SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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KARI ROBLES, infant by her Mother and Natural Guardian, MARIA ROBLES and MARIA ROBLES, Individually,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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Index No.: 350060/2010

DECISION and ORDER

HON. SHARON A. M. AARONS:

Defendant New York City Housing Authority moves: (1) to dismiss the theory of liability in the complaint that defendant failed to post signs, barricades or warnings as to certain conditions in defendant's building; (2) to dismiss allegations in the complaint that defendant failed to comply with unidentified "statutes, rules, ordinances and regulations;" (3) to dismiss allegations in plaintiff's expert's disclosures that plaintiff violated the New York City Administrative Code (Admin. Code) by failing to use non-skid materials, and use of improper paint; (4) to dismiss allegations in plaintiff's expert's disclosure that defendant was in violation of Admin. Code §§ 27-127 and 27-128; and, (5) excluding the testimony of plaintiff's expert.

This is an action to recover for personal injury sustained by the infant, Kari Robles, arising from a slip and fall on the landing of an interior stairway on Defendant New York City Housing Authority's premises, on July 16, 2009. Plaintiffs allege that the infant suffered a left ankle bimalleolar fracture which required surgery consisting of an open reduction and internal fixation.

In the instant Notice of Motion, Defendant New York City Housing Authority states that it seeks to dismiss what it denotes as "certain theories of liability" which are set forth in "Plaintiffs' Complaint, Bill of Particulars and Notices of Exchange of Expert Information", respectively. In

support of its motion, Defendant includes the Plaintiffs' Notice of Claim dated Sept. 10, 2009; transcripts of Plaintiffs' GML 50(h) hearings dated Jan.13, 2010; Plaintiffs' Summons and Complaint dated Jan. 27, 2010; Plaintiffs' Verified Bill of Particulars dated April 8, 2010; the Note of Issue filed on or about April 24, 2012; Plaintiffs' Notices of Exchange of Expert Information, pursuant to CPLR 3101(d), for expert engineer Stanley H. Fein, dated Dec. 20, 2012 and Jan. 31, 2013, respectively.

Ten months after the filing of the Note of Issue, Defendant made the instant motion to dismiss the aforementioned alleged "theories of liability" upon the ground that they purportedly were not originally asserted in the Notice of Claim. In addition, Defendant also seeks to preclude Plaintiffs' engineering expert, Mr. Fein, from testifying at trial.

Pursuant to GML 50-e(1)(a), and 50-i, a tort action against a municipality must be commenced by service of a notice of claim upon the municipality within 90 days from the date on which the claim arose.

In relevant part, GML 50-e(1) "Notice of claim" provides that: "(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, ... the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises."[1]

"It is well established that the purpose of the notice of claim is to give a municipal authority the opportunity to investigate." (Goodwin v. New York City Hous. Auth., 42 A.D.3d 63, 68, 834

[1] In addition, GML 50-I "Presentation of tort claims; commencement of actions" provides that "the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based."

N.Y.S.2d 181, 185 [1st Dept. 2007]).

The Court of Appeals has held that "[t]he test of the sufficiency of a Notice of Claim is merely "whether it includes information sufficient to enable the city to investigate" [citations omitted] ... 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." (Brown v. City of New York, 95 N.Y.2d 389, 393, 718 N.Y.S.2d 4, 6 [2000]).

In relevant part, GML 50-e(b)(2) provides that the notice of claim shall include: "the nature of the claim; [and] ... the place where and the manner in which the claim arose".

In the case at bar, Plaintiffs' Notice of Claim provided the following detailed description of the manner in which the claim arose, stating that:

> "On July 16, 2009, ... in the "A" stairwell **on the 6th floor landing** thereat ... KARI ROBLES was caused to sustain serious personal injuries when she slipped on a **dangerous, unsafe and hazardous condition**, to wit: **urine that had accumulated over a significant period of time at the subject stairwell.** ... [Defendant NYCHA] had actual and constructive notice of the aforesaid condition for at least 3 days prior to the subject incident, **but failed to clean, mop, alleviate or otherwise address said condition.**" [emphasis added] (See Notice of Claim, dated Sept 10, 2009).

