Oswald v City of Albany, N.Y.
2016 NY Slip Op 32960(U)
March 14, 2016
Supreme Court, Albany County
Docket Number: 901427-15
Judge: Denise A. Hartman

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ANNE V. OSWALD,

Plaintiff,

-against-

CITY OF ALBANY, NEW YORK, and
733 BROADWAY LLC,

Defendants.

DECISION AND ORDER

Index No. 901427-15
(RJI No. 01-15-119343)

APPEARANCES:

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Hartman, J.

In this negligence action, plaintiff Anne V. Oswald seeks to recover for injuries she allegedly sustained when she tripped over an appurtenance related to municipal water service embedded in the sidewalk in front of property owned by defendant 733 Broadway, LLC. Defendant City of Albany moves to dismiss the complaint against it for failure to state a cause of action, based on plaintiff's failure to plead compliance with the City's prior written notice requirement. The City also argues that it has demonstrated that it had no duty to repair or maintain the municipal water appurtenance over which plaintiff tripped. Giving plaintiff the benefit of all favorable inferences, however an exception to the prior written notice requirement may apply to the facts of this case. And whether the City owed a duty of care to plaintiff with respect to the municipal water appurtenance implicates a question of fact that is not obviated by the code provisions cited by the City. Accordingly, the City's motion to dismiss is denied.

Background

Plaintiff's notice of claim states that her claim "is for the recovery of personal injuries that [she] sustained when she tripped and fell over a defective and dangerous water and/or sewer box, cap, or fixture." It specifies that the accident occurred on October 13, 2014, in front of 733 Broadway in Albany. According to the notice of claim, "as a result of the negligence of defendants,

[plaintiff] sustained substantial personal injuries." Plaintiff submitted to an examination pursuant to General Municipal Law § 50-h. The record of the examination has not been provided to the Court.

Plaintiff's complaint alleges that she tripped over "sewer accesses/ drains/vents/caps/curb boxes" in front of 733 Broadway. The complaint further alleges, among other things, that both the City defendants and property owner had a duty to maintain the appurtenance over which she tripped. According to the complaint, the defendants were negligent in the performance of their duty, both by omission and by affirmative act.

Plaintiff filed an amended complaint along with her opposition to the motion to dismiss. The amended complaint adds allegations that defendants "obtained a special use" from the water appurtenance over which plaintiff allegedly tripped and adds detail to the allegation that the defective or dangerous condition of the appurtenance was caused by affirmative conduct of defendants. The amended complaint also adds a second cause of action against defendant 733 Broadway, LLC.

Legal Standard

In considering a motion to dismiss for failure to state a cause of action, the Court must "determine only whether the facts as alleged fit within any cognizable legal theory" (*Davis v S. Nassau Communities Hosp.*, ___NY3d___, 2015 NY Slip Op 09229, *4 [2015] [internal quotation marks omitted]). The

Court is bound to accept all allegations in the complaint as true and afford the plaintiff every favorable inference (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "In other words, where the allegations are ambiguous, we resolve the ambiguities in plaintiff's favor" (*id.* [internal quotation marks omitted]).

Municipal Law § 50-e (4) authorizes municipalities to enact prior written notice provisions. City of Albany Code § 24-1 provides that no civil action can be maintained against the City for personal injury resulting from a defective or dangerous condition of a sidewalk, unless the City has been given prior written notice of the condition and failed to remedy it after a reasonable time. In general, compliance with a prior written notice code provision is a condition precedent to commencement of an action that must be pleaded (*Katz v City of NY*, 87 NY2d 241, 243 [1995]). The Court of Appeals has delineated two exceptions to prior written notice requirements: "where the locality created the defect or hazard through an affirmative act of negligence and where a 'special use' confers a special benefit upon the locality" (*Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999] [internal citation omitted]).

Analysis

The City argues that plaintiff has failed to allege in her complaint that the prior written notice requirement was satisfied, and that neither exception to the prior written notice requirement is applicable. The City also argues that

under City Code, it has no duty to maintain water appurtenances. Plaintiff counters that the prior written notice statute does not apply to this action and that both exceptions apply. Plaintiff also denies that the City Code provisions preclude it from recovering against the City in this action. The Court holds that the prior written notice provision generally applies to this action. Nevertheless, granting plaintiff every favorable inference and assuming all allegations of fact in the complaint to be true, it cannot be determined as a matter of law at this stage of the action whether the City created the alleged defect through an affirmative act of negligence or violated a special duty.

