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

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice PART 5

Index Number : 100624/2009
MANCILLA, MARIA
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
DISM ACTION/INCONVENIENT FORUM
Cal # 8 6

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 ...	1
~~Answering Affidavits~~ — Exhibits Cross Mot & Opp	2
~~Replying Affidavits~~	3, 4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/1/10
OCT 01 2010

_____ J.S.C.
BARBARA JAFFE
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 5

----------x

MARIA MANCILLA,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

----------x

Index No. 100624/09
Motion Date: 08/24/10
Motion Seq. No.: 002
Calendar No.: 86

DECISION & ORDER

BARBARA JAFFE, JSC:

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By notice of motion dated April 23, 2010, City moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint, or in the alternative, pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes, and, by notice of cross-motion dated July 1, 2010, moves pursuant to General Municipal Law (GML) § 50-e(6) for an order amending her notice of claim. City opposes the cross-motion.

I. UNDISPUTED FACTS

On September 30, 2008, well within 90 days of her accident, plaintiff served her notice of claim, alleging that City was liable for a dangerous condition "in the street on the north east corner of the intersection of Broadway and 56th Street" at the crosswalk, adjacent to a grate. (Affirmation of Lynn M. Leopold, Esq., dated Apr. 23, 2010 [Leopold Aff.], Exh. A). She commenced this action on January 9, 2009 by serving a summons and complaint on City.

(Leopold Aff., Exh. D). She alleges in her complaint that on July 18, 2008, while walking north on Broadway in Manhattan, she fell in a defective area of the roadway at a crosswalk at the northeast corner of Broadway and 56th Street. (Affirmation of Bartly L. Mitchell, Esq., dated July 1, 2010 [Mitchell Aff.]; Reply Affirmation of Lynn M. Leopold, dated Aug. 17, 2010). One block to her left was a pharmacy, and as she attempted to cross 56th Street, she tripped in a hole in the street. (Leopold Aff., Exh. G at 10-11, 28).

At a 50-h hearing held on December 10, 2008, plaintiff testified that she had tripped and fallen and upon being shown photographs of the northeast corner of 56th and Broadway, identified the defect on which she tripped which is adjacent to a sewer grating. (Leopold Aff., Exh. G at 9). She also clarified the date and time of her fall (*id.* at 9, 28-30), and counsel notified City of his intent to file an amended notice of claim with the correct date and time (*id.*, Exh. G).

Abraham Lopez, a record searcher for the New York City Department of Transportation (DOT), testified at a deposition as to the results of a search conducted by an unidentified DOT employee for records relating to 56th Street between Broadway and Seventh Avenue. (Leopold Aff., Exhs. H, I). The scope of the search was for the two years preceding and including the date of plaintiff's accident. (*Id.*). The search yielded 17 permits, seven applications, 14 corrective action requests, five notices of violations, 15 intersections, two maintenance and repair records, one gang sheet for roadway defects, and three maps. (*Id.*). Lopez also stated that no contract information or in-house resurfacing records, complaints, or gang sheet for milling and resurfacing was found. (*Id.*). He did not otherwise explain the search results.

On July 6, 2009, another justice of this court granted plaintiff's motion to amend her notice of claim by changing the date and time of the accident, noting plaintiff's confusion and

inability to speak English and that she had set forth the time of her accident in military hours. (*Id.*, Exh. B). The amended notice of claim reflects the date and time of the accident per her 50-h testimony; the accident location remains unchanged and, as with the original notice of claim, there is no allegation that she tripped and fell. (*Id.* Exh. C).

On April 12, 2010, plaintiff filed her note of issue and certificate of readiness. (*Id.*, Exh. K).

II. NOTICE OF CLAIM

A. Contentions

City argues that plaintiff has not complied with GML § 50-e(2) because she failed to include the required information in her notice of claim, and that leave to amend the notice with the assertion of a new, substantive theory of liability may not be granted because the limitations period has expired. (Leopold Aff.).

In opposition, and in support of her cross-motion, plaintiff argues that she is entitled to amend her notice of claim pursuant to GML § 50-e(2), absent bad faith or prejudice, to include the allegation that she had fallen. (Mitchell Aff.).

