1-23-2014

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4

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Mark Weiss

21372-12

Index No. ~~31398-2012~~

Plaintiff(s),

DECISION/ORDER

-against-

The City of New York, New York City Department of Correction, New York City Department of Environmental Protection , The New Fulton Fish Market cooperative at Hunts Point , Inc., Sublink Ltd.,

Defendant(s).

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The following papers numbered 1 to 3 read on this motion and cross-motion submitted May 16, 2013

	PAPERS NUMBERED	
Notice of Motion-Exhibits A-F and Affirmation Annexed	1	
Notice of Cross-Motion and Affirmation and Exhibits 1-5	2	
Affirmation in Reply	3	

Upon the foregoing papers this motion by the City of New York s/h/a The City of New York Department of Correction and the New York City Department of Environmental Protection for an order pursuant to CPLR 3211 (a) (7) and/or CPLR 3212 dismissing the complaint and all cross-claims against the City of New York, and the cross-motion of the plaintiff for an order pursuant to General Municipal Law §§ 50-e(6) and CPLR § 305 (c) for an order grating leave to file an amended notice of claim is decided as set forth below.

Procedural Background

By Notice of Claim dated October 28 2011, Mark L. Weiss notified the City of New York that on September 13, 2011, he was caused to trip and fall while walking out of 1 Halleck Street, Bronx, New York 10474. The accident location was further described as the intersection of Halleck Street and "Ryawa Avenue." In addition to the failure to provide adequate illumination it is alleged that the claimant failed to provide a sidewalk and failed to keep the roadway safe for members of the general public [Id. ¶2]. It was further alleged that the incident was caused solely by the negligence of the New York City Department of Environmental Protection depriving the claimant of a safe place to walk ; adequate illumination, and an adequate sidewalk/or walkway , and *inter alia*, "in fail[ing] to maintain a five (5) foot cleared sidewalk ", and in "obstruct[ing] the public highway and prevent[ing] free and unencumbered use of a public highway." The Notice further stated the municipal agency "placed vehicle equipment , materials, cement barricades and/or obstructions to constitute a danger to the claimant . . . " [Id.].

It is undisputed here that in May 2012, counsel for the claimant provided to the Office of the Comptroller twenty-two photographs of the location.

By notice dated June 29, 2012, plaintiff was advised that his claim was disallowed pursuant to Administrative Code Section 7-210, on the grounds that the City was not liable for any injury caused by the failure to maintain sidewalks .

This case was commenced in July 2012, and issue was joined with the service of the City of New York's answer in the same month. The complaint interposes three negligence causes of action as against the municipal defendants in connection with the ownership, maintenance, control, and operation of the sidewalk "located at Halleck Street , South of Ryawa Avenue ..."

The Verified Bill of Particulars of January 16, 2013 describes the incident location as "at the public thoroughfare and/or sidewalk located on Halleck Street, South of Ryawa Avenue in Bronx County....." [Id. ¶ 2]. It is alleged that plaintiff tripped and fell due to a broken and dangerous and defective and trap-like condition of the aforementioned sidewalk [Id. ¶ 18], which was broken and exposed a metal cable [Id. ¶ 22-23].

Motion and Cross-Motion

The City of New York moves for dismissal of the complaint and cross-claims asserted against it for the failure of the plaintiff to comply with General Municipal Law §§ 50-e and 50-h on the grounds that plaintiff did not sufficiently describe the location of the accident in the notice of claim, and as a result the City cannot determine the location of the accident. Nor , it is argued can the City discern from a review of the notice and pleadings, what caused plaintiff to fall. As such , it is maintained that the City was unable to conduct a proper investigation of the claim.

Alternatively, the City argues that dismissal is warranted for plaintiff's failure to appear for a hearing pursuant to General Municipal Law § 50-h.

Plaintiff cross-moves for an order pursuant to General Municipal Law § 50-e(6) and CPLR § 305 (c) granting leave to file an amended Notice of Claim more specifically identifying the location of the defect .

Plaintiff argues that the notice identified the location and the dangerous condition causing him to trip, i.e., the cement barricades and/or obstructions incident to a construction project of the City's Department of Environmental Protection , and that communication with the Comptroller's Office after the production of the photographs depicting the precise location of the hazardous condition included a representation by that office's named representative that the 50-h hearing, which had been adjourned at the request of plaintiff's counsel, would be rescheduled. It is argued that the municipal defendant can show no prejudice resulting from any imprecision in the notice , as there is no evidence that the municipal defendants attempted to conduct any investigation of the claim .

The proposed Amended Notice of Claim[1] provides in pertinent part, that while the claimant was walking out of 1 Halleck Street he was caused to trip and fall "on broken cement barricades , visible in all the photographs annexed hereto in the vicinity of the bus stop on Halleck Street ..."

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[1] Exhibit 5

In **reply,** the City argues that the photographs do not depict the precise location of the accident, and the proposed Amended Notice of Claim also fails to specify it , thereby depriving the municipal defendant of sufficient information to investigate the claim.

In addition, the City contends that the notice to amend the notice should be deemed a motion to file a late notice that must be denied as the court is without jurisdiction to permit a party to comply with the Notice of Claim requirement after the expiration of the statute of limitations.

Discussion and Conclusions

It is settled that the notice of claim statute, General Municipal Law 50-e, is to be "applied flexibly" (Goodwin v. New York City Housing Authority, 42 A.D.3d 63, 66; 834 NYS2d 181 [1st Dept. 2007]). Upon consideration of whether a specific notice conforms with the statute, the following criteria apply.

> The test of the sufficiency of a Notice of Claim is merely 'whether it includes information sufficient to enable the city to investigate" (see, *O'Brien v City of Syracuse*, 54 NY2d 353, 358). " "Nothing more may be required" (*Schwartz v City of New York*, supra, 250 NY, at 335). Thus, in determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident (*Purdy v City of New York*, supra, 193 NY, at 524; *Widger v Central School Dist. No. 1*, 18 NY2d 646, 648).
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> Brown v. City of New York, 95 N.Y.2d 389,393; 740 NE2d 1078 [2000]

Flexibility is determinative in such an analysis to ensure a balance "of two countervailing interests: on the one hand , protecting municipal defendants from stale or frivolous claims , and on the other hand, ensuring that a meritorious case is not dismissed for a ministerial error.'" Rosenbaum v. City of New York, 24 AD3d 349, 806 NYS2d 543 [1ST Dept. 2005], *revd on other grounds* 8 NY3d 1, 861 NE2d 43, 828 NYS2d 228 [2006].

In addition, as applicable here, pursuant to § 50-e(6) " [a]t any time after the service of a notice of claim and at any stage 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 was not prejudiced thereby."

Prejudice will not be presumed from such an error, but must be established by the municipality , and this may not be done absent a showing that an attempt was made to investigate the accident (see, Goodwin v. New York City Hous. Auth., 42 A.D.3d 63, 68 834 N.Y.S.2d 181, N.Y. App. Div. [1st Dep't 2007]; see also, Rodriguez v. City of New York, 38 A.D.3d 268, 269, 832 NYS2d 13 [1st Dept. 2007]; Williams v. City of New York , 229 A.D.2d 114, 654 NYS2d 775 [1st Dept. 1997]).

The timely filed Notice of Claim here advised that the municipal agency *inter alia*, had provided no safe place for a pedestrian to walk, and had placed cement barricades and/or obstructions to constitute a danger to the claimant when he walked out of the specific location. In addition, and as evidence properly before the court for consideration (see, D'Alessandro v. New York City Transit Auth., 83 N.Y.2d 891, 893 , 636 N.E.2d 1382 [1994]) the claimant provided more than twenty photographs of the seemingly non-residential accident location, consistent with the notice, depicting broken pieces of cement dividers positioned in no discernible pattern along and onto a roadway, and a sidewalk from which the road is in large measure undifferentiated . Among the photographs is that of a road sign identifying 1 Halleck Street as the location of the"NYC Department of Corrections Vernon C. Bain Center."

Upon review of the papers on submission here it is the finding of this court that the Notice of Claim of October 28, 2011 was not fatally deficient, as it adequately described the location and the nature of plaintiff's claim to allow the City to conduct an investigation had defendant chosen to do so.

It is the further finding of this court that branch of the motion seeking to dismiss for failure to comply with General Municipal Law §§ 50-e and 50-h should also be denied as the record supports plaintiff's assertion that the scheduled hearing was adjourned without a date, and not re-scheduled (see, Billman v. City of Port Jervis, 71 A.D.3d 932, 897 N.Y.S.2d 507 [2d Dept. 2010]). It is noted that plaintiff consents to appearance at

a hearing as and if so ordered herein.

It is submitted that the proposed amendment contemplates a good faith correction, and not a substantive change to the original notice, purposed to clarify that the causative defect was a portion of a "broken" cement barricade depicted in the photographs exchanged, and that the area of the incident was in proximity to the bus stop. There is no showing of prejudice by the movant as there is no claim that there was an on-site investigation conducted by the City that was thwarted by the omission of any information in the original notice.

For the reasons above-stated it is ORDERED that the defendant's motion be and hereby is denied and plaintiff's cross-motion be and hereby is granted to the extent of granting leave to serve the amended Notice of Claim annexed to the cross-moving papers as Exhibit 5 thereto with a copy of this decision/order within thirty (30) days of the entry of this order and it is further

ORDERED that within forty-five days of the service of the Amended Notice of Claim plaintiff be produced for purposes of a hearing pursuant to General Municipal Law § 50-h at a date and time to be provided by defendant.

This constitutes the decision and order of this court.

Dated : January 9, 2014

Howard H. Sherman