of any sidewalk defect at the Hurds' address prior to Mrs. Eberhardt's accident (*see*

Prucha v Town of Babylon, *supra*; ***Giarraffa v Town of Babylon***, *supra*). In opposition, the Hurd defendants submit an affirmation of their attorney, who does not address the prior written notice issue. Plaintiffs' also submit an affirmation of their attorney, who takes no position on the Town's cross motion. As the affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*), plaintiffs and the Hurd defendants have failed to rebut the Town's prima face showing that it had no prior written notice of the alleged sidewalk defect or that any of the exceptions to the written notice requirement apply (*see* ***Amabile v City of Buffalo***, *supra*; ***Kiernan v Thompson***, *supra*; ***Barnes v Incorporated Vil. of Port Jefferson***, *supra*; ***Miller v Town of E. Hampton***, *supra*).

In light of the foregoing, the Hurd defendants' motion for summary judgment is denied, the Town's cross motion for summary judgment is granted, and the plaintiffs's motion for leave to serve a supplemental bill of particulars is granted.

Dated: 9/8/2016

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**