

**Rivera v Consolidated Edison**

2009 NY Slip Op 30232(U)

January 29, 2009

Supreme Court, New York County

Docket Number: 105521/08

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT:

J.S.C. Justice

PART 11

Index Number : 105521/2008

RIVERA, FILIPA

vs.

CONSOLIDATED EDISON

SEQUENCE NUMBER : # 001

AMEND

INDEX NO. 105521-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on 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 and cross-motion are determined in accordance with the annexed decision and order.

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

FILED FEB 04 2009 COUNTY CLERK'S OFFICE NEW YORK

Dated: January 29, 2009

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
FILIPA RIVERA,

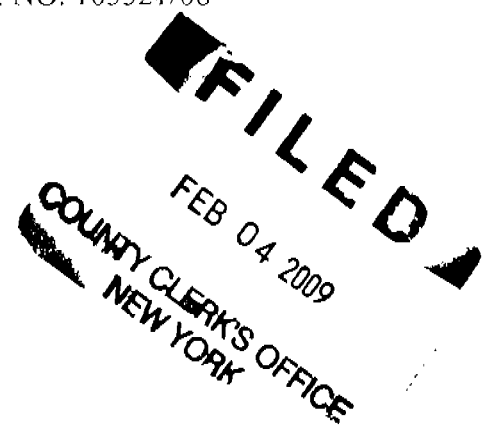
INDEX NO. 105521/08

Plaintiff,

-against-

CONSOLIDATED EDISON and THE NEW YORK  
CITY HOUSING AUTHORITY,

Defendants.  
-----X



JOAN A. MADDEN, J.:

Plaintiff moves for an order pursuant to General Municipal Law §50-e(6) granting leave to amend her notice of claim to correct the date of the occurrence, and pursuant to CPLR 3025(b) to correct the index number on the summons and complaint served on defendants. Defendant New York City Housing Authority (“Housing Authority”) opposes the motion and cross-moves to dismiss the complaint on the grounds that the “incorrect Notice of Claim has prejudiced” its investigation. Defendant Consolidated Edison (“Con Ed”) does not oppose the motion, and partially opposes the cross-motion to the extent that it seeks to preserve its cross-claims against the Housing Authority.

Plaintiff alleges she was injured due to defendants’ negligence when she tripped and fell over metal plates in the sidewalk in front of her apartment building located at 205 Avenue C in Manhattan. Liability of defendant Housing Authority is predicated on its duty as the abutting property owner to maintain the sidewalk in a safe condition; liability of defendant Con Ed is predicated on its duty as the owner of the metal plates.

Plaintiff's notice of claim, timely filed on December 20, 2007, indicates that the accident occurred on October 14, 2007. In support of the instant motion to amend the notice of claim, plaintiff's counsel states that when he was originally retained by plaintiff, she told him the accident occurred on October 14, 2007, but when he received plaintiff's hospital records at the end of January or the beginning of February 2008, he discovered that the records reflect an October 7, 2007 date of treatment. Plaintiff's counsel contacted plaintiff, and she said the accident occurred two days before she went to the hospital and therefore, she fell on October 5, 2007. As plaintiff testified at the 50-h hearing, after she fell, her ankle swelled and she remained at home for two days, but decided to go to the hospital after she slipped in her apartment causing her suddenly to put weight on her left leg, so that she was "feeling the pain more because [of] the pressure" and thought her leg was "really broken."

In a letter dated February 8, 2008, plaintiff's counsel immediately notified the Housing Authority of the error as to the date of the accident and plaintiff's intention to amend her notice of claim. On March 13, 2008, plaintiff appeared for a 50-h hearing and testified that the date of her accident was October 5, 2007. When the attorney for the Housing Authority asked about the October 14 date in the Notice of Claim, plaintiff's counsel explained that the date in the notice of claim was a "mistake." Plaintiff's counsel noted on the record that he had sent the February 8, 2008 letter to give the Housing Authority "notice that there was a wrong date when we determined the date was wrong," and that he intended to "make a motion to amend the notice of claim." On July 10, 2008, plaintiff made the instant motion to amend the notice of claim to correct the date of the accident.

General Municipal Law §50-e(6) authorizes a court, in its discretion and at any stage of a proceeding, to grant leave to serve an amended notice of claim where the error in the original notice of claim was made in good faith, and where the municipal corporation has not been prejudiced thereby. See Gatewood v. Poughkeepsie Housing Authority, 28 AD3d 515 (2<sup>nd</sup> Dept 2006); Arroyo v. New York City Housing Authority, 12 AD3d 254 (1<sup>st</sup> Dept 2004); Fabian v. New York City Transit Authority, 271 AD2d 244 (1<sup>st</sup> Dept 2000); Sanchez v. City of New York, 25 AD2d 731 (1<sup>st</sup> Dept 1966). Here, nothing in record suggests that the error in setting forth the accident date in the original notice of claim was made in bad faith, nor has the Housing Authority demonstrated any actual prejudice, and the record discloses no basis to presume prejudice. See Puzio v. City of New York, 24 AD3d 679 (2<sup>nd</sup> Dept 2005).

