

Gonzalez v New York City Hous. Auth.

2012 NY Slip Op 30010(U)

January 5, 2012

Supreme Court, New York County

Docket Number: 115785/10

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

BENJAMIN GONZALEZ, an infant by his mother and natural guardian, GRACIE TOYER and GRACIE TOYER, individually,
Plaintiffs,

-v-

NEW YORK CITY HOUSING AUTHORITY, et al.,
Defendants.

INDEX No. 115785/10

MOTION DATE _____

MOTION SEQ. No. 002 + 001

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1+2, 6

Answering Affidavits- Exhibits _____ 3, 4, 5

Replying Affidavits _____

CROSS-MOTION: YES NO

FILED

JAN 09 2012

Upon the foregoing papers, it is ordered that this motion is:

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 1/5/12

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----x
BENJAMIN GONZALEZ, an infant by his
mother and natural guardian, GRACIE
TOYER and GRACIE TOYER, individually,

Plaintiffs,

Index No.: 115785/10

-against-

DECISION

NEW YORK CITY HOUSING AUTHORITY, HAKS
ENGINEERS, ARCHITECTS AND LAND
SURVEYORS, P.C., WHITESTONE
CONSTRUCTION CORP., NEELAM
CONSTRUCTION CORPORATION and
MILLENNIUM CENTURY CONSTRUCTION, INC.,

Defendants.

-----x
DONNA MILLS, J.:

FILED

JAN 09 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

Motion sequence numbers 001 and 002 are consolidated for
disposition.

In motion sequence number 001, defendant Millennium Century
Construction, Inc. (Millennium) moves, pursuant to CPLR 3212, for
summary judgment dismissing the complaint asserted as against it.
Defendant Neelam Construction Corporation (Neelam) cross-moves,
pursuant to CPLR 3212, for summary judgment dismissing the
complaint and all cross claims asserted as against it. Defendant
New York City Housing Authority (NYCHA) cross-moves to have its
cross claims asserted as against Millennium converted into a
third-party action if the court dismisses the complaint asserted
as against Millennium and, if the court dismisses the claims

asserted as against Millennium, to dismiss the complaint and all cross claims asserted as against NYCHA.

In motion sequence number 002, defendant NYCHA moves, pursuant to CPLR 3212, to dismiss the complaint and all cross claims asserted as against it, with prejudice. Plaintiffs cross-move, pursuant to CPLR 3025 (b), to file and serve an amended complaint and, pursuant to section 50-e (6) of the General Municipal Law, to file and serve an amended notice of claim.

BACKGROUND

This is an action for personal injuries arising from an incident that occurred on October 16, 2009, involving a scaffolding that was erected in front of the premises known as 159-38 Harlem River Drive, New York, New York. Complaint. Infant plaintiff, Benjamin Gonzalez (Gonzalez), claims that he was injured when a piece of the wood scaffolding broke and fell off from the aforementioned scaffolding, causing him to fall to the sidewalk.

According to the complaint, NYCHA is the owner of the premises where the accident took place, and Haks Engineers, Architects and Land Surveyors, P.C. (Haks), Neelam, Whitestone Construction Corp. (Whitestone) and Millennium were engaged to perform construction work at the premises, which necessitated the use of scaffolding.

Motion sequence number 001

Millennium asserts that the scaffolding was erected by defendant Whitestone, pursuant to a work permit issued to Whitestone by the New York City Department of Buildings (DOB), in connection with work being performed at the subject premises. Motion, Ex. E. According to the affidavit of Andon Veizi (Veizi), president of Millennium, at the time of the occurrence Millennium was not performing any work at the premises, nor has it ever performed work at that location. Motion, Ex. G. Millennium has provided copies of its work orders for the month of October 2009, which corroborates Veizi's averment that Millennium did not work at the subject location at the time of the occurrence. Motion, Ex. H.

It is Millennium's position that there is no proof that Millennium ever performed any work at the location where the accident took place and, therefore, the complaint should be dismissed as against it.

In its cross motion, Neelam also argues that, according to its contract with Haks, it was to perform work at the Harlem River Houses, whereas the subject location is part of the Rangel Houses. Cross Motion, Ex. G. Kathy Bhanderi (Bhanderi), president of Neelam, has provided an affidavit in support of Neelam's motion, in which she avers that Neelam never performed any work at or in the vicinity of 159-38 or 159-48 Harlem River Drive. Cross Motion, Ex. H. Therefore, Neelam asserts that the

complaint must be dismissed as against it because it performed no work at the location at which plaintiffs allege that the accident occurred.

In its cross motion, NYCHA asserts that the location of the accident is in issue: at the statutory hearing (50-H hearing) held on April 14, 2010, plaintiffs' counsel informed NYCHA that the photographs attached to the notice of claim were incorrect, showing the scaffolding erected across the street from the building where the incident occurred. The photograph depicts the Polo Ground Houses, which is part of the Rangel Houses.

At the 50-H hearing, Gonzalez failed to identify the building indicated in the notice of claim and the complaint, and he testified that he did not know at which building the accident occurred because he was running at the time and was out of breath. Gonzalez 50-H Hearing EBT, at 51. However, Gonzalez also stated that his accident took place at 159-48 Harlem River Drive. *Id.* at 46-47. Moreover, plaintiff Gracie Toyer (Toyer) also testified that she did not know where the accident took place. Toyer 50-H EBT, at 25-27.

It is NYCHA's position that, because the actual location of the accident is in question, the parties' summary judgment motions should be deferred until discovery has taken place to determine the exact location of the alleged accident.

In opposition to Millennium's motion and Neelam's cross

motion, Haks and NYCHA argue that, since the location of the accident has yet to be established, these motions should be denied without prejudice until discovery has taken place.

The reply papers of the various movants reiterate, in sum and substance, the arguments presented in their respective motions.

Motion sequence number 002

In this motion sequence, NYCHA asserts that the complaint and all cross claims asserted as against it should be dismissed because plaintiffs have failed to identify the location at which the accident allegedly took place, but have stated that it did not occur at the location indicated in the notice of claim and complaint. Further, since the location of the occurrence has yet to be identified, NYCHA has been unduly prejudiced because the incident could have occurred in one of three buildings identified by Gonzalez at his 50-H hearing, but not the building identified in the notice of claim and complaint and, therefore, NYCHA has not been able to conduct a timely investigation. In support of this contention, NYCHA has provided the affidavit of William Schwartz (Schwartz), the investigator retained by NYCHA to investigate Gonzalez' claim, who averred that he investigated the address provided by plaintiffs in their notice of claim and complaint. Motion, Ex, J.

In their cross motion, plaintiffs state that this cross

motion also forms the basis of their opposition to all of the motions and cross motions filed by the various defendants.

Plaintiffs' counsel avers that the notice of claim and complaint were prepared from information given by Gonzalez, who was 11 years old at the time of the accident. Plaintiffs' counsel argues that Gonzalez made a minor mistake as to the accident location because he did not live at the housing complex where the incident occurred. Moreover, plaintiffs' counsel contends that the correct location of the accident was identified by Gonzalez at his 50-H hearing as 159-48 Harlem River Drive. Gonzalez 50-H EBT, at 57. In support of their cross motion, plaintiffs have included an ambulance report indicating that the address to which the ambulance responded was 159-48 Harlem River Drive. Cross Motion, Ex. 3.

In reply, NYCHA contends that there was scaffolding surrounding at least four buildings at the general location at which Gonzalez alleges that the accident took place (Aff. of Pedro Carrion, superintendent of the Rangel Houses), and that Gonzalez did not know exactly where the incident occurred. In addition, NYCHA disputes plaintiffs' assertion that it knew where the accident happened after the 50-H hearing, and NYCHA maintains that Gonzalez' testimony was not conclusive. Moreover, NYCHA points out that plaintiffs' cross motion does not include an affidavit from Gonzalez or any witness indicating the correct

location of the accident.

Additionally, NYCHA contends that the ambulance report should not be considered because it is hearsay.

In reply, plaintiffs provide an affidavit from Gonzalez in which he avers that the accident occurred at 159-48 Harlem River Drive. Further, plaintiffs say that the ambulance report is not hearsay, merely confirmation of Gonzalez' 50-H hearing testimony.

NYCHA also replied, basically reiterating its position previously stated.

DISCUSSION

The first issue that must be addressed by the court is plaintiffs' cross motion for leave to amend their notice of claim and complaint, because the other motions are dependent upon that determination.

That portion of plaintiffs' cross motion seeking leave to amend their notice of claim is denied.

Section 50-e (6) of the General Municipal Law states:

"At any time after service of a notice of claim and at any stage of an action or special proceeding to which the provisions of the 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 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."

In order to amend a notice of claim, after the period in which to file a notice of claim has expired, "the mistake,

*9] omission, irregularity, or defect must be made in good faith, and second, it must appear that the public corporation was not prejudiced thereby." *Ingle v New York City Transit Authority*, 7 AD3d 574, 575 (2d Dept 2004). In the instant matter, "[i]t is not disputed that plaintiff's mistake was inadvertent and not calculated to mislead or confuse [NYCHA]." *Cancel v New York City Housing Authority*, 200 AD2d 384, 384 (1st Dept 1994). However, plaintiffs have failed to demonstrate that NYCHA would not be unduly prejudiced by allowing the notice of claim to be amended at this late date.

Plaintiffs argue that NYCHA was informed of the correct address of the incident at the 50-H hearing, held on April 14, 2010, six months after the accident. It is plaintiffs' contention that this gave NYCHA sufficient opportunity to investigate the actual location of the occurrence. However, the court notes that plaintiffs continued to use the admittedly incorrect address on the complaint, filed on December 6, 2010, eight months after the 50-H hearing, and only decided to make the present application to the court by cross motion on September 19, 2011, 17 months after the 50-H hearing and 23 months after the accident. Moreover, the court does not find that Gonzalez' testimony at the 50-H hearing is conclusive as to the correct address of the location of the accident.

"The plaintiff's mistaken description in [the] notice of claim ..., together with the [21]-month delay in

seeking leave to amend the notice of claim, prejudiced the defendants by depriving them of the opportunity to conduct the type of prompt investigation envisioned by General Municipal Law § 50-e."

Canelos v City of New York, 37 AD3d 637, 638 (2d Dept 2007);

Pelaez v City of New York, 79 AD3d 1115 (2d Dept 2010).

Moreover, "the fact that the plaintiff ultimately supplied the defendant with the correct location of the alleged [accident] some [six] months after the claim arose does not serve to mitigate the extent of the prejudice which would be sustained by the defendant." *Serrano v City of New York*, 143 AD2d 652, 653 (2d Dept 1988).

Since plaintiffs have failed to demonstrate that there would be no prejudice to NYCHA as a consequence of the delay caused by their failure to identify the correct address of the accident, plaintiffs' cross motion is denied with respect to amending the notice of claim (*Matter of Parker v New York City Housing Authority*, 81 AD3d 964 [2d Dept 2011]) and, as a consequence, NYCHA's motion to dismiss the complaint and all cross claims asserted as against it is granted. Additionally, based on this determination, NYCHA's cross motion asserted in motion sequence number 001 is hereby denied as moot.

That portion of plaintiffs' motion seeking leave to amend the complaint is granted.

CPLR 3025 (b) provides that

"[a] party may amend his pleading, or supplement it by

setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

As stated in *Seidman v Industrial Recycling Properties, Inc.*

(83 AD3d 1040, 1040-1041 [2d Dept 2011]):

"Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend."

Since none of the defendants other than NYCHA has opposed plaintiffs' cross motion, and no prejudice to those defendants has been asserted, this branch of plaintiffs' cross motion is granted without opposition.

Having granted plaintiffs' cross motion to the extent of permitting them to amend the complaint to allege the correct address of the accident, the court must now address the summary judgment motions appearing in motion sequence number 001.

"The 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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan*

Museum of Art, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Since the motion and all of the cross motions were argued and predicated on the incorrect address appearing in the complaint, and plaintiffs have hereby been granted leave to amend the complaint to allege the correct address, all of the summary judgment motions are denied as irrelevant, without prejudice to the parties to renew such motions at an appropriate stage in the proceedings, based on the amended complaint.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiffs' cross motion (motion sequence number 002) seeking to amend the notice of claim is denied; and it is further

ORDERED that the branch of plaintiffs' cross motion (motion sequence number 002) seeking leave to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the amended

complaint or otherwise respond within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a Compliance conference in Room 574, 111 Centre Street, on 2/24, 2012, at 10:00 A.M.; and it is further

ORDERED that defendant New York City Housing Authority's motion (motion sequence number 002) seeking to dismiss the complaint and all cross claims asserted as against it is granted and the complaint and all cross claims asserted as against New York City Housing Authority are dismissed, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that Millennium Century Construction Inc.'s motion and Neelam Construction Corp.'s cross motion (motion sequence number 001) are denied, without prejudice; and it is further

ORDERED that New York City Housing Authority's cross motion (motion sequence number 001) is denied as moot.

Dated: 1/5/12

FILED

JAN 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Donna Mills

Donna Mills, J.S.C.

DONNA M. MILLS, J.S.C.