B. Analysis

Prior to commencement of an action against City for personal injury, a notice of claim must be served on it within 90 days of the accident, setting forth the nature of the claim and the time, place and manner in which it arose. (GML § 50-e[2], 50-i). At any time thereafter, a court may permit a plaintiff to amend the notice of claim due to a "mistake, omission, irregularity or defect," taking into account whether the mistake was in good faith, and whether defendant will be prejudiced by the amendment. (GML § 50-e[6]). In making this determination, a court is not

limited to the four corners of the notice of claim, and may consider other evidence such as testimony from a 50-h hearing. (*D'Alessandro v New York City Trans. Auth.*, 83 NY2d 891, 893 [1994]).

"The purpose of the notice of claim is to give a municipal authority the opportunity to investigate." (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 67 [1st Dept 2007]). Its requirement is not designed to be "a sword to cut down honest claims." (*Id.* at 66). Rather, it "is to be applied flexibly . . . so as to balance two countervailing interests: on one hand protecting defendants from stale or frivolous claims, and on the other hand, ensuring that a meritorious case is not dismissed for a ministerial error." (*Id.*).

Although plaintiff's notice of claim may be inartfully drawn and does not contain the allegation that she fell, it is easily deduced that she fell, and she testified to having fallen at her 50-h hearing and so alleged in her complaint. (*See Dowd v City of New York*, 40 AD3d 908, 912 [2d Dept 2007] [no prejudice where plaintiff testified in detail at hearing]; *Miles v City of New York*, 173 AD2d 298, 299 [1st Dept 1999] [notices were not "models of specificity," but full details brought out at hearing]). The additional allegation does not constitute a new theory of liability; rather, it corrects an omission.

Moreover, City does not explain how it would have responded differently had the notice of claim indicated that she had fallen, does not allege that it has conducted an investigation which has been stymied by the absence of this information (*see Goodwin*, 42 AD3d at 68 [no prejudice where there is no evidence that public authority attempted to conduct an investigation]; *Baez v New York City Hous. Auth.*, 182 AD2d 554, 555-56 [1st Dept 1992] [notwithstanding inadequacy of notice of claim, no allegation of investigation prior to hearings]; *Miles*, 173 AD2d

at 300 [no indication that investigation was "stymied by a lack of specifics"]), or that it unsuccessfully sought clarification before the 50-h hearing (*cf Goodwin*, 42 AD3d at 69 [municipal authorities often ask for information from claimants]; *Reyes v City of New York*, 281 AD2d 235 [plaintiff failed to respond to City's request for more information]). Accordingly, plaintiff has established that defendant is not prejudiced by her failure to include in the notice of claim that she had fallen.

There is also no allegation of bad faith. Rather, the omission appears to have been inadvertent, and not one "calculated to mislead or confuse" (*Dillon v Manhattan and Bronx Surface Trans. Operating Auth.*, 182 AD2d 553 [1st Dept 1992]), and her request for leave is based on facts which are consistent with her theory of liability (*cf Mahase v Manhattan and Bronx Surface Trans. Operating Auth.*, 3 AD3d 410, 411 [1st Dept 2004] [plaintiff may not amend where her assertion is based on inconsistent facts and it "smacks of immediacy" to preserve her claim]).

Moreover, a denial of leave to amend the notice of claim is contrary to the principles of the GML and serves no purpose other than to cut down a potentially meritorious claim for which discovery is complete and the theories of liability are unambiguous. (*See Goodwin*, 42 AD3d 63, 66).

III. WRITTEN NOTICE

A. Contentions

City maintains that it may not be held liable for a street defect absent written notice, and denies that it caused or created the alleged defect, relying on plaintiff's 50-h testimony, the original and amended notices of claim, photographs of the alleged defect, Lopez's deposition

testimony, the results of the DOT search, and the Big Apple map which it alleges depicts a defect in the east-west crosswalk as opposed to the north-south crosswalk where plaintiff fell. (Leopold Aff., Exhs. A, C, F, G, H, I, J).

In opposition, plaintiff asserts that City had written notice of the defect in the Big Apple map, relying on the first amended notice of claim, her 50-h testimony, the summons and complaint, the Big Apple map, and photographs of the defect. She argues that the accident occurred within the north-south crosswalk and at its junction with the east-west crosswalk at the northeast corner of 56th Street and Broadway, and that the crosswalk defect reflected on the map is the defect on which she fell, which is "very close to the curb line at the northeast corner of 56th Street and Broadway." (Mitchell Aff.). Thus, she distinguishes *D'Onofrio v City of New York*, 11 NY3d 581 (2008), where the Court rejected a proposition not advanced here, namely, that a different kind of condition reflected on a Big Apple map may afford City notice.