Lack of Prior Written Notice to the City Does Not Require Dismissal Here

The City's prior written notice provision applies to this type of action where plaintiff claims she tripped over what appears to be a water system appurtenance located on a sidewalk in the City. The Appellate Division, Third Department, has held that, in order to maintain a personal injury action for injuries allegedly caused by a water shut-off disk embedded in a sidewalk, a municipality's similar prior written notice provision must be satisfied (*Charbonneau v City of Cohoes*, 232 AD2d 931, 933 [3d Dept 1996]). Here, photographs provided by plaintiff in opposition to the City's motion show that the object over which plaintiff allegedly tripped is a metal disk that is embedded in and protrudes slightly from the sidewalk. Thus, the appurtenance

here, whether it be a drain, cap, or shut-off, is directly analogous to the appurtenance analyzed in *Charbonneau* and plaintiff's failure to plead satisfaction of the prior written notice requirement is fatal to her cause of action against the City unless one of the exceptions applies.

The City has not demonstrated, as a matter of law, that the affirmative act exception does not apply under the circumstances presented here. The complaint alleges injuries as a result of an affirmative act. And the City itself has provided evidence indicating that, in September 2014, the month before the alleged accident, it opened a cap above a water shut-off valve in front of 733 Broadway in order to shut off water causing a leak in the building. At this early stage of the litigation, the Court cannot say, as a matter of law, that the City did nothing affirmatively on that visit to create a dangerous condition that caused plaintiff to trip (*compare Oboler v City of N.Y.*, 8 NY3d 888, 890 [2007] [*summary judgment* affirmed where plaintiff had not presented evidence that work on manhole cover immediately resulting in dangerous condition had been performed by city defendant]).

Although the special use exception is likely inapplicable to the City here, the Court declines to reach it at this time. In *Charbonneau*, the Appellate Division held that a water shut-off valve did "not confer any special benefit upon the City or its citizens who use the sidewalk" (232 AD2d at 933). But *Charbonneau* affirmed a grant of summary judgment after the facts were

fleshed out (*id.* at 932). Here, the City has moved to dismiss under CPLR 3211 (a) (7). Discovery is incomplete, plaintiff's factual assertions must be taken as true, and plaintiff must be given the benefit favorable inferences. The amended complaint alleges that the City "obtained a special use from the sewage and/or water accesses/drains/vents/caps/curb boxes . . . in the proximity of 733 Broadway . . ., including . . . access to underground equipment, pipes, and/or mechanisms." Because the Court cannot determine from the face of the pleadings and motion papers the exact nature or function of the appurtenance over which plaintiff allegedly tripped it cannot rule out the possibility that plaintiff may establish the applicability of the special use exception (*see Posner v N.Y. City Tr. Auth.*, 27 AD3d 542, 544 [2d Dept 2006] [access to city equipment under a manhole cover is a special use]).

The Code Provisions Cited by the City Do Not Warrant Dismissal of the Complaint against the City

The City also cites two provisions of the City Code in support of its argument that it has no duty to maintain the water appurtenance at issue here (*see* Albany City Code §§ 371-54 [f], 299-16). The provisions the City cites state that the property owner is responsible for maintenance of "house supply pipes, fixtures, and appurtenances," and that the property owner is liable—and must indemnify the City—for damages resulting from failure to meet this obligation. But again, in the context of a motion to dismiss for failure to state a cause of

action, the Court is in no position to make a finding of fact necessary to determine whether the appurtenance at issue here falls within the ambit of these Code provisions. Even assuming the Code provisions apply to the appurtenance at issue here, it does not preclude the possibility that the City breached a duty of care to plaintiff. Plaintiff has alleged affirmative acts of negligence by the City. Such allegations provide an independent basis for liability beyond the failure to maintain or repair water appurtenances contemplated by the provisions on which the City relies.

