

Fleischer v New York City Tr. Auth.
2009 NY Slip Op 31029(U)
May 5, 2009
Supreme Court, New York County
Docket Number: 109040/2008
Judge: Harold B. Beeler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Beeber
Justice

PART 21

WILLIAM FLISCHER

INDEX NO.

109040/08

MOTION DATE

MOTION SEQ. NO.

1

MOTION CAL. NO.

- v -

NYCTA

The following papers, numbered 1 to _____ 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

FILED

MAY - 8 2009
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

Dated: 5/5/09



HAROLD BEEBER s.c.
J.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):

At IAS Part 21 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 5th of May, 2009.

PRESENT: HON. HAROLD B. BEELER,
Justice

WILLIAM M. FLEISCHER,
Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY
Defendants.

INDEX NUMBER 109040/2008
Motion Sequence 001
DECISION & ORDER

Plaintiff moves for leave to serve an amended notice of claim, an amended summons and complaint, and an amended bill of particulars, all to correct the location of the alleged accident. Defendant opposes the motion, and cross-moves for summary judgment dismissing plaintiff's claims. For the reasons discussed herein, plaintiff's motion for leave to amend is granted, and defendant's motion is denied.

It is conceded by plaintiff that his notice of claim, summons and complaint, and bill of particulars all specify that the location of his alleged accident is the subway platform at the Lexington Avenue and 53rd Street "E" station, although the accident actually occurred at the platform at the 5th Avenue and 53rd Street station.

Plaintiff regularly takes the E train to work from the 50th Street and 8th Avenue location. His office is close to the exit at Madison Avenue and 53rd Street, which he mistakenly believed

was an exit for the Lexington Avenue/53rd Street location. Plaintiff alleges that on February 20, 2008, he tripped and fell over a deteriorated wooden plank with raised edges that was secured to the platform adjacent to the tracks, twisting his ankle. Four days later, he returned to this location and informed the station manager of the accident. He also took photographs of the accident location, which he alleges was in the same condition as it was on the day of his accident. Two or three days later, plaintiff noticed that the alleged defect was replaced with a new board with rounded edges. He took photographs of the new board.

On March 6, 2008, plaintiff served the Notice of Claim, pursuant to General Municipal Law § 50-e, on defendant. The Notice of Claim incorrectly stated that the accident location was the Lexington Avenue/53rd Street station. The photographs taken by plaintiff were attached to the Notice of Claim, and one of the photographs depicts a sign designating the exit at Madison Avenue.

At a 50-h hearing, when plaintiff was asked if he intended to take a train at the "Lexington 53rd Street subway station," he replied, "Yes, that's the closest subway." In response to a subsequent question, he stated that he entered at the entrance at "55th Street and Madison"

Plaintiff served his summons and complaint on June 30, 2008, and his bill of particulars on August 7, 2008. Both stated that accident location was the subway station at Lexington Avenue/53rd Street.

At plaintiff's deposition on March 6, 2009, the following exchange took place:

- Q. To where would you ride?
A. I would ride to the 53rd and Lexington stop on the E – 53rd and Madison, that stop.
Q. You worked at Madison Avenue, correct?
A. Yes, correct.

- Q. When you exited the subway –
- A. No, you’re right, it’s Madison and 53rd. I just can’t remember – there’s another stop on Lexington, so the stop is Madison and 53rd that I normally would get off on.
- Q. Is that station sometimes known as the Fifth Avenue/53rd Street station?
- A. If there’s an entrance on there, I guess that’s correct

And subsequently:

- Q. Then the next stop would be where you get off?
- A. Correct.
- Q. That would be Fifth Avenue and 53rd Street, correct?
- A. Correct.

According to plaintiff, this was the first time he became aware that he was mistaken about the designation of the accident location. Six days later, plaintiff filed a motion for leave to amend.

Discussion

The purpose of a Notice of Claim requirement is to provide a municipality with the opportunity to investigate the alleged defect in a timely fashion, not to avoid liability. *Williams v. City of New York*, 229 A.D.2d 114, 116, 654 N.Y.S.2d 775 (1st Dept 1997). The Court has discretion, pursuant to GML 50e-(1), subdivision (6), to amend a notice of claim “at any time” thereafter, and “at any stage” of the action, to correct a “mistake, omission, irregularity or defect” made in good faith, provided that the other party has not been prejudiced. *See Id.* Similarly, a complaint may be amended where a party is not prejudiced. *See Haggerty v. Everett Realty*, 21 A.D.3d 268, 269, 800 N.Y.S.2d 7, 8 (1st Dept 2005) (permitting plaintiff to amend complaint to correct incorrect accident location, where defendant would not suffer any prejudice).