Specifically, plaintiff submits an affidavit that her “memory for dates and details is not good” and “I made a mistake when I told my lawyer that the accident happened on October 14, 2007 and that is why I told him last winter to talk to my daughter, Delilah, who spoke to me after the accident happened.” Plaintiff explains she was examined by the Housing Authority’s doctor, Dr. Sherry in April 2008, but “did not tell him my accident happened October 14, 2007.” She also explains that she did not report the accident to the Housing Authority, “because I fell on the public sidewalk in front of my building and Con Edison put the plates there. My lawyer told me he was making a claim against the Housing Authority.”

Plaintiff’s daughter, Delilah Martinez, submits an affidavit that at the time of “my mother’s accident on October 5, 2007, I was working in New Jersey and on the night of October 4, 2007, I stayed over night at my mother’s apartment before leaving for work early Friday morning. When I left the building I noticed big metal plates placed all over the sidewalk area in

front of my mother's building. I had to walk over plates to get to my car. . . . Later that day I received a call from my mother who said she had tripped on one of those plates and hurt her ankle. She said her ankle was swollen and painful but she hoped it was only sprained. I told her to go to the hospital but she said that neither of my brothers was at home, and she wanted to wait and see if her ankle would feel better on Saturday. As I understand from my brothers, she stayed home during the day Saturday and most of the day Sunday until she slipped trying to clean water and that had spilled from the dog dish. Although my mother slipped she didn't fall, but suddenly put weight on her left foot trying to catch her balance. It was at this point that she felt how badly her ankle had deteriorated since Friday. She then told my brother Michael he would have to take her to Beth Israel Hospital. . . . The date of the accident was October 5, 2007, a Friday afternoon, my mother went to Beth Israel Hospital two days later, Sunday the 7<sup>th</sup>. My mother had her accident on Friday afternoon October 5, 2007 and called me on that date." Ms. Martinez also states that when her mother's attorney called her "about the discrepancy in the accident date reflected in the hospital record," she told him "that my mother gets easily confused and it did not surprise me that she gave him the incorrect date of the accident."

Plaintiff also submits an affidavit from an eyewitness, Cuca Silvagnoli, stating as follows: "On the first Friday in October last year, 2007, I saw the plaintiff Filipa Rivera, trip and fall over two metal plates that I believe Con Edison had placed on the sidewalk in front of 205 Avenue C, New York, New York. The metal plates were not placed together like the others on the sidewalk, and this is what caused Filipa to trip and fall. . . . I was sitting with a friend in front of the building at the time of the accident. It was about 3:00 o'clock in the afternoon. . . . Filipa fell to the ground and my friend and I had to take her arms and help her up to her apartment . . . Her

ankle started to swell and I told her she should go to the emergency room. Filipa said she didn't want to go to the hospital. She told me it was probably only a sprain.”

While the Housing Authority asserts that it has been prejudiced in its investigation, it has not sufficiently demonstrated that it was misled to its prejudice or its investigative efforts were actually hampered by the erroneous date in the notice of claim. See Arroyo v. New York City Housing Authority, supra; Fabian v. New York City Transit Authority, supra; Sanchez v. City of New York, supra. To the contrary, the Housing Authority concedes that it did not commence the investigation until January 28, 2008, which was just 11 days before the February 8, 2008 letter from plaintiff's counsel advising of the error in the notice of claim as to the date of the accident. Plaintiff has established that her attorney notified the Housing Authority of the correct date immediately after he became aware of the error in late January or early February 2008, upon receipt of plaintiff's hospital records indicating the date of treatment as October 7, 2007.

Also, in making a determination as to prejudice, the court may look to the evidence adduced at the 50-h hearing. See Fabian v. New York City Transit Authority, supra at 245. On March 13, 2008, plaintiff testified at the 50-h hearing that the accident occurred on October 5. When she was questioned about the date in the notice of claim, her attorney made a point of referring to his February 8<sup>th</sup> letter advising the Housing Authority of the correct date, and indicating his intent to make a formal motion to amend the notice of claim.

Under these circumstances, where the Housing Authority was aware of the correct date within 11 days after commencing its investigation, it is unable to demonstrate how it was prejudiced by the incorrect date in the notice of claim.

Plaintiff, therefore, shall be permitted to amend her notice of claim to correct the date of the accident. In light of this determination, Con Edison's motion to dismiss the complaint, is denied.

Plaintiff shall also be permitted to amend the pleadings to correct the index number on the summons and complaint served on defendants. Plaintiff explains that the summons and complaint served on the Housing Authority and Con Edison had an incorrect index number (Index No. 8105521/08). Thus, the summons and complaint served on defendants shall be deemed amended *nunc pro tunc* to reflect the correct Index Number 105521/08.

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to serve an amended notice of claim is granted, and within 20 days of the date of this decision and order, plaintiff shall serve an amended notice of claim alleging that the accident occurred on October 5, 2007; and it is further

ORDERED that the summons and complaint served on defendants is hereby deemed amended *nunc pro tunc* to reflect the correct Index Number 105521/08; and it is further.


ORDERED that defendant Consolidated Edison's cross-motion to dismiss is denied; and it is further

ORDERED that the parties are directed to appear for the conference previously scheduled for February 5, 2009.

DATED: January 29, 2009

**FILED**  
FEB 04 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

ENTER:

  
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J.S.C.