

<b>Billy v City of New York</b>
2010 NY Slip Op 30341(U)
February 16, 2010
Supreme Court, New York County
Docket Number: 115297/07
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Jaffe BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 115297/2007  
BILLY, MARILYN  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 002  
AMEND SUPPLEMENT PLEADINGS  
CAL # 18

INDEX NO. 115297/07  
MOTION DATE 2/9/10  
MOTION SEQ. NO. 002  
MOTION CAL. NO. 18

this motion to ~~for~~ amend and dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

FEB 23 2010

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER  
NEW YORK  
CLERK'S OFFICE

Dated: 2/16/10  
BARBARA JAFFE  
J.S.C. FEB 16 2010

[Signature]  
BARBARA JAFFE J.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):

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK : PART 5

-----X  
 BILLY, MARILYN,

Index No. 115297/07

Plaintiff,

Motion Date: 2/9/10

Motion Seq. No.: 007

-against-

THE CITY OF NEW YORK, THE DEPARTMENT OF  
 EDUCATION OF THE CITY OF NEW YORK, NEW  
 YORK CITY DEPARTMENT OF PARKS AND  
 RECREATION AND JOINTLY OWNED  
 PLAYGROUND,

Defendants.

-----X  
 BARBARA JAFFE, JSC:

By notice of motion dated December 30, 2009, defendants move pursuant to CPLR 3025(b) for an order granting them leave to amend their answer to assert an affirmative defense to plaintiff's negligence claim based on the Workers' Compensation Law, and pursuant to CPLR 3211(a)(7) dismissing the complaint. Plaintiff opposes the motion.

Plaintiff alleges in her complaint that on November 2, 2005, while walking on a sidewalk owned by defendants, she fell and sustained injuries, that the accident was caused by defendants' negligence, and that defendants had actual and/or constructive notice of the sidewalk's defective condition. (Affirmation of John Orcutt, Esq., dated Dec. 30, 2009 [Orcutt Aff.], Exh. C).

Absent a sufficient basis for finding that plaintiff was surprised or prejudiced by defendants' amended answer, and in light of the merit of defendants' proposed affirmative defense (*see infra.*), defendants are granted leave to amend their answer. (CPLR 3025[b]).

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a

cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*).

However, the movant may submit affidavits or any other items of proof in order to undermine any material fact on which the claim depends, and if it is shown that any material fact the pleader claims to be a fact is not a fact at all and that no significant dispute exists regarding it, the motion may be granted. (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 3211:25 [2004 main vol]). Thus, when extrinsic evidence is submitted on the motion, the allegations are not deemed true, and the standard of review becomes whether the proponent of the pleading has a cause of action, not whether she has stated one. (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76 [1<sup>st</sup> Dept 1999], *aff'd* 94 NY2d 659 [2000]). A claim is thus subject to dismissal when it is established that "the essential facts have been negated beyond substantial question" by the evidence. (*Biondi*, 257 AD2d at 81).

In support of their motion, defendants offer evidence that defendant City has paid plaintiff over \$53,000 in workers' compensation benefits for this incident. (Orcutt Aff., Exh. G). They thus argue that as workers' compensation benefits constitute the exclusive remedy for a negligence claim brought by an employee against her employer, plaintiff is barred from maintaining this action. (Orcutt Aff.). They also offer plaintiff's deposition, at which she testified that while employed by the New York City Police Department as an administrative assistant, she was injured after leaving her workplace to get something to eat for lunch. (*Id.*, Exh.

B).

Plaintiff disagrees, contending that pursuant to General Municipal Law (GML) § 205-e, her receipt of workers' compensation benefits does not impact her right to sue defendant for negligence. (Affirmation of Stacey Haskel, Esq., dated Jan. 13, 2010).

In reply, defendants deny that GML § 205-e is applicable as plaintiff was not injured while in the discharge or performance of any official duty. (Reply Affirmation of Michael Chadirjian, Jr., Esq., dated Jan. 28, 2010).

Pursuant to GML § 205-e(1), "in addition to any other right of action or recovery under any other provision of law," an employee of any police department may recover damages arising from the negligence of any person if such injury occurs "while in the discharge or performance at any time or place of any duty imposed." The statute also provides that "nothing in this section shall be deemed to expand or restrict any right afforded to or limitation imposed upon an employer, an employee . . . by virtue of any provisions of the workers' compensation law."

Although workers' compensation is generally the exclusive remedy for an employee's work-related claim against her employer (Workers' Compensation Law §§ 11, 29), "there remain certain exceptional circumstances in which an employer may be subject to common-law liability." One exception is "where the legislature has provided by statute for an action." (52 NY Jur 2d Employment Relations § 357 [2010]). Here, the Legislature enacted GML § 205-e(1) which expressly provides that police department employees may recover damages in addition to any other right of action under any other provision of law. Consequently, one's receipt of workers' compensation benefits does not preclude an action pursuant to GML § 205-e. (*Salvador-Pajaro v Port Auth. of New York and New Jersey*, 52 AD3d 303 [1<sup>st</sup> Dept 2008];

*LoTempio v City of Buffalo*, 6 AD3d 1197 [4<sup>th</sup> Dept 2004]).

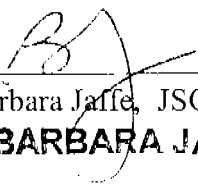
Here, however, plaintiff was injured while going to lunch, an activity that is not claimed to have constituted a discharge or performance of any official duty imposed. (*Cf Lynch v City of New York*, 14 AD3d 347 [1<sup>st</sup> Dept 2005] [question of fact as to whether plaintiff was performing duties as firefighter when he was injured while retrieving firefighter gear from locker]; *Walters v City of New York*, 23 Misc 3d 1127[A], 2009 NY Slip Op 50975[U] [Sup Ct, New York County 2009] [question of fact as to whether plaintiffs were performing firefighter duties when they were injured while in process of retrieving dinner; they were not provided meal breaks and were “in service” and ready to respond to call]; *Amandola v Holland*, NYLJ, Nov. 15, 1993, at 25, col 3 [Sup Ct, New York County] [police officer was performing police duty as he was on patrol while driving to stationhouse for meal]).

Thus, absent a valid claim under GML § 205-e, plaintiff has failed to state a cause of action. (CPLR 3211[a][7]). Accordingly, it is

ORDERED that the motion for leave to amend City’s answer is granted and the amended answer is deemed served in the proposed form annexed to the moving papers; and it is further

ORDERED that the complaint is dismissed pursuant to CPLR 3211(a)(7).

This constitutes the decision and order of the court.

  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: February 16, 2010  
New York, New York

**FILED**  
FEB 23 2010  
NEW YORK COUNTY CLERK'S OFFICE