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SHORT FORM ORDER

INDEX No. 11075-04

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/8/06 (#003)
MOTION DATE 10/13/06 (#004 005)
MOTION DATE 11/17/06 (#006)
ADJ. DATES 12/8/06
Mot. Seq. # 003 - MD
Mot. Seq. # 004 - MG
Mot. Seq. # 005 - MG
Mot. Seq. # 006 - MD; CDISP

SUSAN ATWATER, Plaintiff, -against- COUNTY OF SUFFOLK, SUFFOLK COUNTY COMMUNITY COLLEGE and P&M DOORS & HARDWARE, INC., Defendants.	KUJAWSKI & DELLICARPINI Attys. For Plaintiff P.O. Box 661 Deer Park, NY 11729 ANTHONY P. MONCAYO, ESQ. Suffolk County Attorney Atty. For Defs. County & College P.O. Box 6100 Hauppauge, NY 11788 CASCONE & KLUEPFEL, LLP Attys. For Defendant P&M Doors 1399 Franklin Ave. Garden City, NY 11530

Upon the following papers numbered 1 to 20 read on these motions to compel, dismiss, summary judgment and to strike answer; Notices of Motion/Order to Show Cause and supporting papers 1-3; 4-6; 8-11; 12-14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 15-16; 17-18; ; Other 7 (memorandum); 19-20 (affirmation) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) by plaintiff for an Order pursuant to CPLR 3124 and 3126 to compel the defendant, Suffolk County Community College, to comply with plaintiff's Notice of Discovery and Inspection dated April 4, 2006, is denied as being academic and moot; and it is further

ORDERED that this motion (#004) by the defendants, County of Suffolk and Suffolk County Community College, for an Order pursuant to GML § 50-e and CPLR 3212, to dismiss plaintiff's complaint and all cross claims with prejudice for plaintiff's failure to comply with the specificity requirement of the notice of claim, or in the alternative, to grant summary judgment dismissing the plaintiff's complaint and all cross claims, is granted; and it is further

ORDERED that this motion (#005) by the defendant, P&M Doors & Hardware, Inc., for an Order pursuant to CPLR 3212 granting summary judgment in favor of P&M Doors & Hardware, Inc., as there are not triable issues of fact, is granted; and it is further

ORDERED that this motion (#006) by the plaintiff for an Order striking the answer of the defendants, County of Suffolk and Suffolk Community College, due to their spoilation of all records pre-dating the complained of incident and relating to work performed by Suffolk Community College carpenters on exterior doors on its campus buildings, including the subject door or precluding said defendants from denying that it created or had notice of the defective condition of that door at trial, is denied as being academic and moot in view of the Court's decision herein; and it is further

ORDERED that counsel for the plaintiff and defendants shall each serve a copy of this Order upon respective counsel with Notice of Entry within thirty (30) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavits of service with the Clerk of the Court.

This action was commenced by plaintiff against Suffolk Community College (hereinafter "College") and the County of Suffolk (hereinafter "County") for personal injuries she allegedly sustained when a door she was trying to open on her way to class at the College suddenly hit her in the face. Plaintiff had tried unsuccessfully several times to open said door. At the time of the incident, plaintiff was a student at for a number of years at the College and was familiar with the building where the incident occurred. After plaintiff commenced the action against the College and the County, the County commenced a third party action against P&M Doors & Hardware, Inc. (hereinafter "P & M"), a commercial vendor who repaired doors on the College campus on a contractual basis. Plaintiff subsequently amended its complaint to assert a direct cause of action against P&M.

In motion # 003, plaintiff moves pursuant to CPLR 3124 and 3126 to compel the County and the College to comply with plaintiff's Notice of Discovery and Inspection dated April 4, 2006. CPLR 3126(3) provides that the court has the discretion to strike a pleading for failure to abide with discovery. The striking of pleadings is an extreme remedy and should not be taken absent a showing of wilful and contumacious actions on behalf of the defaulting party (*see* ***Davidson v Aetna Cas. & Sur. Ins. Co.,*** 237 AD2d 321, 655 NYS2d 446 [2d Dept 1997], *app dism* 90 NY2d 844, 660 NYS2d 869 [1997], *lv app dism* 91 NY2d 842, 667 NYS2d 678 [1997]; ***Stathoudakis v Kelmar Contr. Corp.,*** 147 AD2d 690, 538 NYS2d 297 [2d Dept 1989]; ***Delaney v Automated Bread Corp.,*** 110 AD2d 677, 487 NYS2d 402 [2d Dept 1985]).

The County did respond to plaintiff's Notice of Discovery and Inspection on or about August 16, 2005 when it provided all of the documentation in its possession as stated in the affidavit of Michael Paduano, Suffolk County's Director of Construction and Compliance, dated July 25. 2006. Therefore, the County has complied with the plaintiff's discovery request by providing all of the documents in its possession and was unable to produce any further documents as same no longer existed due to the inability to reproduce them (*see* ***Maffai v County of Suffolk,*** 36 AD3d 765, 829 NYS2d 566 [2d Dept 2007]). Accordingly, the motion is denied.

Furthermore, plaintiff did not sustain her burden of demonstrating that the level of conduct required by CPLR 3126 to strike defendants' pleadings by showing repeated wilfulness and non-compliance with this discovery notice by the opposing party existed (*see* ***Kubacka v Town of No. Hempstead,*** 240 AD2d 374,

657 NYS2d 770 [2d Dept 1997]; ***Garcia v Kraniotakis,*** 232 AD2d 369, 648 NYS2d 156 [2d Dept 1996]). There was no conduct on defendants' part which would permit the Court in its discretion to invoke the drastic sanction of striking their answer.

The County and the College moves in motion #004 pursuant to GML § 50-e and CPLR 3212 for an Order dismissing the complaint and all cross claims with prejudice for plaintiff's failure to comply with the specific requirement of the notice of claim, or in the alternative, to grant summary judgment dismissing the plaintiff's complaint and all cross claims against it. P&M also moves in motion #005 pursuant to CPLR 3212 for summary judgment as there are no triable issues of fact regarding its liability as to the happening of the accident. The defendants are all in compliance with the pleading requirements of CPLR 3212(b) in addition to submitting the transcript of the plaintiff's 50- h hearing and the examinations before trial of the plaintiff and a witness produced on behalf of the defendants,[1] in addition to their own affirmations (*see* ***Osowicki v Cohen,*** 140 AD2d 898, 528 NYS2d 716 [3d Dept1988]).

At her 50-h hearing and examination before trial, plaintiff testified that the accident occurred as she was walking from the Southampton building after attending one class to another building where she was to attend a second class; that she approached the double door of the building and tried to open the left door; that when it did not immediately open, she tugged on the door with both hands but it still did not open; that she was standing 5-6 inches away from the door while trying to open it; that she did not see anything holding the door closed; that after the fourth attempt to open the door with both hands, it suddenly sprung open and hit her nose causing personal injury; that she did not try to open the right door during this time; that there were no witnesses to the incident, nor any weather conditions to affect the operation of the door; that she was seen by the school nurse and went to a local hospital for treatment with one of her parents; and that the photographs of the doors were taken three months after the incident by her mother and herself when she accompanied her mother to the campus grounds[2] (*see* 50-h hearing, 8/1/03 and EBT of Susan Atwater, 9/16/05).

On November 4, 2005, County produced Michael Paduano, Director of Plant Operations, and at the time of the incident, he was the Director of Construction and Compliance. He was aware of problems with

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[1] Copies of the pretrial transcripts submitted to the Court as to Richard Pohl's examination before trial dated November 4, 2005 and March 30, 2006 are unsigned and certified by the court reporter. However, none of the parties claim them to be inaccurate. Assuming that the original transcripts were properly submitted for signature or that, in fact, the signatures were affixed, transcripts of depositions attached as exhibits to an attorney's affirmation may be used in support of or to defeat a summary judgment motion (*see* CPLR 3116; ***Thomas v Hampton Express, Inc.,*** 208 AD2d 824, 617 NYS2d 831 [2d Dept 1994]; *app. den.* 85 NY2d 803, 624 NYS2d 373 [1995]; ***Olan v Farrell Lines,*** 64 NY2d 1092, 489 NYS2d 884 [1985]).

