

Omehih v City of New York

2013 NY Slip Op 32990(U)

November 22, 2013

Sup Ct, NY County

Docket Number: 159017/2013

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

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 : 159017/2013
OMENIH, DIESODE
vs
CITY OF NEW YORK
Sequence Number : 001
OTHER

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: 11-22-13


HON. KATHRYN FREED, J.S.G.
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
DIESODE OMEHIH,

Plaintiff,

-against-

DECISION/ORDER
Index No. 159017/2013
Seq. No. 001

THE CITY OF NEW YORK, THE NEW YORK CITY
POLICE DEPARTMENT, POLICE OFFICER JUAN
RODRIGUEZ-Shield #4117, POLICE OFFICER
BRADLEY KUCYK-Shield # 14955 and JANE DOE-
Police Officer as yet unidentified,

Defendants.

-----X
KATHRYN E. FREED, J.S.C:

RECITATION, AS REQUIRED BY CPLR2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS
MOTION:

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

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

Plaintiff moves for an Order “to amend the County of the location of where the incident occurred on the Notice of Claim and Amended Notice of Claim; permitting the filing of the prior Notice of Claim to be deemed filed *nunc pro tunc* with the correct date of the incident.” Defendants oppose.

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

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries allegedly sustained on December 20, 2012, as a result of assault, battery, and false arrest emanating from an incident involving some police officers. Thereafter, plaintiff filed a Notice of Claim on February 25, 2013, which stated the location of the incident to be 122nd Street and 8th Avenue, Kings County, N.Y. Subsequently, plaintiff filed an Amended Notice of Claim on March 6, 2013 which also listed Kings County as the proper county. Plaintiff asserts that both said Notices of Claim incorrectly listed Kings County as opposed to New York County as the correct county. Consequently, plaintiff now moves to amend the Notice of Claim again, to list New York County as the appropriate county.

Positions of the parties:

Plaintiff argues that the requested amendment should be permitted pursuant to GML§ 50-(e)(6), because it is a mere error, which would not result in any prejudice accruing to defendants. Plaintiff also refers to and relies on CPLR§ 3025(b), as support for its position, arguing that this section also empowers a court to grant leave to amend and/or supplement pleadings.

Defendants argue that the instant motion necessitates dismissal because plaintiff has failed to annex a proposed Notice of Claim, thereby rendering the motion defective. Additionally, they argue that “granting leave to Plaintiff to *amend the date* of the Notice of Claim will prejudice the City because the *amended date* could render the action untimely. Additionally, the City does not know which *date* Plaintiff wishes to add because of Plaintiff’s failure to provide this Court or the City with a proposed Amended Notice of Claim.” (Aff. in Opp., ¶ 6), (Emphasis added).

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 and 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’Allesandro 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.*, 234 A.d.2d 673 [2d Dept. 1993]). The test of the sufficiency of a notice of claim is whether it includes information sufficient to enable the municipal agency to investigate the allegations contained therein(see *Canelos v. City of New York*, 27 A.D.3d 637 [2d Dept. 2007]).

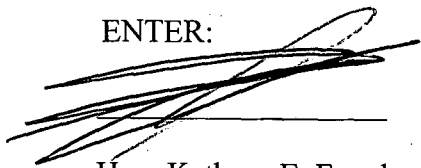
In the case at bar, the Court notes that it is defendants opposition that is defective, in that it fails to address the specific relief requested in the motion. Moreover, and quite amazingly, while plaintiff clearly requests the opportunity to amend the *county* of the subject incident, defendants argue against amending the *date* of the incident. Indeed, the Court is hard pressed to consider the prospect of any prejudice to defendants when they clearly misapprehend the contents of the motion.

Moreover, since the motion merely seeks to amend the Notice of Claim to replace County of Kings, with County of New York, it is unnecessary for plaintiff to have annexed this “proposed” change to its moving papers. Interestingly, defendants fail to proffer any legal authority to support this rather specious argument.

Lastly, the Court notes that there could have been no confusion on the part of defendants as to the county at issue, in that the intersection of 122nd Street and Eight Avenue, does not exist in Brooklyn, but does exist in Manhattan. Additionally, the Notice of Claim references the 28th Precinct, which is located in New York County, and the action was filed in New York County. In consideration of this, any allegation of prejudice by defendants is totally devoid of merit.

Therefore, in accordance with the foregoing, it is hereby
ORDERED that plaintiff's motion to amend his Notice of Claim to replace "Kings County"
with "New York County," is granted; and it is further
ORDERED that this constitutes the decision and order of the Court.

DATED: November 22, 2013
NOV 22 2013

ENTER:


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

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**