

Garcia v City of New York

2011 NY Slip Op 30780(U)

April 1, 2011

Sup Ct, NY County

Docket Number: 116820/09

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART 52

Index Number : 116820/2009
GARCIA, MILAGROS
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 116820/09

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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 is decided in accordance with the attached decision.

FILED

APR 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/1/11

CYNTHIA S. KERN 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 52

-----X
MILAGROS GARCIA,

Plaintiff,

Index No. 116820/09

-against-

DECISION/ORDER

THE CITY OF NEW YORK and CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,

FILED

Defendants.

APR 04 2011

-----X
HON. CYNTHIA S. KERN, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

Plaintiff commenced the instant action to recover damages for personal injuries allegedly sustained when plaintiff tripped and fell on West 145th Street in New York City on February 13, 2009 . Defendant the City of New York (the "City") now moves pursuant to § 3211(a)(7) of the Civil Practice Law and Rules ("CPLR") for an order dismissing plaintiff's complaint for failure to comply with General Municipal Law ("GML") § 50-e and dismissing all cross-claims against it. Plaintiff cross-moves pursuant to GML § 50-e for an order amending her Notice of Claim. For the reasons set forth below, plaintiff's cross-motion is granted and the City's motion to dismiss is denied.

The relevant facts are as follows. In her Notice of Claim served upon the City on March 16, 2009, plaintiff stated that she fell in “the crosswalk located at West 145th Street and St. Nicholas Avenue...in front of 500 West 145th Street.” On or about December 21, 2009, plaintiff served a summons and complaint on the City again alleging that she fell on West 145 Street. The City now moves for an order dismissing plaintiff’s complaint because plaintiff’s Notice of Claim fails to satisfy the requirements of GML § 50-e, namely that a Notice of Claim must not only set forth the nature of the claim, but also the time, place and manner in which the claim arose. The City argues that plaintiff failed to identify the place where the alleged accident occurred because the Notice of Claim includes two different locations - the crosswalk located at West 145th Street and St. Nicholas Avenue as well as the area in front of 500 West 145th Street, which the City alleges is a few blocks away from the aforementioned crosswalk. In her opposition papers, plaintiff has attached a proposed amended Notice of Claim which alleges that the accident took place “on the roadway located at West 145th Street near Amsterdam Ave...in front of 500 West 145th Street, New York New York; and more particularly located 40 feet west of Amsterdam Avenue on the south side of the street and 86 inches from the south curb line of West 145th Street.”

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* GML §50-e(1)(a). GML § 50-e(6) provides that courts may grant leave to amend a Notice of Claim as follows:

At any time after the service of a notice of claim and at any stages of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be

corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

See also Venezian v. City of New York, 172 A.D.2d 251 (1st Dept 1991). Courts have consistently granted plaintiffs leave to amend a Notice of Claim to correct a mistake made in good faith as long as the other party was not actually prejudiced by the mistake. The First Department has consistently held that the notice of claim requirement is to be applied flexibly and is not meant to be “a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious ones.” *Goodwin v New York City Housing Authority*, 42 A.D.3d 63, 66 (1st Dept 2007) (citations omitted).

In the instant case, plaintiff is entitled to amend her Notice of Claim. Plaintiff's proposed amendment to the Notice of Claim seeks only to correct a mistake as to location, not to change the cause of action. The City argues that in providing two different accident locations, plaintiff denied the City the opportunity to conduct a prompt and accurate investigation while the facts surrounding the incident were still fresh. However, the City did receive actual notice of the correct location in this case within a reasonable time when plaintiff testified to the correct location of her accident at the § 50-h hearing less than three months after filing the Notice of Claim. Additionally, the address 500 West 145th Street, New York, New York was one of the locations alleged in plaintiff's Notice of Claim, summons and complaint and bill of particulars. As a result, the City had the opportunity to conduct a prompt and accurate investigation. The City does not provide any evidence that it actually investigated the wrong location in this case, which would have resulted in sufficient prejudice to deny leave to amend the Notice of Claim. Because the City has not been prejudiced by plaintiff's mistake in any way, its motion to dismiss must be