[2] The photographs were not produced at plaintiff's 50-h hearing as plaintiff's trial counsel at the hearing had not received them from her referring attorney. The record does not indicate if plaintiff had forward copies of same before the examination before trial or that they were first produced at the examination.

the main front doors in 2002 and had brought with him to the examination work orders regarding the front main doors identified by plaintiff as the situs of the incident. However, when presented with plaintiff's photographs of the situs of the accident, he identified the photographs as not being of the main front doors of the Southampton building but the doors on the opposite side of the building. Based upon this information presented by Mr. Paduano, the examination was adjourned to another date (*see* EBT of Michael Paduano, 11/5/05).

Also on November 4, 2005, P&M produced Richard Pohl, sales manager, for an examination. Mr. Pohl testified that P&M performed door repairs in 2002 on the main doors in the subject building, but when shown the photographs taken by plaintiff, he stated that they were not photographs of the front main doors. His examination was then adjourned (*see* EBT of Richard Pohl, 11/4/05).

On March 30, 2006, Michael Paduano was again deposed and stated that the doors in question where the incident occurred were at the back of the building and not in the front as plaintiff testified; that any records which may have existed regarding prior complaints and/or related work orders on the doors in the Southampton building were stored on computer discs and there was no printed documentation; that in late 2003, the County changed from one computer system to a entirely different system; that due to this computer system change, any disc containing information regarding the doors was not retrievable; that although he produced copies of work orders done by P&M on building doors in the building in question, the documents indicated that the work was performed on other doors in the building in 2002 and not the rear doors where the accident occurred; and that neither he nor any other person employed by the College ever checked work performed by an outside contractor (*see* EBT of Michael Paduano, 3/30/06).

At his second examination before trial on March 20, 2006, Richard Pohl testified that P&M worked in 2002 on the front doors of the Southampton building; that the repair work was to various hardware components of the doors; that he identified work documents presented to him; and that he reiterated the fact that the photographs taken by plaintiff were not photographs of the main front doors of the building and not the situs were the accident actually occurred (*see* EBT of Richard Pohl, 3/30/06).

Louis Pedota, assistant director of the physical plant at Suffolk Community College Selden Campus from 1999 until January 1, 2003, testified at his examination before trial that all work orders were done by computer and he had no independent recollection of any work being done on the doors in question by either the County or P&M; and that he only recalled that P&M was a contractor for Suffolk County (*see* EBT of Louis Pedota, 6/9/06).

The Court first addresses the motion of defendants, County and College, seeking an Order to dismiss the plaintiff's action for her failure to note with specificity the location of the door wherein the accident occurred. "The test of the sufficiency of a notice of claim is whether it includes information sufficient to enable the municipal agency to investigate the allegations contained in the notice of claim. In determining whether there has been compliance with the requirements of General Municipal Law § 50-e(2), we must focus on whether, based upon the claimant's description, the relevant municipal authorities can locate the place, fix the time, and understand the nature of the accident" (***Canelos v City of New York,*** ____ AD3d ____, 830 NYS2d 334 [2d Dept 2007] *citations omitted*).

General Municipal Law § 50-e(6) provides that "[a] mistake, omission, irregularity or defect" in the

notice of claim may be "corrected, supplied or disregarded" in the court's discretion, provided that the mistake, omission, irregularity was made in good faith, and the public corporation was not prejudiced thereby" (***Canelos v City of New York,*** ____ AD3d ____, *supra, citations omitted*). While the plaintiff testified at her 50-h Hearing as to the route she traveled from one class to another, in the Southampton Building, her original notice of claim dated May 20, 2003 stated that it occurred "while attempting to enter the main entrance of the Southampton Building through steel doors located on the left side of said entrance." Plaintiff's amended notice of claim dated May 29, 2005 stated verbatim the location set forth in her original notice of claim. Also, plaintiff's amended complaint filed with the Clerk of the Court on October 6, 2004 in paragraph numbered 22 stated that the accident occurred "while attempting to enter the main entrance of the Southampton Building" and her verified bill of particulars dated July 7, 2004 stated in paragraph No. 2 that the accident occurred "more particularly in the vicinity of the doors located on the left side of the main entrance of the Southampton Building." Plaintiff's verified bill of particulars dated April 28, 2005 and served upon counsel for P&M is identical to the bill pf particulars served upon the County seven and a half months earlier noting the location of the accident. Thus, plaintiff was bound by the notices and pleadings regarding the location of the accident (*see e.g.* ***Hallock v State,*** 64 NY2d 224, 485 NYS2d 510 [1984]; *see also* ***Bellino v Bellino Constr. Co.,*** 75 AD2d 630, 427 NYS2d 303 [2d Dept 1980]).