Plaintiff's Notice of Claim Was Sufficient to Enable the City to Investigate

In response to plaintiff's assertion of the special use and affirmative act exceptions, the City argues that plaintiff is precluded from alleging in its amended complaint theories of liability not included in its notice of claim. But the notice of claim does all the law requires of it: it provides sufficient notice of the accident to allow the City to investigate.

As a condition precedent to assertion of a tort claim against a municipal corporation, a plaintiff must serve on the municipality a notice of claim within 90 days of the claim arising (General Municipal Law § 50-e; *Brown v City of N.Y.*, 95 NY2d 389, 392 [2000]). "The test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable the city to investigate" (*Brown*, 95 NY2d at 393 [internal quotation marks omitted]; *see*

Pierce v Hickey, 129 AD3d 1287, 1289 [3d Dept 2015]; *Baker v Town of Niskayuna*, 69 AD3d 1016, 1017 [3d Dept 2010]). The sufficiency of a notice cannot be determined by application of any bright line rule, but "depends on the circumstances of the case" (*see Kim L. v Port Jervis City Sch. Dist.*, 40 AD3d 1042, 1044 [2d Dept 2007]). Pursuant to General Municipal Law § 50-e (6), "[a]t any time after the service of a notice of claim . . . , a mistake, omission, irregularity or defect made in good faith in the notice of claim . . . may be corrected, supplied or disregarded . . . , in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby." To determine whether a municipality has suffered prejudice, "the Court may look beyond the notice of claim "to evidence adduced at a section 50-h hearing, and to such other evidence as is properly before the court" (*see D'Alessandro v N.Y. City Tr. Auth.*, 83 NY2d 891, 893 [1994]).

Here, plaintiff's notice of claim identifies the time, place, and manner of her injury. It states that plaintiff sustained injuries from a trip and fall caused by the City's negligence. Any defect in the notice of claim does not appear to have prejudiced the City's investigation of the claim. It was able to conduct a General Municipal Law § 50-h examination of plaintiff and has not demonstrated any prejudice or impediment to its investigation (*see D'Alessandro*, 83 NY2d at 893). According to the attorney affirmations and party affidavits submitted by plaintiff, the City has conducted an effective

investigation, such that it is able to confidently assert that the work done by the City on the water shut-off box the month before the accident is the only work the City has done in front of 733 Broadway.

Nor has plaintiff impermissibly asserted a new theory of liability. Negligence, as a theory of liability, includes both acts and omissions. Therefore, when plaintiff claimed that the City's negligence caused her injuries, she implicitly alleged both affirmative acts and omissions by the City (*see Baker*, 69 AD3d at 1017–1018). In any event, plaintiff was not required to identify every possible cause of action or theory of recovery in her notice of claim (*see id.*; *Goodwin v N.Y. City Hous. Auth.*, 42 AD3d 63, 68 [1st Dept 2007] ["The Legislature did not intend that the claimant have the additional burden of pleading causes of action and legal theories in the notice of claim, which must be filed within 90 days of the occurrence"] [internal quotation marks and ellipses omitted]; *but cf. Semprini v Vil. of Southampton*, 48 AD3d 543 2d Dept 2008] [affirming grant of summary judgment where plaintiff did not allege affirmative negligence in notice of claim or complaint]).

In sum, the Court holds that plaintiff's complaint and notice of claim are sufficient to withstand the City's motion to dismiss pursuant to CPLR 3211 (a) (7). Accordingly, it is

ORDERED that the motion to dismiss of defendant City of Albany is denied.

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to plaintiff's counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this Decision and Order does not constitute entry or filing under CPLR 2220 and counsel is not relieved from the applicable provisions of that rule respecting filing and service.

Dated: Albany, New York
March 14, 2016

Denise A. Hartman
Acting Supreme Court Justice

Papers Considered:

1. Complaint
2. Amended Complaint
3. Notice of Motion to Dismiss
4. Affirmation in Support of Motion to Dismiss, with Exhibits A–E
5. Memorandum of Law in Support of Motion to Dismiss
6. Affirmation in Opposition, with Exhibits A–C
7. Memorandum of Law in Opposition
8. Reply Memorandum of Law
9. Sur-Reply Memorandum of Law