

Matter of Rodriguez v City of New York

2010 NY Slip Op 33347(U)

November 30, 2010

Supreme Court, New York County

Docket Number: 12232/10

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.
Justice

PART 5

ALFONSO RODRIGUEZ
- v -
CITY OF NY

INDEX NO. 112232/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion to ~~the~~ amend N/C

	PAPERS NUMBERED
Notice of Motion/ <u>Order to Show Cause</u> — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 02 2010

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 11/30/10
NOV 30 2010

BARBARA JAFFE
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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
In the Matter of the Application of
ALFONSO RODRIGUEZ,

Petitioner,

-against-

THE CITY OF NEW YORK,

Respondent.

-----X?
BARBARA JAFFE, JSC:

For petitioner:
Giulio S. Frasciello, Esq.
Rosenblatt, Frasciello & Knipping-Diaz, LLC
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212-544-8892

Index No. 12232/10

Motion Date: 10/19/10
Motion Seq. No.: 001

DECISION & JUDGMENT

FILED

DEC 02 2010

NEW YORK
COUNTY CLERK'S OFFICE

For defendant City:
Andrew Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-0560

By order to show cause dated September 21, 2010 petitioner seeks, pursuant to GML § 50(e)-6, an order granting him leave to serve and amended notice of claim on respondent.

Respondent opposes. For the reasons that follow, the petition is granted.

I. BACKGROUND

Petitioner alleges that on August 13, 2009, he fell through a large hole in the crosswalk between the northeast and southeast corners of 204th Street and Sherman Avenue. (Affirmation of Giulio S. Frasciello, Esq., dated Sept. 7, 2010 [Frasciello Aff.]; Affidavit of Alfonso Rodriguez, dated Sept. 7, 2010 [Rodriguez Affid.]).

Petitioner first met with counsel shortly after the accident, spoke with him through a Spanish interpreter, and presented him with photographs of the accident location depicting an

uneven layer of asphalt. (Rodriguez Affid.). Misunderstanding the nature of the accident based on petitioner's comments and the photographs, counsel prepared a petition containing an allegation that petitioner fell because respondent "improperly filled the roadway in the crosswalk with asphalt or some other type of black material." (Frasciello Aff., Exh. 1). The notice of claim was timely served on respondent on September 16, 2009. (Frasciello Aff., Exh. 1).

At a 50-h hearing held on December 2, 2009, petitioner testified, through an interpreter, that he had fallen into a hole in the street, and that his right leg went in all the way up to the middle of his thigh, and that Consolidated Edison of New York had been working at that area for several days. (Frasciello Aff., Exh. 2 at 14, 15). Some time after the hearing, petitioner's counsel learned that the hole in which petitioner had allegedly fallen had been repaired shortly after the accident. (Frasciello Aff.). Counsel also discovered a report indicating that a "street cave" at the location had been reported to respondent 10 days before plaintiff's accident. (*Id.*). Counsel then realized that he had served the notice of claim based on a photograph that did not depict the area at the time of plaintiff's accident. (*Id.*).

II. CONTENTIONS

Petitioner contends that he should be granted leave to file an amended notice of claim because his erroneous description of the defect in the road was made in good faith and respondent will not be prejudiced by the amendment. (Frasciello Aff.). In opposition, respondent argues that leave should be denied absent a sufficient excuse for failing to do so earlier and evidence of written notice. (Affirmation of Andrew Lucas, ACC, dated Oct. 18, 2010).

III. ANALYSIS

Prior to commencement of an action against respondent 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 plaintiff may amend a notice of claim due to a “mistake, omission, irregularity or defect. (GML § 50-e[6]). In deciding the application, a court is not limited to the four corners of the notice of claim, and may consider other evidence, such as testimony at a 50-h hearing. (*D’Alessandro v New York City Tr. 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]). This requirement is not designed to be “a sword to cut down honest claims . . . [but] 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.* at 66).

Leave to amend a notice of claim pursuant to GML § 50-e(6) requires the absence of bad faith and prejudice. (*See Goodwin*, 42 AD3d at 66 [trial court erred in treating correction as a late notice of claim rather than an amended notice of claim]). Absent any allegation of bad faith or prejudice here (*Goodwin*, 42 AD3d at at 68; *cf Williams v City of New York*, 156 AD2d 361 [2d Dept 1989] [leave to serve amended notice of claim where City, having submitted no opposition, claimed no prejudice]), and as the hole had been paved before the expiration of the 90-day period within which a notice of claim must be filed, the evidence indicating that respondent was aware of the hole and sought to correct it, and the absence of any investigation at the accident location in response to the original notice of claim, respondent has not shown it is prejudiced. (*Compare Goodwin*, 42 AD3d at 68 [prejudice not shown absent evidence of attempt to investigate];

Williams v City of New York, 229 AD2d 114, 117 [1st Dept 1997] [same], with *Adlowitz v City of New York*, 205 AD2d 369, 370 [1st Dept 1994] [serious prejudice where City misled into investigating wrong site]).

Respondent's alternative ground for denial, that the claim lacks merit, is premature as discovery has not yet been commenced. (See *Burke v Inc. Village of Hempstead*, 156 AD2d 630 [2d Dept 1989] [premature to deny amended notice of claim as patently without merit]; *Goldberg v State*, 122 AD2d 248, 249 [2d Dept 1986] [cannot say, without further factual development that claim is patently groundless]; *P.I. ex rel P.I. v N.Y.C. Bd. of Educ.*, 10 Misc 3d 1073[A], 2006 NY Slip Op 50051[U] [Sup Ct, NY County 2006] [inappropriate to deny late notice of claim as patently meritless where discovery not yet begun]). And, a judgment based on written notice pursuant to Administrative Code § 7-201 generally follows a search of municipal records. Here, the written report of a "street cave" was only offered in support of the motion for leave to amend.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the petition to serve an amended notice of claim is granted; it is further

ORDERED, that petitioner is ordered to serve his amended notice of claim upon City

within 20 days of this order; and it is further

ORDERED, that petitioner shall commence an action and purchase a new index number in the event a lawsuit arising from this notice of claim is filed.

This constitutes the decision and order of the court

FILED

DEC 02 2010

NEW YORK COUNTY CLERK'S OFFICE

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

DATED: November 30, 2010
New York, New York

NOV 30 2010