Here, defendants do not make an allegation that plaintiff’s mistake was made in bad faith,

nor does this court find any evidence of bad faith. Plaintiff testified that he regularly entered and exited the station at Madison Avenue, and that he mistakenly believed that this was the station designated Lexington Avenue/53rd Street. The photographs attached to the Notice of Claim clearly depict a sign stating Madison Avenue, which is an exit only to 5th Avenue/53rd Street station. *Compare McPherson v. Glenwood Estates, Inc.*, 208 A.D.2d 699, 700-01, 617 N.Y.S.2d 526 (denying motion for leave to amend complaint where plaintiff failed to provide proof that the accident occurred at the proposed location).

Therefore, the sole issue is whether defendant will be prejudiced by plaintiff's amending his pleadings. *See Williams*, 229 A.D. at 116, 654 N.Y.S.2d 775.

Defendant argues that where a party has conducted a timely investigation of the wrong site in reliance on the location designated on the notice of claim, this alone constitutes prejudice warranting dismissal. *See Id.* at 117, 654 N.Y.S.2d 775. Defendants allege that its investigation of the incident consisted of a Master Reference from its Capital Program Management department generated on July 16, 2008, depicting all in-house contract work performed by defendant for the Lexington Avenue/53rd Street station; and a maintenance and repair record for same station generated on October 22, 2008. Defendant does not explain how these documents aided its investigation or what they revealed. Considering that these documents were generated many months after the notice of claim and the 50-h hearing, the Court questions whether they are timely for the purpose of defendant's argument.

Regardless, defendant's review of documents is not the type of investigation that would constitute prejudice warranting denial of plaintiff's relief, let alone dismissal of its claim. In the cases relied upon by defendant where a Court found prejudice, defendants conducted an onsite,

physical investigation of the location mistakenly designated in the notice of claim. *Adlowitz v. City of New York*, 205 A.D.2d 369, 613 N.Y.S.2d 174 (1st Dept 1994) (noting that defendant City conducted an investigation at the wrong site); *Konsker v. City of New York*, 172 A.D.2d 361, 568 N.Y.S.2d 620 (1st Dept 1991) (discussing detailed report submitted by defendant's investigator, including a scale diagram and photographs of the erroneous location). Compare *Kaminsky v. City of New York*, 238 A.D.2d 380, 381, 656 N.Y.S.2d 324 (2d Dept 1997) (finding no prejudice where defendant did not show evidence that it physically investigated location). Defendant's minimal investigation does not result in the same kind of prejudice as would a physical investigation. If defendant had made a greater effort to investigate the location with a "modicum of effort," it likely would have discovered the true location or at least alerted defendant to the likelihood of an error. See *Williams*, 229 A.D. at 114, 654 N.Y.S.2d 775, *Santarpia v. City of New York*, 231 A.D.2d 726, 727, 647 N.Y.S.2d 861 (2d Dept 1996). Compare *Reyes v. City of New York*, 281 A.D.2d 235, 722 N.Y.S.2d 17, 18 (1st Dept 2001) (noting that plaintiff's vague 50-h testimony and obscure photographs of the location prevented defendant from discovering the error). Moreover, defendant provides no reason why its cannot duplicate its previous efforts with the corrected information, and obtain results no different than it would have had it generated reports earlier.

Additionally, because plaintiffs allege that the defect was corrected one week following the accident, defendant would not have had the opportunity to observe and investigate the location if it were inclined to do so. Thus, a more accurate description in the notice of claim would have not enabled defendant to conduct a more meaningful investigation. See *Butler v. Town of Smithtown*, 293 A.D.2d 696, 698-99, 742 N.Y.S.2d 324 (2d Dept 2002) (holding that

where the defect was repaired before plaintiff timely filed notice of claim, defendant would not be prejudiced because it would have been unable to conduct a meaningful investigation if the notice accurately described the location).

Because defendant has not shown it would be prejudiced by the corrected location, plaintiff is entitled to amend its pleadings and defendant is not entitled to a dismissal.

Accordingly, it is hereby

ORDERED that plaintiff's motion to amend its notice of claim, bill of particulars, and complaint is granted, and plaintiff is ORDERED to file and serve its amended papers within 30 days of receipt of this order, and it is

ORDERED that defendant's motion is denied in its entirety.

All relief otherwise requested is denied.

DATE: May 5, 2009

ENTER:

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HAROLD B. BEELER, J.S.C.

HAROLD BEELER
J.S.C.