It was not until the deposition on of the witnesses on behalf of the County and P&M on November 4, 2005 that the location of the doors where the accident occurred was found to be the rear door of the Southampton Building and not the main entrance doors as set forth in plaintiff's pleadings (*see* ***Wilson v New York City Hous. Auth.,*** 187 AD2d 260, 589 NYS2d 425 [1st Dept 1992], *app den* 81 NY2d 704, 589 NYS2d 425 [1993]). The deposition testimony of the witnesses has established that there were numerous exterior entrance doors in the building.

The plaintiff's mistaken description in her notice of claim, amended notice of claim, amended complaint, and bills of particulars all refer to the wrong location of the doors in the subject building. The County upgraded its computer system in late 2003 and any disc information regarding work on the Southampton building doors that may have been saved is not retrievable under the new computer software system now being utilized by the County. Plaintiff served a discovery demand for this information in April of 2006 upon the County after she learned of the mistake in her location of the accident. This continuum of misidentification prejudiced the County "of the opportunity to conduct the type of prompt investigation envisioned by General Municipal Law § 50- e" (***Canelos v City of New York,*** ____ AD3d ____, *supra, citations omitted*).

Here, while the plaintiff testified as to the route she took to arrive at the building, she did not establish at her 50-h hearing the location of the doors and whether they were the front doors or rear doors in order to cure any deficiencies in her notice of claim (*see* ***Svartz v Town of Fallsburg,*** 241 AD2d 799, 661 NYS2d 799 [3d Dept 1997]; *see also* ***Wilson v New York City Hous. Auth.,*** 187 AD2d 260, *supra*. The photographs of the doors taken by plaintiff three months after the occurrence of the accident and not provided to defendants at the time of the 50-h hearing but identified by plaintiff at her examination before trial two and a half years later, also does not cure any deficiencies in her notice of claim regarding the location of the doors. It is noted that upon plaintiff learning of her mistake in the location of the doors as depicted in her photographs in the second examinations before trial held in March of 2006, she then served a discovery demand in April of 2006 for records concerning any work done on the doors.

Further, even after discovering after two and a half years when the initial notice of claim was filed, that the location of the doors was incorrect, plaintiff did not proffer any explanation of her failure to provide a correct description of the location of the accident (*see* ***Molina v City of New York,*** 284 AD2d 511,727 NYS2d 324 [2d Dept 2001]). Instead, plaintiff brought a motion for sanctions against the County for the alleged spoilation of evidence based upon plaintiff's contention that Suffolk County was aware of the correct location due to her 50-h hearing. Plaintiff cannot, without proof, years after the filing of an insufficient notice of claim, suddenly claim that the other party knew the right location when plaintiff herself consistently identified a totally different area where the accident occurred in her pleadings.

What is required of a claimant is sufficient particularity to adequately advise a municipality of the alleged location of the defect (*see* ***Rivera v City of New York,*** 169 AD2d 387, 563 NYS2d 818 [1st Dept 1991]) and to assure the municipality an adequate opportunity to explore the merits of the claim while information is readily available (*see* ***Adkins v City of New York,*** 43 NY2d 346, 401 NYS2d 469 [1977]). Where the information in the notice of claim about the location of the accident is incorrect, appellate courts have routinely held that notice is statutorily defective (*see* ***Archon v City of New York,*** 239 AD2d 371, 657 NYS2d 429 [2d Dept 1997]; ***Kornecki v City of New York***, 205 AD2d 665, 614 NYS2d 248 [2d Dept 1994]; ***Wilson v New York City Hous. Auth.***, 187 AD2d 260, *supra*; ***Setten v City of New York***, 174 AD2d 723, 571 NYS2d 566 [2d Dept 1991]). The fact that the notice of claim misidentifies the location where the claim arose (*see* ***Bacchus v City of New York,*** 134 AD2d 393, 521 NYS2d 27 [2d Dept 1987]) or if it fails to identity the site with sufficient particularity, renders the notice inadequate to meet the statutory requirements (*see* ***Eherts v County of Orange,*** 215 AD2d 524, 626 NYS2d 836 [2d Dept 1995]; *app den* 86 NY2d 708, 634 NYS2d 442 [1995]; ***Krug v City of New York***, 147 AD2d 449, 537 NYS2d 299 [2d Dept 1989]) and the resultant prejudice therefrom (*see* ***Harper v City of New York,*** 129 AD2d 770, 514 NYS2d 763 [2d Dept 1987]).

Under the facts and circumstances of this matter, the Court finds that the County and the College were "prejudiced by not being able to conduct a proper investigation while the facts surrounding the incident were still fresh"(***Turner v Town of Oyster Bay***, 268 AD2d 526, 701 NYS2d 653 [2d Dept 2000] *citation omitted*). According, defendants' motion is granted and plaintiff's complaint is dismissed as to the County and the College.

The Court will now address the motion of defendant, P&M. "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegard v New York Univ. Med. Ctr.,*** 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see* ***State Bank v McAuffile,*** 97 AD2d 607, 467 NYS2d 944 [1983] *app dism* 61 NY2d 758 [1984]). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.,*** 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, *supra*; ***Stewart Title Ins. Co., Inc. v Equitable Land Serv., Inc.***, 207 AD2d 880,881, 616 NYS2d 650 [2d Dept 1994]).

In applying foregoing principals to this matter, the Court finds that P&M has sufficiently

demonstrated its entitlement to summary judgment as a matter of law (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, *supra*; ***Zuckerman v City of New York,*** 49 NY2d 557, *supra*). In support of its motion for summary judgment, P&M has presented through the testimony of plaintiff herself, the witnesses who testified on behalf of the County and the College, its own sales manager and the documentary evidence submitted by the County, that any repair work performed by P&M prior to the date of the incident was not done on the doors where the accident occurred but rather, on other doors on the interior of the building. Plaintiff has failed to produce any evidence that would establish that P&M performed maintenance or repair work on doors wherein she stated the incident occurred. Although plaintiff had the opportunity during two examinations before trial of two separate parties to establish whether P&M did any work on the doors in question, she failed to do so and the Court cannot, based on the record before it, find any triable issue of fact as to P&M's alleged negligence in this matter.

In opposition to P&M's motion, plaintiff failed to raise a triable issue of fact as to notice (*see* ***Lopez v G&J Rudolph Inc.***, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]; ***Herman v Village of Kiryas Joel***, 19 AD3d 544, 796 NYS2d 534 [2d Dept 2005]; ***Filaski-Fitzgerald v Town of Huntington***, 18 AD3d 603, 795 NYS2d 614 [2d Dept 2005]; ***Betzold v Town of Babylon***, 18 AD3d 787, 796 NYS2d 680 [2d Dept 2005], ***Gold v County of Westchester***, 15 AD3d 439, 790 NYS2d 675 [2d Dept 2005]; ***Matter of Cuttitto Family Trust,*** 10 AD3d 656, 781 NYS2d 696 [2d Dept 2004]; *see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, *supra*). The affirmation of plaintiff's attorney, submitted in opposition hereto, and who does not have personal knowledge of the facts and circumstances of the accident, lacks probative weight. Therefore, it cannot raise a triable issue of fact to sustain plaintiff's burden (*see* ***Zuckerman v City of New York***, 49 NY2d 557, *supra*; *see also* ***Noel v L&M Holding Corp.,*** 35 AD3d 681, 826 NYS2d 690 [2d Dept 2006]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]; ***Batista v Santiago,*** 25 AD3d 326, 807 NYS2d 340 [1st Dept 2006]; ***Bates v Yasin,*** 13 AD3d 474, 788 NYS2d 397 [2d Dept 2004]; ***Stahl v Stralberg,*** 287 AD2d 613, 731 NYS2d 749 [2d Dept 2001]; ***Riverhead Bldg. Supply Corp. v Regine Starr, Inc.,*** 249 AD2d 532, 672 NYS2d 117 [2d Dept 1998]; *see also e.g.* ***Olan v Farrell Lines, Inc.,*** 105 AD2d 653, 481 NYS2d 370 [1st Dept 1984] *affd* 64 NY2d 1092, 489 NYS2d 884 [1985]).

Accordingly, the plaintiff's motion to compel discovery from defendants, the County and the College, is denied as moot and the motion by defendants, the County and the College, to dismiss plaintiff's complaint for lack of specificity in the notice of claim, as well as the motion by defendant P&M for summary judgment dismissing the complaint, are granted.

DATED: 3/24/07

THOMAS F. WHELAN, J.S.C.