SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63
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Neal Lewis,

Plaintiff,

-against-

New York City Housing Authority,

Defendant.
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Index Number:156611/2012
Subm. Date: June 18, 2014
Motion Sequence: 001

DECISION AND ORDER

Ellen Coin, J.:

Defendant New York City Housing Authority (NYCHA) moves for an order dismissing certain claims as being beyond the scope of the plaintiff's notice of claim (the Notice) and precluding plaintiff's expert William Marletta (Marletta) from testifying or, alternatively, striking the case from the trial calender and compelling plaintiff to provide additional discovery.

Background

Plaintiff alleges that on January 23, 2012, at approximately 2:20 p.m., he started walking from his apartment on the eleventh floor of a NYCHA building (the Building), located at 177 Nagle Avenue, New York, New York and went down the nearby staircase 11 B (the Staircase) (plaintiff General Municipal Law § 50-h Hearing [Hearing] at 3-4, 10; Notice, item 3). He stated there were no signs or tape on or near the Staircase that would indicate a wet floor or other potential hazard (Hearing at 18-19, 21, 27; Notice, item 3). He further stated that the steps of the

Staircase were grey concrete with no treads or colored marking on them (Hearing at 12).

Plaintiff states that, as he was descending, he lost his footing on the second or third step of the Staircase at the top of the eleventh floor when his left foot slipped and that he fell to the landing, resulting in injuries including bleeding to the knuckles of both hands and pain in his lower back that was later diagnosed as disk herniation at L5/S1 (*id.* at 10, 14-15, 17-18, 22, 39-40). He contends that the steps of the Staircase were slippery and wet and that he saw a NYCHA worker at the landing with a bucket and mop, who was mopping the floor of the landing (*id.* at 15-16, 17-18, 22, 27-29). Plaintiff also stated that there was no debris on the Staircase and that after his fall, he returned to his apartment, called to report the incident and later was taken by ambulance to Columbia Presbyterian Hospital's emergency room, where he was examined, given a cane and a prescription for pain medication (*id.* at 19, 22-24, 29-34, 55-56).

On February 7, 2012, plaintiff served the Notice on NYCHA, identifying "the third step from the top of the, [S]taircase" in the Building as the accident location and specifying the failure "to properly maintain said stairway area; [the failure] to put up wet floor signs . . . [or] to erect barricades or otherwise restrict use of the aforesaid area while it was being cleaned

[and] . . . permitting and allowing the aforesaid condition to exist on the [S]taircase area" as the manner in which the claim arose (Notice, item 3). The Hearing was held on May 22, 2012. On September 24, 2012, plaintiff commenced this action by filing a summons and complaint. Defendant NYCHA interposed its answer on November 2, 2012, admitting ownership and control of the Building and the Staircase (answer, ¶ 5).

On January 7, 2013, plaintiff served a bill of particulars that specified the wet condition of the Staircase and the failure to display warning signs or to place barricades as NYCHA's negligent conduct (Bill of Particulars, item 3). On January 27, 2014, plaintiff served a second supplemental bill of particulars (the Supplemental B/P) that added the failure "to provide a slip resistant surface on the [S]taircase" and the purported inadequate training of NYCHA workers in mopping to the claimed negligence and enumerated various sections of the Building Code of the City of New York (the Building Code)[1] and, two days later on January 29, 2014, served his note of issue. On February 4, 2014, plaintiff served his CPLR §3101(d) information, identifying Marletta as his expert witness and indicating that he proposed to

[1]New York City Building Code (2008) §1003.4 [requirement of slip-resistant surface at the means of egress] , The Building Code of the City of New York (1968-2008) §27-375[risers, treads, guardrails], The Building Code of the City of New York (1938-2008) C26-292.0, The New York City Building Code (effective July 2008-the present) §28-301.1[owner responsibility to maintain the building in compliance with the code], and The New York City Building Code (1968-2007) §27-127 [repealed].

testify regarding purported deficiencies in the stair tread of the Staircase, the need for adequate signage in the vicinity of areas being cleaned and improper training of NYCHA workers in mopping. On February 20, 2014, NYCHA made this motion. The action is on the trial calendar.

Notice of Claim

"General Municipal Law § 50-e [2] requires written, 'sworn to or on behalf of the claimant,' which sets forth the name and post-office address of each claimant, and of his attorney, if any,' 'the nature of the claim,' 'the time, when, the place where and the manner in which the claim arose' and 'the items of damage or injuries to have been sustained so far as then practicable'" (*Rosenbaum v City of New York*, 8 NY3d 1, 10 [2006]). "[T]he 'plain purpose' of statutes requiring pre-litigation notice to municipalities 'is to guard them against imposition by requiring notice of the circumstances . . . upon which a claim for damages is made, so that its authorities may be in a position to investigate the facts as to time and place, and decide whether the case is one for settlement or litigation'" (*id.* at 11, quoting *Purdy v City of New York*, 193 NY 521, 523 [1908], *rearg denied* 195 NY 604 [1909]).

However, "the statute does not require 'those things to be stated with literal nicety or exactness' . . . [and] [t]he test of the sufficiency of a Notice of Claim is merely 'whether it

includes information sufficient to enable the city [or other governmental entity] to investigate'" (*Brown v City of New York*, 95 NY2d 389, 393 [2000], quoting *Purdy*, 193 NY at 523 and *O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]; *see also Phillipps v New York City Tr. Auth.*, 68 AD3d 461, 462 [1st Dept 2009]). The Notice can be "amplified in [plaintiff's] complaint and bill of particulars [so long as it does] not present new theories of liability" (*Cooke v City of New York*, 95 AD3d 537, 538 [1st Dept 2012]; *see also DeJesus v New York City Hous. Auth.*, 46 AD3d 474, 475 [1st Dept 2007]). A new theory of liability "would substantially alter the nature of the claim and [therefore] would be prejudicial to the [defendant]." (*Steinberg v Village of Garden City*, 247 AD2d 463, 464 [2d Dept 1998]; *see also Olivera v City of New York*, 270 AD2d 5, 6 [1st Dept 2000]).

Where the initial claim involved a foreign substance on stairs, poor lighting "created a new theory of liability" (*White v New York City Hous. Auth.*, 288 AD2d 150, 150 [1st Dept 2001]). Similarly, broken steps also create a sufficiently different claim from a foreign substance on stairs as to be "precluded for failure to assert them in the original notice of claim" (*Chieffet v New York City Tr. Auth.*, 10 AD3d 526, 527 [1st Dep 2004]; *see also regarding hiring decisions, Lopez v New York City Hous. Auth.*, 16 AD3d 164, 165 [1st Dept 2005]; *but cf. Jimenez v City of New York*, 117 AD3d 535 [1st Dept 2014]). Finally, design

defects such "treads and risers of insufficient length . . . and stairs not coated with nonskid materials" are considered to be a new theory of liability when the notice of claim asserted "a liquid substance on the floor and inadequate lighting" as the defective condition (*Rodriguez v Board of Educ. of City of N.Y.*, 107 AD3d 651, 651 [1st Dept 2013]).

Expert Witness

"The guiding principle [as to expert testimony] is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, . . . beyond the ken of the typical juror" (*DeLong v County of Erie*, 60 NY2d 296, 307[1983][citations omitted]; *see also Christoforatos v City of New York*, 90 AD3d 970, 970 [2d Dept 2011]).

Discussion

Applying the above-noted principles to this case, plaintiff impermissibly added new theories of liability in the Supplemental B/P. The Notice and plaintiff's testimony at the Hearing set forth his claim of a wet substance on the Staircase and the failure to secure the area with tape or to provide signs to warn of a wet floor (Notice, item 3: Hearing at 17-19, 21-22, 27). This provided "information sufficient to enable the [governmental defendant] to investigate" (*Brown*, 95 NY2d at 393; *see also Bennett v New York City Tr. Auth.*, 4 AD3d 265, 266-267 [1st Dept], *affd* 3 NY3d 745 [2004]). However, the single, cursory

mention of the lack of treads on the Staircase in the Hearing does not apprise NYCHA that plaintiff was asserting a problem inherent in the steps, rather than a foreign substance. The Notice did not mention either the lack of treads or other nonskid material on the Staircase or inadequate supervision of NYCHA workers or claim violations of the Building Code (see *Rodriguez*, 107 AD3d at 651). Consequently, the newly raised claims of design defect and improper supervision, together with the supporting regulatory violations, present "a new theory of liability" and must be stricken (*DeJesus*, 46 AD3 at 475; *Chieffet*, 10 AD3d at 527; *White*, 288 AD2d at 150).

The testimony of plaintiff's expert must be limited to those theories of liability that plaintiff raised in the Notice, i.e., the wet condition of the Staircase and the absence of tape, signs or barricades. Marletta's proposed testimony on tread risers, nonskid coatings, alleged inadequate training of NYCHA workers in mopping and code violations must be precluded. However, he may testify regarding signs, barricades, tape or other manner of restricting use of the Staircase and the alleged wet condition of the Staircase, as the Notice and the Hearing "sufficiently apprised" NYCHA of these claims (*Cooke*, 95 AD3d at 538).

In accordance with the foregoing, it is therefore

ORDERED that the motion of defendant New York City Housing Authority is granted to the extent of dismissing those portions

of plaintiff's claim relating to tread risers, nonskid surfaces, failure to train porters and listed regulatory violations and precluding plaintiff's expert witness, William Marletta, from testifying regarding said matters, and is otherwise denied.

Dated: Oct. 14, 2014

ENTER:

Ellen M. Coin, A.J.S.C.