Plaintiff also observes that City offers no support for its assertion that the defect shown on the map is within the other crosswalk. Rather, she argues that the photographs clearly show that "the broken, irregular area of paving extends from the side of the grate within the east-west crosswalk, to the side of the grate that is within the north-south crosswalk on the 56th Street side [and that a] defect which is partially within the crosswalk, and extends out of the crosswalk can only be identified on a Big Apple Map by the square box symbol." Consequently, she continues, "[t]here is no way, on the Big Apple Map, to indicate a defect that begins at the inside edge of a crosswalk and extends significantly beyond it" and, as an "imprecise instrument," the map reflects only an approximate location which presents an issue of fact for the jury. (*Id.*).

In reply, and in opposition to the cross-motion, City argues that the Big Apple map does

not reflect the defect alleged by plaintiff but one located in another crosswalk. (Leopold Reply Aff.).

B. Analysis

It is well-settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853). Accordingly, it is City's burden here, as movant, to demonstrate its entitlement to judgment, and must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). If shown, the burden shifts to plaintiff to establish that there exists a triable issue of fact.

Pursuant to New York City Administrative Code § 7-201(c), no civil action may be maintained against City arising from a dangerous condition on a street unless the plaintiff demonstrates that City had written notice of the condition "to the commissioner of transportation or any person or person or department authorized by the commissioner to receive such notice," or "written notice" of a prior injury to a city agency. Whereas plaintiff bears the burden of establishing at trial that City had written notice of the defective condition (*Katz v City of New York*, 87 NY2d 241, 243 [1995]), at the pleading stage she bears no such burden. Rather, City as movant bears the burden of establishing an absence of notice. (*See McNeill v City of New York*,

40 AD3d 823 [2d Dept 2007]). The Big Apple map, provided by the New York State Trial Lawyers Association for the purpose of providing the written notice required under the Administrative Code, may constitute evidence of prior written notice so long as the precise defect appears thereon. (*D'Onofrio v City of New York*, 11 NY3d 581 [2008]).

Here, the records offered by City are the product of a search performed by an unidentified individual. Absent Lopez's personal knowledge of the pertinent facts, an explanation of the search results, testimony that the search was comprehensive, or even a conclusion that the search reveals that there was no written notice, his testimony does not satisfy City's burden (*cf McNeill*, 40 AD3d 823 [DOT employee's testimony not based on personal knowledge]), and counsel's conclusion as to the results of the search is of no evidentiary value (*see Kelly v Rubin*, 224 AD2d 262 [1st Dept 1996] [facts alleged only in counsel's affirmation are without evidentiary value]).

The absence of an explanation of the search results is particularly significant where a defect in the area appears on the Big Apple map and there is no testimony that the defect does not correspond with plaintiff's description or with the evidence of defects yielded in the search. If neither, there is no assurance that the search was sufficiently comprehensive. And, as Lopez testified that the search was specifically for 56th Street between Broadway and 7th Avenue, whereas City asserts that plaintiff's testimony reflects that her fall was on Broadway and not on 56th Street, the search may not have encompassed the relevant area.

Moreover, the map is not an accurate depiction of the area, as the curb defects are marked in the road and not at the curb. Thus, although the crosswalk defect is marked in the middle of Broadway, it is also adjacent to the curb defects, which permits an inference that if it is not nearer

to the curb than depicted, its exact location is unclear. While City correctly asserts that the map does not clearly establish that the defect is the defect on which plaintiff had fallen, it also does not clearly establish that it was not. Consequently, it too does not constitute *prima facie* evidence of an absence of written notice. *D'Onofrio* is not to the contrary as it does not address City's burden of proving, on a motion for summary judgment, the absence of written notice.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that City's motion for summary judgment is denied; it is further

ORDERED, that plaintiff is to serve her amended notice of claim within 20 days of the date of this order; and it is further

ORDERED, that plaintiff's cross-motion to amend her notice of claim is granted.

This constitutes the decision and order of the court.

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: October 1, 2010
New York, New York

OCT 0 1 2010

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK