

Gillespie v City of New York

2013 NY Slip Op 30570(U)

March 19, 2013

Sup Ct, New York County

Docket Number: 111183/2011

Judge: Kathryn E. Freed

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: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 111183/2011
GILLESPIE, DORIS
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001 CAL # 29
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

| | |
|--|---------------------|
| Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____ |
| Answering Affidavits — Exhibits _____ | No(s). _____ |
| Replying Affidavits _____ | No(s). _____ |

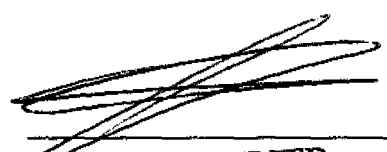
Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

MAR 25 2013
NEW YORK
COUNTY CLERKS OFFICE

Dated: 3-19-13
MAR 19 2013


_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
DORIS GILLESPIE,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

DECISION/ORDER
Index No.: 111183/2011
Seq. No.: 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

FILED

-----X
HON. KATHRYN E. FREED:

MAR 25 2013

RECITATION, AS REQUIRED BY CPLR §2219(a), **NEW YORK COUNTY CLERK'S OFFICE** PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

| PAPERS | NUMBERED |
|---|----------------|
| NOTICE OF MOTION AND AFFIDAVITS ANNEXED..... |1-2..... |
| ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED..... | |
| ANSWERING AFFIDAVITS..... | |
| REPLYING AFFIDAVITS..... | |
| EXHIBITS..... | 3-4..... |
| STIPULATIONS..... | |
| OTHER..... | |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff moves for an Order pursuant to CPLR§3025(b) and 1001(a), granting leave to amend the complaint to add Empire City Subway as a direct defendant in this action. No opposition has been submitted.

After a review of the papers presented, all relevant statutes and caselaw, the Court grants the motion.

Factual and procedural background:

The instant action arises out of personal injuries allegedly sustained by plaintiff on December

23, 2010, due to a trip and fall caused by a sidewalk defect in front 35 East 50th Street, between Park Avenue and Madison Avenue. Consequently, plaintiff commenced the instant action via a Summons and Complaint on September 30, 2011. Issue was joined by defendant City of New York by service of a Verified Answer on October 17, 2011.

On October 11, 2012, during defendant's deposition, witness Fatima Rosas, a record searcher for the Department of Transportation, testified that a permit was issued to Empire City Subway for "the purpose of repair of electric, slash, communications, RPO, cable failure." Ms. Rosas also testified that the street opening permit authorizing the opening of the roadway or the sidewalk, was issued to Empire City Subway. She further testified that said permit was in effect for the time period of December 23, 2008 to December 23, 2010. A copy of this component of Ms. Rosa's testimony is annexed to the instant motion as Exhibit "B." A copy of the permit is annexed as Exhibit "C."

Plaintiff argues that Empire City Subway is a necessary party to this litigation and incorporating it into the action at this time is permissible in that the statute of limitations does not expire until December 23, 2013. Additionally, plaintiff argues that no prejudice would accrue to defendant as the information concerning this proposed defendant was obtained from documents exchanged by defendants' counsel and from the witness produced at the deposition.

Conclusions of law:

"Leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay" (Fahey v. County of Ontario, 44 N.Y.2d 934, 935 [1978]). Pursuant to CPLR§ 3025(b), a party may amend its pleadings at any time by leave of court and leave shall be freely given upon such terms as may be just. It is within the court's discretion whether to permit a

party to amend its complaint (*see* Peach Parking Corp. v. 345 W. 40th Street, LLC, 43 A.D.3d 82 [1st Dept. 2007]; Mayers v. D'Agostino, 58 N.Y.2d 696 [1982]; Lanpont v. Savvas Cab Corp., Inc., 244 A.D.2d 208 [1st Dept. 1997]). On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations (Lucindo v. Mancuso, 49 A.D.3d 220, 227 [1st Dept. 2008]), but must show that the proffered amendment is not palpably insufficient and has merit (Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 A.D.3d 363, 366 [1st Dept. 2007]; MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499 [1st Dept. 2010]; Helene-Harisson Corp. v. Moneyline Networks, Inc., 6 A.D.3d 151 [1st Dept. 2004]).

In the case at bar, given the nature and purpose of the proposed amendment, it does not seem likely that the City would be surprised or prejudiced. Indeed, since evidence has been submitted which indicates that proposed defendant Empire City Subway, Inc., was granted a permit to open the subject sidewalk, adding it as a defendant seems legitimate and necessary.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for leave to amend the complaint to add Empire City Subway, as a defendant is granted; and it is further

ORDERED that the caption is to be amended accordingly, and the amended complaint in the proposed form shall be deemed served upon a copy of this order with notice of entry thereof; and it is further

ORDERED that defendant Empire City Subway shall serve an Answer to the amended complaint or otherwise respond within 20 days from the date of said service; and it is further

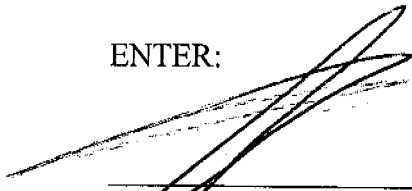
ORDERED that counsel are directed to appear for a status conference in Room 103, at 80 Centre Street, on May 21, 2013, at 2:00 P.M., and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: March 19, 2012

MAR 19 2013

ENTER:



Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED
MAR 25 2013
NEW YORK
COUNTY CLERKS OFFICE