

Cruz v City of New York

2011 NY Slip Op 33388(U)

December 9, 2011

Sup Ct, NY County

Docket Number: 117239/09

Judge: Cynthia S. Kern

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: CYNTHIA S. KERN
Justice

PART 52

CRUZ, ZENAIDA C.

INDEX NO. 117239/09

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

THE CITY OF NEW YORK

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the annexed decision.

FILED

DEC 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/9/11

CYNTHIA S. KERN
J.S.C. 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
ZENAIDA C. CRUZ,

Plaintiff,

Index No. 117239/09

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

Defendant.
-----X

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

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.....	_____
Replying Affidavits.....	_____
Exhibits.....	<u>3</u>

FILED

DEC 16 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Plaintiff commenced the instant action to recover damages for personal injuries allegedly sustained when she tripped and fell on the east side of Second Avenue between East 15th and East 17th Streets in New York City. Plaintiff moves pursuant to General Municipal Law ("GML") § 50-e for an order amending her Notice of Claim. The City of New York (the "City") cross-moves pursuant to § 3211 of the Civil Practice Law and Rules ("CPLR") for an order dismissing plaintiff's complaint for failure to comply with GML § 50-e. For the reasons set forth below, plaintiff's motion is granted and the City's cross-motion is denied.

The relevant facts are as follows. In her Notice of Claim served upon the City on December 3, 2008, plaintiff stated that she fell "on east side of Second Avenue, abutting

Gramercy Park, approximately 40-50 feet south of East 15th Street in Manhattan.” In a letter dated March 5, 2009, the City informed plaintiff’s counsel that the claim was being disallowed pursuant to New York City Administrative Code § 7-210 based on the location of the fall. Plaintiff’s counsel responded by a letter dated March 23, 2009 correcting the location of the fall because the location stated on the notice of claim was incorrect. Although the initial notice of claim stated that the fall took place on the east side of Second Avenue, it stated that it was the sidewalk abutting Gramercy Park when it was actually the sidewalk abutting Stuyvesant Park. At her 50-h hearing held on June 4, 2009, plaintiff testified that she fell on the sidewalk abutting Stuyvesant Park between 17th and 15th Streets. Plaintiff’s summons and complaint also alleged that the accident took place on “the sidewalk on the eastside of Second Avenue, abutting, and the Stuyvesant Square Park, between East 15th and East 17th Street (sic).”

Plaintiff now moves for an order allowing her to amend her notice of claim to reflect the correct location where she fell. In this regard, plaintiff has attached a proposed amended Notice of Claim which alleges that the accident took place “on east side of Second Avenue, abutting Stuyvesant Square Park, between East 15th and East 17th Street, Manhattan.”

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

[* 4]

was not prejudiced thereby.

See also Venezian v. City of New York, 172 A.D.2d 251 (1st Dept 1991). The First Department has 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. *See Venezian*, 172 A.D.2d at 252; *Stohmal v New York City Hous. Auth.*, 289 A.D.2d 65, 66 (1st Dept 2001); *Ramos v New York City Transit Auth.*, 60 A.D.3d 517, 520 (1st Dept 2009). Moreover, 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. Moreover, the City is not prejudiced by plaintiff’s mistake because plaintiff’s counsel sent the City a letter notifying it of the correct location and plaintiff correctly identified the location of her fall in her complaint as well as at her 50-h hearing.

The City makes two arguments to support its motion to dismiss plaintiff’s claim. First, the City argues that plaintiff did not state her theory of the City’s liability in her notice of claim. The court finds this claim to be without merit as the court finds plaintiff’s statement in her notice of claim that she fell and injured herself on broken sidewalk sufficiently advances her theory of liability. Second, the City opposes plaintiff’s motion to amend the notice of claim on the ground that the proposed amendment to the notice of claim amounts to a substantial, not technical change. The City argues that prejudice is implied in the nature of the mistake because sidewalk and

roadway defects, being transitory in nature, must be investigated promptly to avoid prejudice. However, the City did receive actual notice of the correct location in this case within a reasonable time when it received a letter from plaintiff's counsel correcting the location of her accident just three and a half months after filing the Notice of Claim. Additionally, the plaintiff also stated the corrected location of the accident – the sidewalk abutting Stuyvesant Park between 17th and 15th Streets – at her 50-h hearing, in her complaint and all discovery disclosed by plaintiff was with regard to the correct location of the accident. Furthermore, although plaintiff initially named the wrong park that she fell in front of, she always maintained that the fall took place on the eastside of Second Avenue. 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 denied.

Accordingly, plaintiff's motion for leave to amend the Notice of Claim is granted. The proposed amended Notice of Claim shall be deemed served upon service of a copy of this order with notice of entry thereof. This constitutes the decision and order of the court.

Dated: 12/9/11

FILED
DEC 16 2011
 NEW YORK
 COUNTY CLERK'S OFFICE

Enter: CK
 J.S.C.
CYNTHIA S. KERN
 J.S.C.