Cohill v New York City Tr. Auth.
2007 NY Slip Op 33458(U)
October 11, 2007
Supreme Court, New York County
Docket Number: 0117822/2005
Judge: Donna Marie Mills
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SCANNED ON 10/24/2007

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

COHILL, SYLVIA

Petitioner,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

INDEX NO. 117822/05

MOTION DATE ______

MOTION SEQ. NO. 002

MOTION CAL NO. ______

The following papers, numbered 1 to ______ were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2
Answering Affidavits– Exhibits	3
Replying Affidavits	

CROSS-MOTION: ✓ YES ____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED
OCT 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10-11-07

[signature]
J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

SYLVIA COHILL,

Plaintiff,

-against-

Index No. 117822/2005

THE CITY OF NEW YORK and NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

DONNA MILLS J.:

Defendant New York Transit Authority (TA) moves, pursuant to CPLR 3211, CPLR 3212, and General Municipal Law (GML) § 50-e for an order dismissing the complaint and all cross claims asserted against said defendant. Plaintiff cross-moves to amend the Notice of Claim.

According to the Notice of Claim, plaintiff brought this action to recover monetary damages for personal injuries allegedly sustained on June, 4, 2005, in a trip and fall on the roadway in front of the building known as 166 West 125th Street in Manhattan. Plaintiff alleges that she fell due to a defective condition in the roadway.

Although both the City of New York (City) and TA are both named in the caption of the Notice of Claim, the body of the Notice of Claim only contains allegations against the City and does not make any allegations against the TA.

The caption of the summons names both the City and TA as defendants, but the caption of the complaints names the City and New York City Housing Authority (NYCHA) as defendants. There are no allegations in the complaint against NYCHA.

In paragraph 9 of the complaint, plaintiff alleges that the City is the owner of the roadway in front of 166 West 125th Street, where plaintiff fell.

In paragraphs 10-16 of the complaint, plaintiff alleges that the City is liable because the City, by its agents, servants and/or employees, operated, managed, controlled, supervised, repaired, maintained and inspected the aforesaid location. In all seven paragraphs, the location is only referred to as the aforesaid location.

In paragraph 17 of the complaint, plaintiff alleges that the TA is the owner of the premises known as 1900/1920 Monterey Ave., Bronx., New York.

In paragraphs 18-24 of the complaint, plaintiff alleges that the TA is liable because the TA, by its agents, servants and/or employees, operated, managed, controlled, supervised, repaired, maintained and inspected the aforesaid location. In all seven paragraphs, the location is only referred to as the aforesaid location.

Paragraph 25 states, "That on or about June 4, 2005, plaintiff, Sylvia Cohill was lawfully upon the aforesaid premises when she was caused to trip, slip and fall and be violently precipitated to the ground."

Thus, from the face of the complaint, it appears that plaintiff is claiming that the City is liable by virtue of its relationship to the location in front of West 166 Street in Manhattan, and the TA is liable by virtue of its relationship to the property located at 1900/1920 Monterey Ave in the Bronx.

> "To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim [citations omitted] General Municipal Law § 50-e (2) ('Form of notice; contents') requires, among other things, that a Notice of Claim 'be in writing, sworn to by or on behalf of the claimant' and that it set forth:
>
> '(1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable'.
>
> Reasonably read, the statute does not require 'those things to be stated with literal nicety or exactness' [citations omitted] . The test of the sufficiency of a Notice of Claim is merely 'whether it includes information sufficient to enable the city to investigate' [citation omitted]. 'Nothing more may be required' [citation omitted]. Thus, in determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident [citations omitted]."

Brown v City of New York, 95 NY2d 389, 392 (2000).

The TA points out that since the Notice of Claim does not contain a single allegation against the TA, it does not advise the TA of the nature of the claim against the TA, and as such, is not a valid Notice of Claim vis-a-vis the TA.

In addition, the complaint seems to be alleging that the TA is liable for plaintiff's trip and fall at 1900/1920 Monterey Ave., while the Notice of Claim only refers to a trip and fall at the 166 West 125th Street address. Thus, even if the allegations

in the Notice of Claim are alleged against the TA, the Notice of Claim does not advise the TA of the nature of the claim against it.

Moreover, putting aside any inadequacies, in the Notice of Claim, defendant contends that it cannot be held liable for a trip and fall in either of the two locations.

The location on West 125th Street, where plaintiff alleges she fell, is part of the public roadway. "It is beyond cavil that the duty to keep public sidewalks in reasonably safe condition and to repair any defects falls upon the municipality [citation omitted]." Rubin v City of New York, 211 AD2d 417 (1st Dept 1995). "The duty to keep public sidewalks and roadways, including those adjacent to bus stops, in a reasonably safe condition and to repair any defects falls upon the municipality [citation omitted]" Cioe v Petrocelli Electric Co., Inc., 33 AD3d 377 (1st Dept 2006). Thus, the TA contends that it cannot be held liable for a defect in the public roadway.

The premises known as 1900/1920 Monterey Ave. in the Bronx is owned by 421 Tremont LLC, not the TA. Thus, the TA contends that it cannot be held liable for a defect at this location.

In support of her cross motion, plaintiff does not submit a proposed amended Notice of Claim, but merely states, "Here, plaintiff seeks to amend her Notice of Claim to correct a mere clerical error by either removing the phrase 'THE CITY OF NEW YORK' where it appears in the body of the Notice of Claim, or in the alternative, adding 'AND THE NEW YORK CITY TRANSIT AUTHORITY' to follow every

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appearance of 'THE CITY OF NEW YORK' in the Notice of Claim." Varcadipane affidavit, paragraph 11.

With respect to the two different locations alleged in the complaint and Notice of Claim, plaintiff argues:

> "14. Defendants claim that the allegations in the Verified Complaint as against the defendant, NYCTA, include a different location for the incident. Defendants' claims are a transparent attempt to establish prejudice to support a decision denying plaintiff's request for leave to amend. Their claims are undeniably false and should be disregarded.
>
> 15. The only allegation in the Verified Complaint regarding the 1900/1920 Monterey Avenue address is paragraph number seventeen (#17), which states, 'That at all times hereafter mentioned the defendant, NEW YORK CITY TRANSIT AUTHORITY, was the owner of the premises located at 1900/1920 Monterey Avenue, Bronx, New York.'"

Varcadipane affidavit.

Thus, plaintiff seems to be taking the position that in paragraphs 18-24 of the complaint when the phrase "aforesaid location" is used, it is not referring to the Monterey Avenue address mentioned in paragraph 17, but it is referring to the West 125th Street address mentioned in paragraph 9.

This would mean that the allegations contained in paragraph 17 are purely superfluous and have no bearing on the claims in the complaint. Despite this, plaintiff does not even attempt to explain why paragraph 17 is in the complaint.

However, no matter which of the two locations plaintiff is using to premise liability against the TA, the TA's motion for summary judgment should be granted.

> "As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact [citations omitted]. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers [citation omitted]. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action."

Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986).

Here, the TA has shown that it does not have a nexus to either location on which liability can be premised for plaintiff's injuries. On the other hand, plaintiff has not even attempted to explain why the TA would be liable for plaintiff's injuries at either location.

For the forgoing reasons, it is

ORDERED that the motion for summary judgment is granted and the complaint and cross claims are hereby severed and dismissed as against defendant New York City Transit Authority, and the Clerk is directed to enter judgment in favor of said defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that plaintiff cross motion is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 10 - 11 - 07

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.

FILED
OCT 24 2007
NEW YORK
COUNTY CLERK'S OFFICE