Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Hanna Yakren,

Plaintiff,

- against -

The City of New York and Village Mall at Hillcrest, Inc.,

Defendants.

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Index Number: 24551/08

Motion Date: 5/3/11

Motion Cal. Number: 28

Motion Seq. No.: 1

The following papers numbered 1 to 15 read on this motion by defendant, The City of New York, for an order to dismiss the complaint against them; and cross-motion by plaintiff for an order granting leave to serve an amended notice of claim against defendant, The City of New York.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross Motion-Affirmation-Affidavit-Exhibits	5-9
Affirmation in Opposition-Exhibits.....	10-12
Affirmation in Opposition & Reply-Exhibit.....	13-15

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment dismissing the complaint against it is granted. The cross-claim of Village Mall asserted against the City is also dismissed insofar as it is premised upon a claim of contribution. Cross-motion by plaintiff for leave to amend her notice of claim is denied.

Petitioner allegedly sustained injuries as a result of tripping and falling on the sidewalk "at or near Union Turnpike at or between 150th Court and Parsons Boulevard" in Queens County on August 9, 2007.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]).

Pursuant to General Municipal Law §50-e(2), in order for a notice of claim to be sufficient, it must, inter alia, state "the time when, the place where and the manner in which the claim arose" (Rosenbaum v City of New York, 8 NY 3d 1, 10 [2006]). A notice of claim must contain sufficient information to allow the municipal authority to ascertain the location, time and nature of the claim (see Brown v City of New York, 95 NY 2d 389 [2000]; Palmieri v New York City Transit Authority, 288 AD 2d 361 [2nd Dept 2001]).

The notice of claim herein merely alleged that the accident occurred "at or near Union Turnpike at or between 150th Court and Parsons Boulevard." This vague statement fails to apprise the City of the location of the accident in any meaningful detail so as to have afforded it the opportunity to investigate the claim in a timely manner.

In the first instance, nowhere in the notice of claim does plaintiff identify the Borough in which the allegedly defective sidewalk was located and plaintiff concedes that there is no location known as "150th Court" in the County of Queens or elsewhere. The Court notes that plaintiff, in her 50-h hearing conducted on December 19, 2007, does identify the location of the accident as having occurred in Queens County, since she stated that she worked at an accounting firm in Flushing and the accident occurred after she left her place of employment and was walking to the parking lot. Also, she stated that the location was "between Parsons and 150th Street", but subsequently, upon being asked whether it was 150th Street or 150th Court, stated that it was 150th Court.

Assuming, arguendo, that the City reasonably was able to extrapolate from plaintiff's 50-h testimony that the accident occurred in Queens County somewhere between Parsons Boulevard and 150th Street, notwithstanding plaintiff's insistence that it was 150th Court, not Street, such information still fails to identify the location of the sidewalk defect with any meaningful particularity. Plaintiff fails to state where between 150th Street and Parsons Boulevard the accident occurred. Moreover, plaintiff was unable to identify in her 50-h hearing the address of the building adjacent to the location where she allegedly tripped and fell. It is undisputed that the distance between 150th Street and Parsons Boulevard spans four blocks. After 150th Street are 152nd

through 154th Streets and then Parsons Boulevard, a considerable distance. Plaintiff's description of the accident location as being somewhere between 150th "Court" and Parsons Boulevard thus fails to satisfy the notice of claim requirement.

The argument of Counsel, therefore, that plaintiff's notice of claim and 50-h testimony sufficiently apprised the City of the exact location of the accident is without merit.

Equally unavailing is counsel's after-the-fact attempt, by way of a cross-motion to amend the notice of claim more than three years after the date of the accident and the filing of the inadequate notice of claim, to particularize the location with "Google Maps" photographs of the location and abutting address. The Court notes that the amended notice of claim annexed to the cross-moving papers identifies the location of the accident as Union Turnpike at or near its intersection with 152nd Street and that the adjacent building was the Village Mall at Hillcrest Condominiums between a waist-high concrete wall and the yellow edge of a driveway and sign displaying the address of the mall as 150-38 – 152-18. It also contains a "Google Maps" photograph upon which plaintiff marked the location of her alleged trip and fall.

A notice of claim may properly only be amended to correct technical, inconsequential mistakes or omissions (see General Municipal Law §50-e[6]; Torres v. New York City Housing Authority, 261 AD 2d 273 [1st Dept 1999]). Amendments of a substantive nature are not permitted (see Gordon v. City of New York, 79 AD 2d 981 [2nd Dept 1981]). The failure of plaintiff to adequately set forth the location of the accident so as to satisfy the notice of claim requirement was not a mere technical or inconsequential omission. The different and far more detailed description of the accident location set forth in plaintiff's proposed amended notice of claim, with photographs marking exact locations only serves to illustrate the inadequacy of the notice of claim that was served and to demonstrate that said inadequacy may not be dismissed as a mere inconsequential omission amenable to amendment.

Plaintiff should have properly and meaningfully described the accident location in her original notice of claim. She not only failed to do so, but also failed to provide an adequate description either in her 50-h hearing or her bill of particulars. She may not seek to correct this failure by way of "amendment" over three years later in an attempt to defeat summary judgment.

Finally, since the complaint is dismissed as against the City, Village Mall is entitled to have its cross-claim against the City contained in its answer converted to a third-party action, but only

insofar as it seeks contractual indemnification or breach of contract as opposed to mere common-law tort contribution.

Where a complaint is dismissed as against one defendant, but the dismissal does not reach a co-defendant's cross-claim against that defendant for indemnification, the Court should convert the cross-claim for indemnification to a third-party claim and amend the caption of the action accordingly (see Aarvac Properties Corp. v. Sterling & Fleetwood Co, 129 AD 2d 600 [2nd Dept 1987]; Nelson v. Chelsea GCA Realty, Inc., 18 A.D.3d 838, 840 [2d Dept.2005]; Jones v. New York City Hous. Auth., 293 A.D.2d 371 [1st Dept.2002]; Eddine v. Federated Department Stores, Inc., 2008 NY Slip Op 31652[U] [Supreme Ct, NY County 2008]). The Court notes that the City does not address, and therefore does not oppose, Village Mall's request to convert its cross-claim into a third-party action.

Accordingly, the motion is granted, the cross-motion is denied and the complaint is dismissed. Village Mall's cross-claim asserted against the City in its answer is hereby converted to a third-party action, but only to the extent that it seeks contractual indemnification or damages for breach of contract. The cross-claim is dismissed to the extent it is premised upon contribution.

The caption of the action is hereby amended as follows:

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Hanna Yakren, Index Number: 24551/08

Plaintiff,

- against -

Village Mall at Hillcrest, Inc.,

Defendant.

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Village Mall at Hillcrest, Inc., ,

Third-Party Plaintiff,

- against -

The City of New York ,

Third-Party Defendant.

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The City shall serve an answer to the third-party complaint within 30 days after service upon it of a copy of this order with notice of entry.

Serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the Trial Term without undue delay.

Dated: May 16, 2011

KEVIN J. KERRIGAN, J.S.C.