

Frankel v New York City Tr.

2014 NY Slip Op 33006(U)

November 24, 2014

Sup Ct, NY County

Docket Number: 152230/2013

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 152230/2013
FRANKEL, ROSA
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 152230/2013
MOTION DATE 10/23/14
MOTION SEQ. NO. 001

The following papers, numbered 12-17, 21, 23-29, 31-33, were read on this motion to dismiss and cross motion for leave to amend a notice of claim

- Notice of Motion; Affirmation; Exhibits A; B; C; D No(s). 12; 13; 14; 15; 16; 17
- Affirmation; Notice of Cross Motion; Affirmation; Exhibits A-C; D; E; D-F No(s). 21; 23; 24; 25; 26; 27; 28; 29
- Affirmation in Opposition to Cross Motion No(s). 31
- Reply Affirmation; Exhibit A No(s). 32; 33

Upon the foregoing papers, it is ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that plaintiff's cross motion for leave to amend the notice of claim is granted, and the proposed amended notice of claim, efiled as NYSCEF Doc # 33, is deemed timely served upon defendant, *nunc pro tunc*, upon service of a copy of this order with notice of entry.

On May 9, 2012, plaintiff served a notice of claim upon defendant, alleging that, on February 26, 2012, between 4:00-4:30 p.m., she slipped/tripped and fell on stairway PL7 leading to the F train at the West 4th Street subway station in Manhattan, due to "debris and/or wetness, water or other liquid on said stairway" (Laughlin Affirm., Ex A.)

Almost five months after the occurrence, plaintiff testified at her statutory hearing on July 25, 2012, as follows:

(Continued . . .)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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“A. We were walking down holding onto the railing, there was the piece missing, so I lost balance and my ankle twisted on the last step.

Q. When you say there was a piece missing, what was missing?

A. The end of the handle as you are going down the stairs.

Q. Okay. So, in other words, you were walking down the stairway and right before you got to almost the bottom of the stairway, the handle wasn't there?

A. Right. It was broken. Right, it was missing.

Q. Okay. When you say missing, it was just—what do you mean by that? It was just the handle ended before the end of the stairway; is that what you're referring to?

A. Yes.

MR. HERBERT: I have photograph [*sic*] too.

*** * ***

MR. VERTI: How about, if you don't mind, counsel, I'll make copies of this file after the hearing.

MR. HERBERT: Yes, yes. That's fine.”

(Laughlin Affirm., Ex B [Tr., at 13-14].)

On March 11, 2013, plaintiff commenced this action, alleging that plaintiff suffered personal injuries “a result of a missing piece of the handrail for said stairway.” (Laughlin Affirm., Ex C [Complaint ¶ 16].)

Defendant now moves to dismiss the complaint on the ground that plaintiff's notice of claim was inadequate, because the notice of claim alleged that plaintiff slipped/tripped and fell due to debris and/or wetness, instead of a defective handrail.

Plaintiff opposes the motion and cross-moves for leave to amend the notice of claim pursuant to General Municipal Law § 50-e (6). The

(Continued . . .)

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proposed amended notice of claim substitutes “a broken handrail” in place of “debris and/or wetness, water or other liquid” in the original notice of claim. (Herbert Reply Affirm., Ex A.) Defendant opposes the cross motion.

“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 General Municipal Law § 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].)**

Here, although the written notice of claim did not set forth the allegations of the missing handrail, plaintiff testified at her statutory hearing about the handrail and made photographs of the alleged defective handrail available for copying.

Defendant argues that *D’Alessandro* is distinguishable, in that plaintiff’s statutory hearing testimony “seeks to completely supplant her notice of claim.” This distinction is unpersuasive. (*See Brown v City of New York*, 56 AD3d 304 [1st Dept 2008] [in combination with plaintiff’s statutory hearing testimony, the notice of claim gave NYCTA sufficient notice that plaintiff might assert a claim for breach of NYCTA’s duty to provide a safe place to board the bus].) Therefore, defendant’s motion to dismiss the complaint on the ground that the notice of claim is inadequate is denied.

(Continued . . .)

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Plaintiff's cross motion for leave to amend the notice of claim is granted. Given the Court's ruling that the notice of claim, coupled with plaintiff's statutory hearing testimony, adequately gave notice of the allegedly defective handrail, the amendment that plaintiff seeks is not a substantive change in the theory of liability. (*Goodwin v New York City Housing Auth.*, 42 AD3d 63 [1 Dept 2007]). Rather, the proposed amendment supplies information from the hearing testimony that was omitted from the written notice of claim. (*See e.g. Shufeldt v City of New York*, 67 AD3d 429 [1st Dept 2009] ["it cannot be said that the court abused its discretion in declining to permit plaintiff to supplement the facially deficient notice of claim by reference to testimony elicited at the section 50-h hearing".])

The proposed amended notice of claim, efiled as NYSCEF Doc # 33, is deemed timely served upon defendant, *nunc pro tunc*, upon service of a copy of this order with notice of entry.

Dated: 11/04/14
New York, New York


_____, J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE