

Kirk v New York City Hous. Auth.

2015 NY Slip Op 30622(U)

April 20, 2015

Supreme Court, New York County

Docket Number: 150952/2014

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

TOMMIE LEE KIRK,
Plaintiff,
-against-
NEW YORK CITY HOUSING AUTHORITY,
Defendant.

INDEX NO. 150952/2014
MOTION DATE 04-15-2015
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this motion to dismiss claims and compel discovery.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3,</u>
Answering Affidavits — Exhibits _____	<u>4</u>
Replying Affidavits _____	<u>5 - 6</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant New York City Housing Authority’s (herein “NYCHA”) motion to dismiss certain theories of liability, compelling plaintiff to particularize the statutes allegedly violated by NYCHA, and compelling plaintiff to provide demanded discovery or be precluded is granted, the portion of the motion to compel plaintiff to serve an Amended Complaint and Amended Bill of Particulars is denied.

This action arises from an alleged slip and fall accident on December 6, 2012 at a building owned by NYCHA, and located at 505 East 120th Street, New York, New York (herein “Premises”). Plaintiff alleges that he slipped and fell while descending internal staircase “A” within the Premises between the third and second floors.

Plaintiff filed a Notice of Claim which stated that the action was to recover for personal injuries sustained by plaintiff “by reason of the negligence of [NYCHA], by its acts and omissions in owning and maintaining a dangerous staircase” (see Moving Papers, Exhibit B, PP. 2). The Notice of Claim further states that:

... more particularly, in failing to maintain the staircase in a reasonably safe condition; in failing to clean the staircase and keep it in reasonably safe condition and free of recurring garbage, unsafe conditions, materials and debris, in failing to provide requisite handrails and bannisters as required by applicable standards and law; in permitting the staircase to become and remain in a recurrently dangerous and slippery condition ... and in failing to maintain the staircase in accordance with the Building and Administrative Codes of the City and State of New York. (Id.).

Plaintiff's 50-H hearing took place on April 10, 2013. Plaintiff was asked "...did you see anything on the steps," to which he replied:

A. No, that wasn't my concern at the time. I know I slipped in something, because it was on my pants whatever it was.

Q. What did you see on your pants?

A. I don't know, it was oily, wet, whatever it was.
(see Moving Papers, Exhibit C, Pg. 19).

Plaintiff commenced this action by summons and complaint dated January 30, 2014. NYCHA answered on March 5, 2014 and asserted various affirmative defenses. The ninth affirmative defense states that:

Plaintiff did not serve a proper Notice of Claim upon defendant NYCHA, as required by General Municipal Law Section 50-e and Public Housing Law Section 157(2) in that plaintiff failed to provide timely notice of (a) a claim of failure to repair interior staircases, handrails, steps, stairs and access doors; (b) a claim of leaving handrails and access doors in a dangerous/defective condition; (c) a claim of a failure to warn about the dangerous and defective condition of interior staircases, handrails, steps and stairs and access doors; (d) a claim allowing handrails and access doors to remain in a dangerous/defective condition; and (e) a claim of failure to properly maintain control, inspect, supervise and manage handrails and access doors. (see Moving Papers, Exhibit e, Pg. 4, PP. 15).

Plaintiff further asserted these claim in his Bill of Particulars dated January 30, 2015.

NYCHA now moves to dismiss the claims that are pled in the Complaint and Bill of Particulars, but unpled in the Notice of Claim, and seeks an order compelling plaintiff to serve an Amended Complaint and Amended Bill of Particulars removing all claims not pled in the Notice of Claim. NYCHA also moves for an order compelling plaintiff to particularize the statutes, rules, ordinances and laws allegedly violated by NYCHA. Lastly, NYCHA moves for an order compelling plaintiff to provide the discovery sought in NYCHA's Supplemental Discovery Demand dated February 20, 2014, which seeks the names and duly executed authorizations for medical providers and doctors in relation to his claims for loss of enjoyment of life and aggravation and/or exacerbation of prior injures and his claim for lost earnings.

General Municipal Law § 50-h states, in part, that "[w]henver a notice of claim is filed against a city ... or school district ... the city ... or school district shall have the right to demand an examination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made." § 50-h requires the demand to be in writing and give reasonable notice of the examination.

