SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. BRUCE D. ALPERT

Justice
TRIAL/IAS, PART 12
NASSAU COUNTY

JANET McELROY and PATRICK McELROY,

Plaintiffs,

INDEX No. 33284/96

-against-

CALENDAR No. 1998H6409

MOTION DATE:
May 26, 2000

ERWIN MOSER and ELFRIEDE MOSER,

Defendants.

MOTION SEQUENCE #1

ERWIN MOSER and ELFRIEDE MOSER,

Third-Party Plaintiffs,

-against-

TOWN OF OYSTER BAY,

Third-Party Defendant.

The following papers read on this application for relief under CPLR 1003 and 3025(b):

Notice of Motion	X
Opposing Affirmation	X
Reply Affirmation	X

Upon the foregoing papers it is ordered that plaintiffs' application for leave to serve a supplemental summons and an amended complaint, converting the third-party defendant into a direct defendant, so as to assert a cause of action sounding in negligence against it, is determined as hereinafter set forth.

This action was initiated to recover damages for both the personal injuries allegedly sustained by plaintiff, Janet McElroy, and the corresponding loss of spousal services assertedly suffered by plaintiff, Patrick McElroy. It is plaintiffs' contention, as gleaned from a review of the underlying complaint, that Ms. McElroy, while traversing the public way in front of 30 Gate Road in Massapequa, New York, on May 18, 1996, was caused to trip and fall due to its raised and uneven surface.

Prior to bringing suit, the McElroys served and filed a Notice of Claim with the Town of Oyster Bay on or about July 1, 1996. In correspondence directed to plaintiffs' attorney dated December 9, 1996, counsel for the municipality indicated that "[a] search of the Town's files, for a five-year period prior to the date of claimants' alleged accident, reveals the Town did not have a record of written notice pertaining to a defective condition at the subject location." Counsel was urged "[t]o do whatever was necessary to independently confirm the information contained in [the subject correspondence] and then withdrawing [sic], in writing, the McElroys' claim against the Town."

It appears from a review of the previously prepared summons and complaint, which

named the Mosers as the sole defendants, that the plaintiffs chose not to proceed against the municipality and to forego further investigatory efforts, including the pursuit of pre-action discovery options. This election preceded expiration of the governing limitations period.

The parties to the litigation completed discovery proceedings, certified the action as trial ready on October 16, 1998, and served and filed a Note of Issue on or about November 18, 1998. Shortly thereafter, a third-party action naming the Town of Oyster Bay as a third-party defendant was initiated. The corresponding pleading contains a single cause of action directed toward indemnification.

While plaintiffs contend that proof of the municipality's potential liability was recently developed, the service and filing of a Notice of Claim within weeks of the underlying accident clearly manifested an intention to hold the Town accountable for the condition of the accident situs and the injuries claimed.

"In general, amendments to pleadings are to be liberally granted (see, CPLR 3025 [b]). Where, however, an action has long been certified as ready for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious (Perricone v City of New York, 96 AD2d 531, 533, affd 62 NY2d 661)." (Clarkin v Staten Island University Hospital, 242 AD2d 552)

Application of the governing legal principles militates against a grant of the relief

sought. (see, Carranza v Brooklyn Union Gas Company, 233 AD2d 287)

Plaintiffs' cause of action against the municipality, to have been timely, had to have been pursued through the initiation of litigation within one year and ninety days of the claims' accrual. (see, GML §50-i[1]) Inasmuch as the limitations period expired long ago, the plaintiffs, if amendment relief is to be extended, are obliged to rebut the presumption that the action is time barred by demonstrating the applicability of the "relation back" doctrine. (see, Austin v Interfaith Medical Center, 264 AD2d 702, 703)

For the reasons hereinafter articulated, the Court finds that the presumption stands.

"For the rule allowing relation back to the original date of filing under CPLR 203 (b) to be operative in an action in which a party is added beyond the applicable limitations period, a plaintiff is required to prove that (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well (see, Buran v Coupal, 87 NY2d 173)." (Moller v Taliuaga, 255 AD2d 563, 564)

Because the Mosers cannot be held vicariously responsible for the alleged

negligence of the municipality in the discharge of its discrete responsibilities, it cannot be said that the interests of the Town and the adjoining property owners "'[i]n the subject-matter [are] such that they stand or fall together and that judgment against one will similarly affect the other' (Prudential Ins. Co. v Stone, 270 NY 154, 159)." (Mondello v New York Blood Center--Greater New York Blood Program, 80 NY2d 219, 226)

In this regard the Court notes that the doctrine of vicarious liability is predicated upon the opportunity to control the conduct of another (see, Kavanaugh v Nussbaum, 71 NY2d 535, 546), and that there is nothing in the record suggestive of such opportunity.

Moreover, where, as here, one party may have a defense which is unavailable to the other, such parties are not united in interest. (see, Desiderio v Rubin, 234 AD2d 581)

Assuming arguendo that the interests of the subject parties could be construed, nonetheless, as united, the applicants have "[f]ailed to demonstrate a mistake as to the identity of the proper party or parties at the time of the original pleading (see, Buran v Coupal, 87 NY2d 173). The [applicants'] mistake was one of law, which is not the type of mistake contemplated by the relation-back doctrine (see, Somer & Wand v Rotondi, 251 AD2d 567; State of New York v Gruzen Partnership, 239 AD2d 735; Yovane v White Plains Hosp. Ctr., 228 AD2d 436)." (Matter of Brucha Mortgage Bankers Corp. v Commissioner of Labor of the State of New York, 266 AD2d 211, 211-212)

It also merits mention that the plaintiffs may obtain no succor from CPLR 203 (f), as

the municipality's receipt of the third-party complaint, sounding in indemnification, afforded no notice that it may be exposed to liability to the plaintiffs on a subsequently brought direct claim sounding in negligence. (see, Fitzpatrick v The City of New York, __ Misc2d __, __ NYS2d __, 2000 N.Y. Misc. LEXIS 219)

"[M]ere notice alone, independent of the original pleadings, is inadequate; the pleadings themselves must give the requisite notice (Werner Spitz Constr. Co. v Vanderlinde Elec. Corp., 64 Misc 2d 157, 162-163; see also, Nichimen & Co. v. Framen Steel Supply Co., 44 Misc 2d 260, 261-262; New York Tel. Co. v. County Asphalt, 86 Misc 2d 958, 959-960)." (Shapiro v Schoninger, 122 AD2d 38, 40; see also Liverpool v Arverne Houses, Inc., 67 NY2d 878)

Accordingly, the instant application is denied.

Dated: August 14, 2000

J.S.C.