Defendant contends that Plaintiffs may not invoke NYC Administrative Code § 27-375, which provides, in relevant part, that: "Treads and landings shall be built of or surfaced with nonskid materials."

What prompted Defendant to make the instant motion was the Plaintiffs' CPLR 3101(d) expert disclosure which set forth Plaintiffs' engineer's opinion that the owner negligently maintained the interior stairway in a dangerous condition, in that:

> "the stairway and the landing was of concrete construction ... , and was painted with a grey

> [sic] paint. It was further reported that there was an accumulation of urine on the landing which remained on top of the landing for at least three days... Good and accepted engineering safety practice and Section 27-375 (h) of the New York City Building Construction Code requires that steps and landings of steps shall be built of or surfaced with nonskid materials. The subject landing was originally constructed of concrete which has good traction because of the grit in the concrete and has a good absorptivity. **Once the surface is painted, the paint fills in the space between the grit and seals the concrete so that it is slippery and can no longer absorb liquids**. Good and accepted engineering safety practice for maintenance of a building of this type is to have **nonskid strips applied to the landing and the steps** to give them proper traction... Urine has a higher specific gravity than water and it would take a longer period of time for it to evaporate. Since the landing floor was non-absorbent, ... the urine would stay there for an extended period of time and it was therefore the same accumulation of urine at the time of the accident that was discovered three days prior." [emphasis added][2]

It is Defendant's position that the aforesaid portion of the opinion of engineer, Mr. Fein, contains new theories of liability, which should be precluded. It is well established that the "General Municipal Law § 50-e (6) notice of claim amendment provision[3] merely permits correction of good faith, nonprejudicial, technical mistakes, defects or omissions, not substantive changes in the theory of liability (Torres v. New York City Hous. Auth., 261 A.D.2d 273, 274, 690 N.Y.S.2d 257 [1999], lv denied 93 N.Y.2d 816, 719 N.E.2d 924, 697 N.Y.S.2d 563 [1999]". (Mahase v. Manhattan & Bronx Surface Transit Operating Auth., 3 A.D.3d 410, 411, 771 N.Y.S.2d 99, 101 [1st Dept. 2004]).

A recent case on point, also, involves an infant plaintiff who fell on a liquid substance on a

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[2] (See Plaintiffs' "Notice of Exchange of Expert Information").

[3] GML 50-e (6) "Mistake, omission, irregularity or defect" provides that:
"At 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**." [emphasis added]

staircase, where the "notice of claim limited plaintiffs' theory of liability to negligent maintenance, upkeep and repair of the subject staircase." (Rodriguez v. Board of Educ. of the City of N.Y., 107 A.D.3d 651, 651, 969 N.Y.S.2d 25, 26 [1st Dept. 2013]). Therein, the First Department Appellate Division Court held that: "Plaintiffs' new theory, ... that the infant plaintiff was caused to slip and fall due to various design defects, including, inter alia, treads and risers of insufficient length, ... and stairs not coated with nonskid materials, is precluded." Id.

Accordingly, in the case at bar, this Court grants that part of Defendant's motion that seeks to preclude Plaintiffs from asserting a new theory of liability concerning an alleged design defect pertaining to "nonskid strips" not having been applied to the subject landing and steps pursuant to NYC Administrative Code § 27-375.

However, as to that part of Mr. Fein's point alleging that the gray paint sealed the concrete so that it could not absorb liquids as readily as bare concrete, this is not deemed to be a new theory of liability; rather, it is merely a rationale concerning allegations set forth by the Plaintiffs from the beginning.

In this regard, for instance, in the Notice of Claim, in describing the urine condition that allegedly caused the infant Kari to slip and fall, Plaintiffs claimed that it been there "for at least 3 days prior to the subject incident".

Further, Plaintiff mother, Maria Robles, testified at her GML 50(h) hearing, on January 13, 2010, that she believed that the brown urine that was on the landing on the date of the accident was the same as that which she had observed on the Monday prior to the accident when she had complained to NYCHA, as well as Mr. Philips the managing agent, about it; she stated: "There was a big puddle that took all of the platform and it was brownish looking". Maria Robles further

testified that the urine, though drier, was still present on the Saturday after the accident and that she recognized the same because her daughter's fingerprint marks remained.[4] When asked about the color of the stairs, the infant KARI testified that they were "gray".[5] Also, the Complaint includes allegations that the Defendant permitted the subject landing to be in a slippery condition.[6]

Thus, the allegations made by Plaintiffs, from the beginning, fairly indicate that the brown urine remained on the slippery gray-painted landing for many days; and Plaintiffs are not precluded from expounding on the rationale for that allegation. This is consistent with the recent First Department case cited above wherein the Court held that a plaintiff was permitted to present her expert's theory that "the use of semi-gloss paint on the steps and their worn treads ... contributed to the accident", Rodriguez, 107 A.D.3d at 652 – even though, as discussed above, plaintiff therein was precluded from including the same expert's theory regarding the stairs not being coated with nonskid materials.[7]

In determining whether a defendant is prejudiced by any mistake, omission, irregularity or defect in the notice, the Court of Appeals has held that the Court's inquiry is not strictly confined to the "four corners" of notice itself, but should consider other evidence, such as "evidence adduced at a section 50-h hearing." D'Alessandro v. New York City Tr. Auth., 83 N.Y.2d 891(1994).

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[4] (Maria Robles EBT, p. 9-13, 17-18, 45-46).

[5] (Kari Robles EBT, p. 23).

[6] (See Complaint, ¶ 14).

[7] See Affidavit of expert engineer Robert Schwartzberg, dated Nov. 4, 2011, presented in the motion papers in Rodriguez v. Board of Educ. of the City of N.Y., Bronx Supreme Court Index No.: 350367/2008.

In a case with similarities to the one at bar, involving a slip and fall on a puddle of water, the Court held that:

> "the notice of claim properly identified plaintiff as the claimant, stated when and where the accident occurred and **described the defective condition** that allegedly caused her to slip and fall as "an unreasonably slippery and slick wet floor." This information was certainly sufficient to enable the defendant Transit Authority to investigate and evaluate plaintiff's claim. **Plaintiff was not required to identify the source of the water that was alleged to be on the floor, as that was well within defendant's investigatory abilities, not only by observation, but also by review of its own internal records**. Moreover, contrary to defendant's contention, plaintiff's subsequent testimony that the water--which her notice of claim explicitly stated was on the station floor where she fell--came from leaks in the station's ceiling does not constitute a change in her theory of the case." [emphasis added] (Bennett v. N.Y. City Tr. Auth., 4 A.D.3d 265, 266-67 (1st Dept. 2004) aff'd 3 N.Y.3d 745 [2004]).

Likewise, in the case at bar, the information set forth in the Notice of Claim, and imparted at the 50(h) hearing, was sufficient to enable Defendant NYCHA to investigate and evaluate the claim. Herein, Plaintiffs were not required to initially elaborate more about the properties of the paint that was alleged to be on the landing in this interior staircase, because Defendant could readily observe its condition, and could identify it by review of its own internal records. Defendant has not asserted that it was unable to timely view its own landing, or review its own internal records, concerning the attributes of the gray paint which it applied to its own interior steps. Since the Defendant did, or could have done so, "with a modicum of effort", the Defendant has not established prejudice – which will not be presumed. (See Williams v. City of New York, 229 A.D.2d 114, 117, 654 N.Y.S.2d 775, 777 [1st Dept. 1997]).

In addition, that part of Defendant's motion which seeks to dismiss Plaintiffs' allegations regarding the failure "to post any signs, barricades or warnings apprising persons thereat of the" condition of the landing, is denied. In this regard, the Notice of Claim does include language alleging

that Defendant failed to "address" the condition, which may encompass the failure to warn. Moreover, when asked at the 50(h) hearing, in January 2010, the infant Plaintiff specifically asserted that there were no warning signs.[8] In addition, the same was promptly set forth in Plaintiffs' Bill of Particulars.

The Court of Appeals held that, reasonably read, GML 50-e "does not require "those things to be stated with literal nicety or exactness"." Brown, 95 N.Y.2d at 393.

The portion of the Defendant's Motion which seeks to preclude Plaintiffs' expert from testifying is denied. The motion is predicated on the argument that the expert will not be able to give an opinion on the painting of the steps, and the absence of non-skid strips, and thus "has nothing left to testify about...." However, as the claims regarding the use of improper paint are not precluded, the expert may testify on that subject.

That portion of Defendant's Motion which alleges that reference to NYC Administrative Code § 27-127 "Maintenance requirements"[9] and § 27-128 "Owner Responsibility"[10] should be precluded merely upon the ground that they were not specifically cited in the Notice of Claim is denied – without prejudice to the trial judge making determinations on how to charge the jury on the

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[8] (Kari Robles EBT, p. 38).

[9] NYC Administrative Code § 27-127 "Maintenance requirements" provided that: "All buildings and all parts thereof shall be maintained in a safe condition. All service equipment, means of egress, devices, and safeguards that are required in a building by the provisions of this code, or other applicable laws or regulations, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working order."

[10] NYC Administrative Code § 27-128 "Owner responsibility" provided that: "The owner shall be responsible at all times for the safe maintenance of the building and its facilities."

law at the time of trial.[11] The aforesaid code sections essentially contain general provisions requiring that a building owner be responsible to maintain premises in a safe manner. In this regard, the Notice of Claim does include language alleging that Defendant was negligent and careless in its ownership and maintenance of the building– which encompasses the failure to safely maintain the premises. A notice of claim need not identify a specific statutory violation so long as the underlying claim is made clear and no new theory is raised. (*Zahra v. New York City Hous. Auth.*, 39 A.D.3d 351, 834 N.Y.S.2d 143 [1st Dept 2007] [plaintiff not required to plead a specific statutory violation in notice of claim for an action under GML 205-a]).

However, in the Complaint, Plaintiffs further allege that Defendant NYCHA failed to maintain the premises in a safe condition "as required by the Multiple Dwelling Law" (¶ 11) and failed to comply with unidentified "statutes, rules, ordinances and regulations" (¶14) requiring it to maintain its premises in a safe manner. In the present context, it has been held that alleging that defendant failed "to comport with all applicable statutes of the Multiple Dwelling Law and such other applicable ordinances, codes and statutes" did not amplify the notice of claim, but merely constituted vague and open-ended assertions which must be stricken. (*DeJesus v. New York City*

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[11] It is noted that both Administrative Code §§ 27-127 and 27-128 were repealed, effective July 1, 2008, and replaced by NYC Administrative Code § 28-301.1 "Owner's responsibilities" which now provides as follows: "All buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service equipment, means of egress, materials, devices, and safeguards that are required in a building by the provisions of this code, the 1968 building code or other applicable laws or rules, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working condition. Whenever persons engaged in building operations have reason to believe in the course of such operations that any building or other structure is dangerous or unsafe, such person shall forthwith report such belief in writing to the department. The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant manner and shall comply with the inspection and maintenance requirements of this chapter."

Hous. Auth., 46 A.D.3d 474, 848 N.Y.S.2d 641 [1st Dept. 2007]).

Accordingly, Defendant NYCHA's motion is: (1) denied as to that part of the motion seeking to dismiss the theory of liability in the complaint that defendant failed to post signs, barricades or warnings as to certain conditions in defendant's building; (2) granted as to that part of the motion seeking to dismiss allegations in the complaint (¶¶ 11, 14) that defendant failed to comply with unidentified sections of the Multiple Dwelling Law, and unidentified "statutes, rules, ordinances and regulations;" (3) granted as to that part of the motion seeking to dismiss allegations in plaintiff's expert's disclosures that plaintiff violated the New York City Administrative Code (Admin. Code) by failing to use non-skid materials, **but denied as to the use of improper paint**; (4) denied as to that part of the motion seeking to dismiss allegations in plaintiff's expert's disclosure that defendant was in violation of Admin. Code §§ 27-127 and 27-128; and, (5) denied as to that part of the motion seeking to exclude the testimony of plaintiff's expert.

This constitutes the Decision and Order of this Court.

Dated: March 13, 2014

SHARON A.M. AARONS, JSC