“The intent underlying the notice of claim requirement embodied in General Municipal Law § 50–e is to protect the municipality from unfounded claims and ensure that it has an adequate opportunity to timely explore the merits of the claim while the facts are still fresh” (Garcia v. O’Keefe, 34 A.D.3d 334, 335, 825 N.Y.S.2d 38 [1st Dept., 2006]). “Causes of action for which a notice of claim is required, that are not delineated in the plaintiff’s original notice of claim, may not be interposed because [t]he addition of such causes of action which were not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of the plaintiffs’ claims” (Id.).

The Complaint and Bill of Particulars adds new theories of liability premised on the dangerous/defective condition of the handrails and access doors, and NYCHA’s failure to warn of these conditions and provide adequate lighting. NYCHA was not given timely notice of these additional claims. At the 50-h hearing, NYCHA did not question plaintiff as to the alleged dangerous/defective conditions of the handrails, access doors, failure to warn and failure to provide adequate lighting. Plaintiff had ample time to put NYCHA on timely notice by timely amending the Notice of Claim prior to the one year and ninety day statute of limitations expiring, or by moving for leave to serve a late amended notice of claim; plaintiff did neither.

“It is well settled that in a tort action, where the complaint alleges a statutory violation, the pleader is required to specify each statute, law, rule and regulation claimed to have been violated” (Alvarado v. N.Y. City Hous. Auth., 302 A.D.2d 264, 265, 756 N.Y.S.2d 6, 7 [1st Dept., 2003]).

Neither the Complaint nor the Bill of Particulars particularizes each statute, law, rule and regulation claimed to have been violated by NYCHA. Particularization of these statutes, laws, rules and regulations is required.

Pursuant to CPLR § 3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court’s discretion to determine whether the materials sought are “material and necessary” as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (see Roman Catholic Church of the Good Shepard v. Tempco Systems, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [1st Dept., 1994]; 148 Magnolia, LLC v. Merrimack Mutual Fire Insurance Company, 62 A.D. 2d 486, 878 N.Y.S. 2d 727 [1st Dept., 2009]). “The words ‘material and necessary’ as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (Kapon v. Koch, 23 N.Y.3d 32, 38, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014]).

Plaintiff placed his physical and mental condition at issue (see Plaintiff’s Bill of Particulars, PP. 13-14, annexed to Moving Papers as Exhibit G). NYCHA is entitled to the discovery sought in their Demand For Bill of Particulars.

The portion of the motion which seeks to compel plaintiff to serve an Amended Complaint and Amended Bill of Particulars is denied as moot. The causes of action not pled in the Complaint and the Bill of Particulars and that are not claimed in the Notice of Claim are hereby severed and dismissed.

Accordingly, it is ORDERED, that the defendant's motion to dismiss certain theories of liability, compelling plaintiff to particularize the statutes allegedly violated by NYCHA, and compelling plaintiff to provide demanded discovery or be precluded is granted in its entirety, and it is further,

ORDERED, that the portion of the motion seeking to compel plaintiff to serve an Amended Complaint and Amended Bill of Particulars is denied, and it is further,

ORDERED, that the claims asserted in the Complaint and the Bill of Particulars that defendant NYCHA (a) failed to repair interior staircases, handrails, steps, stairs and access doors; (b) left handrails and access doors in a dangerous/defective condition; (c) failed to warn about the dangerous and defective condition of interior staircases, handrails, steps and stairs and access doors; (d) allowed handrails and access doors to remain in a dangerous/defective condition; and (e) failed to properly maintain control, inspect, supervise and manage handrails and access doors are hereby severed and dismissed, and it is further,

ORDERED, that within Fifteen (15) days from the date of service of a copy of this Order with Notice of Entry, plaintiff fully and completely respond to defendant's Supplemental Discovery Demand dated February 20, 2014, failure to comply with the Order shall result in plaintiff being precluded from presenting evidence at the time of trial as to the discovery sought in the Supplemental Discovery Demand, and it is further,

ORDERED, that the Clerk of the Court enter judgment accordingly, and it is further,

ORDERED, that the parties appear for a Conference on June 10, 2015 in IAS Part 13 located at 71 Thomas Street, Room 210, New York, NY.. At 9:30AM. .

ENTER: **MANUEL J. MENDEZ**
J.S.C.

Dated: April 20, 2015



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE