SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

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RICHARD ROCCO and SUEANN ROCCO,

Plaintiffs,

-against- Index No.: 115262/09

THE CITY OF NEW YORK,

Defendant.

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KATHRYN E. FREED, J.:

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	1-2(Exs. A-E)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	3
REPLYING AFFIDAVITS	4
EXHIBITS	
MEMORANDUM OF LAW	5
OTHER	

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

Defendant, the City of New York (the City), moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to comply with General Municipal Law (GML) § 50-e.[1] This action

[1] The City moves based on the statement in the October 16, 2013 order that the City was not precluded from raising the notice of claim issue again where it improperly raised the issue for the first time only in reply. Although, generally, this language indicates that an issue may be raised at trial, as it was not adjudicated on the merits, it is not definitive. Therefore, the court will entertain the City's motion, but concerning the notice of claim issue only, and not any other arguments made (*see e.g.* Gibek moving affirmation, ¶ 7; Gibek reply affirmation, ¶ 24), as the reading of the order did not permit the City to raise additional issues in a second CPLR 3211 motion.

was addressed in a previous decision issued by this court, dated October 16, 2013, with which familiarity is presumed.

It is well known that, pursuant to GML § 50–i (1) (a), the timely filing of a notice of claim is a statutory precondition to the initiation and maintenance of a personal injury suit against the City of New York. GML § 50-e (2) requires that the notice set forth the nature of the claim, and the time, place and manner in which the claim arose.

> In passing on the sufficiency of a notice of claim in the context of a motion to dismiss, courts are not confined to the notice of claim itself. The relevant inquiry is set forth in [GML] § 50-e (6), which provides that "a mistake, omission, irregularity or defect made in good faith . . . 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." In making this determination of prejudice, the court may look to evidence adduced at a section 50-h hearing, and to such other evidence as is properly before the court.

(*D'Alessandro v New York City Tr. Auth.*, 83 NY2d 891, 893 [1994] [notice of claim did not identify involved bus or bus driver]; *Portillo v New York City Tr. Auth.*, 84 AD3d 535, 536 [1st Dept 2011] ["[i]n considering the sufficiency of a notice of claim in the context of a motion to dismiss, a court is not confined to the notice of claim itself, but may also look to evidence adduced at a [GML] § 50-h hearing, and to such other evidence that is properly before the court"]; *Brown v City of New York*, 56 AD3d 304 [1st Dept 2008] [on motion to set aside verdict, notice of claim provided sufficient notice that plaintiff might assert a claim for failure to provide a safe place to board bus when viewed in combination with plaintiff's hearing testimony provided approximately six months after the incident and three months after service of the notice of claim]; *Jackson v New York City Tr. Auth.*, 30 AD3d 289, 291-292 [1st Dept 2006] ["[GML] § 50-h hearing testimony three months after the accident, and the bill of particulars . . . served less than eight months after the accident,

specifically set forth . . . claims regarding the absence of adequate grab bars. Thus, to the extent these claims were 'new,' they were made well within the year-and-90-day limitation period"]; *see also Jimenez v City of New York*, 117 AD3d 535, 535- 536 [1st Dept 2014] [complaint allegations considered]).

The accident, involving plaintiff Richard Rocco (Rocco), occurred on June 25, 2009. Plaintiff timely filed the notice of claim on September 18, 2009. Plaintiff asserts in the notice of claim that the City was negligent (1) in failing to provide Rocco with a safe place to work; (2) in causing Rocco to participate in a training exercise that was unreasonably hazardous; and (3) in causing Rocco

> to operate a highly pressurized, untested and unrated hose line without adequate assistance, training or backup; in causing and permitting claimant . . . ROCCO to perform said training exercise in violation of the protocols of the Fire Department of the City of New York [FDNY], including, but not limited to, training bulletins and manuals; in unnecessarily exposing claimant . . . ROCCO to extreme danger in a non-emergency situation; in failing to properly supervise the training exercise in which . . . ROCCO was participating; in directing . . . ROCCO to participate in said training exercise in violation of OSHA Rules and Regulations for said exercise; and in otherwise being careless, reckless and negligent"

(Gibek moving affirmation, exhibit A). Regarding the manner in which the claim arose, the notice of claim states that Rocco, then a firefighter, was directed to control the nozzle of a highly pressurized, untested and unrated hose without proper assistance, training or back up and was thereby thrown to the floor.[2]

At the 50-h hearing, on December 18, 2009, less than three months after the filing of the

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[2] There is no dispute that the notice of claim provides the time, date and the place of the accident at the FDNY training facility located on Randall's Island. The FDNY report from the immediate investigation conducted by FDNY states that the apparent cause of injury was a fall or slip on a wet surface (Cannavo aff, exhibit B; Gibek reply affirmation, ¶ 23).

notice of claim, plaintiff testified that he fell in water while using a hose during an exercise that simulated firefighting and that, while there was water drainage, that it was not "draining as quickly as we would like it to" (*id.*, exhibit E at 51-52). The bill of particulars, dated February 24, 2010, alleged that defendant was negligent

> in causing water to accumulate on the ground during the . . . training exercise; in failing to provide proper drainage for water that accumulated on the ground during the . . . training exercise; in causing and directing plaintiff to participate in the . . . training exercise despite the accumulation of water on the ground.

(*id.*, exhibit D at 7-8).

The notice of claim asserts negligence and an unsafe work place. From plaintiff's 50-h hearing testimony, a reasonable inference readily may be drawn that plaintiff was indicating that the water drainage was not adequate. The City did not question Rocco further about a drainage condition or problem. Plaintiffs' bill of particulars alleges a drainage issue. As set forth in *D'Alessandro*, supra, when deciding a motion to dismiss based on the insufficiency of a notice of claim, the Court may also look to evidence presented in the 50-h hearing, and other evidence before the court. When the evidence is viewed as a whole, it is clear that plaintiff has set forth sufficient information from which the City could readily have ascertained that defendant was setting forth a claim that the drainage was improper and contributed to the alleged injury.

The City's argument that it suffered prejudice is based on its contention that any drainage condition alleged was necessarily a transitory one, in the nature of, for example, a clogged drain. However, assuming the presence of drainage, this is not the only conclusion that may be drawn, as a conclusion that the available drainage was inadequate for the exercise, which used a new type of high pressure hose, also reasonably may be drawn. Furthermore, plaintiff asserts that the condition

was not transitory.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

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

DATED: July 17, 2014

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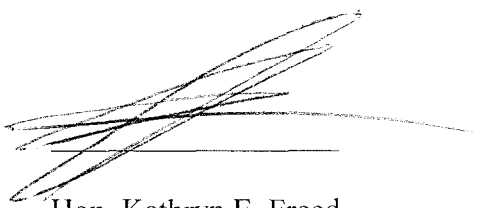

Hon. Kathryn E. Freed
J.S.C.