

Ritchie v Felix Assoc., LLC

2008 NY Slip Op 32340(U)

August 12, 2008

Supreme Court, New York County

Docket Number: 0101038/2006

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB

PART 15

Index Number : 101038/2006

RITCHIE, BRIAN

vs.

FELIX ASSOCIATES, LLC.

SEQUENCE NUMBER : 004

AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 20 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/20/08

WALTER B. TOLUB
S.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----x

BRIAN RITCHIE and HELEN RITCHIE,

Plaintiffs,

Index No.: 101038/06

- against -

FELIX ASSOCIATES, LLC, JUDLAU
CONTRACTING, INC. THE CITY OF NEW YORK,
NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, LIRO GROUP LTD, LIRO
ENGINEERS INC. and LIRO CONSULTING
ENGINEERS, P.C.,

Defendants.

-----x
CONTI ENTERPRISES, INC.

Third-Party Plaintiff,

Third-Party
Index No. 509464/07

- against-

GRANIT HALMAR/SCHIAVONE JV., CO.,
GRANITE HALMAR CONSTRUCTION COMPANY,
INC. a/k/a GRANITE CONSTRUCTION
NORTHEAST, INC., SCHIAVONE CONSTRUCTION
COMPANY, INC. and P.C.M. CONTRACTING
CO., INC.,

Third-Party Defendants.

-----x
WALTER B. TOLUB, J.:

FILED
AUG 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

This is plaintiffs motion seeking leave to amend his
complaint and all subsequent pleadings to correct the date of the
accident and his injuries from March 15, 2005 to March 2, 2005.

Defendants Felix Associates, LLC (Felix), The City of New
York and the City of New York s/h/a New York City Department of
Transportation (collectively the City of New York) cross-move
for: (1)leave to amend the verified answer of the City of New

York to include an affirmative defense, namely that plaintiffs failed to satisfy the condition precedent to commence an action required under General Municipal Law § 50 (CPLR § 3025); and (2) for an order dismissing plaintiffs' complaint and cross claims with prejudice for plaintiffs' failure to satisfy the condition precedent required under General Municipal Law § 50 (CPLR § 3212).

The Liro defendants, Conti Enterprises, Inc., the Granit Halmar defendants, P.C.M. Contracting Co, Inc, and Schiavone Construction Co, Inc., all oppose plaintiffs' motion to amend and argue that they would be prejudiced by such an amendment.

For the following reasons, plaintiffs' motion is granted and defendants' cross motions are denied.

Background

Plaintiff claims that he was injured when he stepped off a sidewalk curb, located on State Street, in New York City. The curb was approximately 90 feet west of the south-west corner of the intersection of State Street and Whitehall Street. Plaintiff claims that on the day that he fell, the City of New York was involved in a construction project at the accident site.

In the notice of claim, dated May 23, 2005, plaintiff claimed that the Accident occurred on March 15, 2005. On October 18, 2005, plaintiff testified at a 50 (h) hearing that the Accident occurred on March 15, 2005. In addition, the amended

* 4]
verified complaint, dated June 13, 2006, and the verified bill of particulars, dated April 19, 2007, indicate that the Accident occurred on March 15, 2005.

Plaintiff Brian Ritchie states in his affidavit that he retained his counsel in April 2005 and "mistakenly advised [them] that [his] accident occurred on March 15, 2005" (Ritchie Aff., ¶ 7). Specifically, plaintiff avers that "it was [his] honest recollection that [the] accident occurred on March 15, 2005" (*id.*). According to plaintiff, he learned from his attorneys that his medical records indicated that his first visit to the doctor was on March 3, 2005 (*id.*, ¶¶ 10, 11). For awhile Plaintiff maintained that the physician's records were inaccurate. However, after following up with his health care provider, it was confirmed that payment was made to plaintiff's physicians for a March 3, 2005 visit (*id.*, ¶¶ 11, 12). Plaintiff then advised his attorneys that he had made an "honest mistake as to the date of [the] accident" and that the date of the Accident was indeed March 2, 2005 (*id.*, ¶ 14).

By this motion, plaintiffs seek to amend the aforementioned pleadings to reflect that the Accident occurred on March 2, 2005.

Discussion

It is well settled that leave to amend a complaint should be freely granted absent prejudice to the defendant (see CPLR 3025 [b]; see also Jacobowitz v Leak, 19 AD3d 453 [2d Dept 2005];

Liebowitz v Mount Sinai Hosp., 296 AD2d 340, 342 [1st Dept 2002];
Tishman Const. Corp. of New York v City of New York, 280 AD2d 374
[1st Dept 2001]).

Defendants Felix and the City of New York contend that plaintiffs should be precluded from amending the pleadings, and more specifically, the notice of claim, because plaintiffs have failed to meet the condition precedent required under General Municipal Law § 50-e.

General Municipal Law § 50-e (2) states in relevant part:

"[t]he notice [of claim] shall be in writing, sworn to by or on behalf of the claimant, and shall 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"

Defendants argue that since plaintiff provided the wrong date of the Accident, the motion to amend should be denied.

However, General Municipal Law § 50-e (6) provides:

"[a]t any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby."

Leave to correct a mistake is left to the sound discretion of the court and may be granted provided that the mistake was made in good faith and no prejudice exists to the other party

(Matter of Puzio v City of New York, 24 AD3d 679 [2d Dept 2005]). No one factor is dispositive. Plaintiffs argue that the error concerning the date of the Accident was a mistake made in good faith and that no prejudice has occurred, and therefore the motion to amend should be granted.

There is nothing in the record to suggest that the incorrect date was provided in bad faith. While plaintiffs seek to amend the mistake three years after the Accident, the statute states that corrections may be permitted at any time, as long as there is no prejudice (Fabian v New York City Tr. Auth., 271 AD2d 244 [1st Dept 2000]).

Defendants argue that they would be prejudiced because the investigation was conducted based on the date set forth in the notice of claim. However, defendants have not demonstrated that there was actual prejudice by this error (see Puzio, 24 AD3d 679; Arroyo v New York City Hous. Auth., 12 AD3d 254 [1st Dept 2004]; Matter of Berko v City of New York, 302 AD2d 594 [2d Dept 2003]). Moreover, discovery has not even commenced in this action.

Accordingly, plaintiff's motion to amend the pleadings is granted.

In light of the court's ruling above, defendants' cross motion is denied (see Palmieri v New York City Tr. Auth., 288 AD2d 361 [2d Dept 2001]).

Accordingly, it is

ORDERED that the motion for leave to amend the notice of claim, bill of particulars and amended complaint by plaintiffs Brian Ritchie and Helen Ritchie is granted; and it is further

ORDERED that the notice of claim, bill of particulars and amended complaint shall be deemed amended to reflect the correct date of the accident as being March 2, 2005 rather than March 15, 2005 upon service of a copy of this order upon all parties with notice of entry; and it is further

ORDERED that the cross motion by defendants Felix Associates, LLC, the City of New York and the City of New York s/h/a New York City Department of Transportation is denied in its entirety.

Counsel for the parties are directed to appear for a conference on September 19, 2008 at 11:00AM in room 335 at 60 Centre Street.

Dated: 8/19/08, 2008

ENTER:

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WALTER B. TOLUB J.S.C.

FILED
AUG 20 2008
COUNTY CLERK'S OFFICE
NEW YORK