

Cruz v City of New York
2013 NY Slip Op 31647(U)
July 18, 2013
Supreme Court, New York County
Docket Number: 153804/2013
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 153804/2013
CRUZ, ZOILA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
AMEND

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

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

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

Dated: 7-18-13
JUL 18 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
ZOILA CRUZ,

Plaintiff,

-against-

THE CITY NEW YORK,

Defendant.

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

DECISION/ORDER
Index No. 153894/2013
Seq. No.: 001

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

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

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

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

Plaintiff moves for an Order pursuant to General Municipal Law §§ 50-(6) and 50-e(7), permitting her to serve an Amended Notice of Claim correcting a mistake, omission, irregularity, or defect and deeming said Amended Notice of Claim annexed hereto served *nunc pro tunc*. Defendant City has not submitted any opposition.

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

Factual and procedural background:

This is an action wherein plaintiff seeks monetary damages for personal injuries she allegedly sustained in a slip and fall on September 25, 2012 in New York County. In her original Notice of Claim served on defendant City on October 12, 2012, she claimed that

“The accident arose on September 25, 2012 at approximately 9:15 p.m. at the intersection of East 92nd Street and Broadway. While claimant ZOILA CRUZ was crossing from east to west across Broadway she was caused to trip and fall and be violently precipitated to the ground as a result of the obstructed, cracked, uneven, raised, depressed, missing and/or deteriorated crosswalk and traffic island there and thereat, upon which crosswalk, immediately abutting said island was a mound of asphalt which was raised, depressed, rutted, uneven and improperly flattened and/or unattended, resulting in sever, personal injuries to said claimant as a result of the negligence, recklessness, and carelessness of the CITY OF NEW YORK, its agents, servants and/or employees in the ownership, operation, maintenance and control of the premises.”

On December 5, 2012, 70 days after plaintiff sustained injury, she appeared for an examination pursuant to GML§50-h. At said hearing, she testified she was injured on September 25, 2012, at the intersection of Broadway and 92nd Street, when she tripped and fell as she was stepping onto the pedestrian median separating northbound and southbound traffic on Broadway. (See transcript, Exhibit “B,” pgs. 9,11, 18-19, 23-26). She tripped when she stepped onto a hole in the roadway next to the median. (*Id.* at 66-67).

Plaintiff argues that although the Notice of Claim incorrectly listed the location as East 92nd Street, defendant would not be prejudiced by the error, because there is no such intersection as Broadway and East 92nd Street. She further argues that defendant cannot credibly claim that, based on the language contained in the Notice of Claim, that it undertook an investigation at the wrong location.

Conclusions of law:

GML § 50-e(6) authorizes a court, in its discretion, to grant leave to serve an amended notice of claim where the error in the original notice of claim was made in good faith, and where the other party has not been prejudiced thereby. It specifically provides that “[a] mistake, omission, irregularity or defect” in the notice of claim may be “corrected, supplied or disregarded” in the court’s discretion, provided that the mistake, omission, irregularity, or defect, was made in good faith, and the public corporation was not prejudiced thereby” (see also *D’Alessandro v. New York City Tr. Auth.*, 83 N.Y.2d 891, 893 [1994]; *Palmieri v. New York City Tr. Auth.*, 288 A.D.2d 361, 362 [2d Dept. 2001]; *Cyprien v. New York City Tr. Auth.*, 243 A.D.2d 673 [2d Dept. 1993]; *Fabian v. New York City Tr. Auth.*, 271 A.D.2d 244 [1st Dept. 2000]).

The test of the sufficiency of the notice of claim is whether it includes information sufficient to enable the municipal agency to investigate the allegations contained in the notice of claim (*Canelos v. City of New York*, 37 A.D.3d 637 [2d Dept. 2007]). The Court must focus on whether based on the claimant’s description, the relevant municipal authorities can locate the place, fix the time and understand the nature of the accident (*Id.*; see also *Brown v. City of New York*, 95 N.Y.2d 389, 393 [2000], *lv dismissed* 96 N.Y.2d 936 [2001]; *O’Brien v. City of Syracuse*, 54 N.Y.2d 353, 358 [1981]).

In the case at bar, the Court finds that the incorrect location in the Notice of Claim is merely a mistake which would not cause any prejudice to the City. Indeed, this determination is buttressed by the City’s failure to oppose the instant motion.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff’s motion for leave to amend the Notice of Claim to correct the

location of the accident is granted; and it is further

ORDERED that said Amended Notice of Claim shall be deemed to have been served *nunc pro tunc*; and it is further

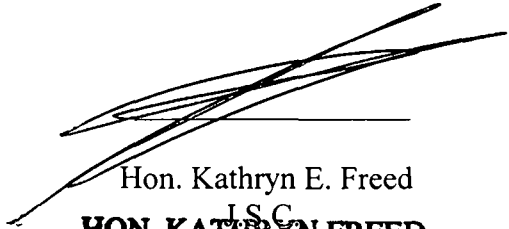
ORDERED that plaintiff shall serve a copy of this order on defendant and the Trial Support Office at 60 Centre Street, Room 158; and it is further

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

DATED: July 18, 2013

ENTER:

JUL 18 2013



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