SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** **PART** **IAS MOTION 5**

Justice

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MARY PETRAROLI and FRANK PETRAROLI,
Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, HIGHLINE PARK, LLC and THE FRIENDS OF THE HIGHLINE,
Defendants.

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INDEX NO. 160679/2016

MOTION SEQ. NO. 003; 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91

were read on this motion to/for **AMEND CAPTION/PLEADINGS**.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112

were read on this motion to/for **DISMISSAL**.

Plaintiffs move the court by order to show cause seeking leave to serve an Amended Notice of Claim, Amended Complaint, and Amended Verified Bill of Particulars pursuant to GML§ 50-e and CPLR § 3025(b) to reflect the correct location of plaintiff's accident.

The City of New York, The New York City Department of Transportation, and The Friends of Highline, (collectively "City") oppose plaintiffs' application for leave to amend and move the court seeking a dismissal of the complaint pursuant to CPLR § 3211 (a)(7) for failure to comply with GML § 50-e, GML § 50-i, and CPLR § 3013.[1]

Plaintiffs commenced this personal injury action alleging that on October 14, 2015[2] Mary Petraroli tripped and fell on wooden bleacher/benches located on the Highline at West 30th Street, New York, New York. Now, plaintiffs seek leave to amend the Notice of Claim, Complaint, and Verified Bill of Particulars to reflect Highline at West 17th Street as the location of the accident. At plaintiffs' 50-h hearing, Mary Petraroli testified that on the date of the accident, she was a chaperone for a school trip and after the conclusion of a guided tour, took a break to eat lunch on the wooden bleacher/benches facing the "glass picture window" overlooking the avenue. Based on the foregoing, plaintiffs assert that the City will not be prejudiced by the proposed amendment arguing that a photograph of the exact location of the accident was provided with the Notice of Claim; that there is

[1] The City in opposition sought to oppose plaintiffs' order to show and cross-move for dismissal, however as the City's papers were noticed only as opposition and not as a cross-motion, the City subsequently moved for dismissal under Motion Sequence 004 which will be considered and decided herein.

[2] The initial Notice of Claim asserted that the accident took place on October 7, 2015. However, pursuant to the November 26, 2016 decision and order of the Hon. J. d'Auguste, plaintiff was permitted to serve an amended Notice of Claim indicating that the accident took place on October 14, 2015.

only one area at the Highline matching the description indicated in the Notice of Claim; that a photograph, identical to the one provided by plaintiffs, is shown on the Highline's website which describes the location as the "10th Avenue Square & Overlook at 17th Street;" and, finally, that there is no picture window overlooking West 30th Street (the location noticed in the original Notice of Claim) as photographs produced of the Highline at West 30th Street do not depict bleachers/benches facing a picture window. (A photograph was annexed to the Notice of Claim depicting the wooden bleachers/benches in front of a picture window. Plaintiff contends that only one such set of bleachers/benches in front of a window exists at the Highline).

Plaintiffs further argue that the City cannot assert an inability to investigate the circumstances of the fall as the incident was reported to the Highline staff when the fall occurred and thus, the City had the correct information as to the exact location of the accident in its possession. To this point, plaintiffs argue that on December 17, 2018, the City produced a "Friends of the Highline Incident Report" which documented the location of the trip and fall as the "10th Avenue Overlook." (See *Exhibit M to Plaintiff's Order to Show Cause-NYSCEF Doc. 58*). Additionally, on February 1, 2019, in response to the parties' December 18, 2018 so-ordered stipulation, the City produced additional records, including a second copy of The Friends of Highline Incident report previously provided; plaintiff's Prehospital Care Report Summary; New York City Department of Parks and Recreation records for the Highline for two years prior to and including the date of plaintiff's accident; a copy of the contract between New York City Department of Parks and Recreation and The Friends of the Highline; The Friends of the Highline's maintenance records for two years prior to and including the date of plaintiff's alleged accident; and The Friends of the Highline's design records for bleachers and related equipment. (See *Exhibit N to Plaintiff's Order to Show Cause-NYSCEF Doc. 59*). Plaintiffs argue that these documents confirm that the accident location was in fact at the 10th Avenue Overlook at the Highline at 17th Street. Additionally, the contract provided states that the Highline has a duty to report hazardous or defective conditions to the appropriate City agency and that pursuant to a May 14, 2014 inspection report, there was a "trip hazard due to cribbing adj sitting area overlooking 10 av ad 17 st." Plaintiffs assert that as these documents were in the City's possession, no surprise or prejudice can be asserted on the part of the City and that, with little effort, the City could have identified the correct location.

The City, in opposition and in support of its motion to dismiss, asserts that plaintiffs' proposed amendment is substantive in nature and thus, impermissible as it is well beyond the statute of limitations. The City further argues that it has been prejudiced in that it has been conducting investigations of an erroneous location based on misinformation provided by plaintiffs. To this point, the City argues that, in 2016, when plaintiffs initially sought leave to amend the Notice of Claim to reflect the correct accident date, they failed to correct the accident location and continued to allege that the location of the accident was the Highline at West 30th Street. The City further argues that plaintiffs then filed complaints in both the action against the City, as well as, in the action against The Friends of Highline alleging that the accident took place near West 30th Street and continued to assert same for two years post-accident.[3] Despite plaintiffs' claims that settlement negotiations were ongoing, the City contends that plaintiffs' belated request to change the accident location to a site of a nearly thirteen-block distance constitutes a substantive change which cannot be made as the statute of limitations has expired. The City avers that as a result of plaintiffs failure to seek leave to amend until June 2019, despite receiving the correct information in December 2018, it has suffered prejudice by producing unnecessary discovery for the wrong location and further, that

[3] The two actions were consolidated by order dated February 16, 2018.

inasmuch as the Notice of Claim fails to provide the correct location of the accident, it is not in compliance with GML§ 50-e and thus, this action must be dismissed.

Pursuant to *General Municipal Law § 50-e(6),* "[a]t 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."

Also, under *CPLR 3025 (b),* a party may amend a pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Absent prejudice or unfair surprise leave to amend should be granted. (*Mallory Factor, Inc. v Schwartz*, 146 AD2d 465 [1st Dept 1989] citing, *Great E. Mall, Inc. v Condon*, 36 NY2d 544 [1975]); *Daigle v Texas Intl. Co.*, 109 AD2d 648 [1st Dept 1985].)

Pursuant to CPLR § 3013, statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense. Nevertheless, when considering a defendant's motion to dismiss for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83 [1994].) Normally, a court should not be concerned with the ultimate merits of the case. (*Anguita v Koch*, 179 AD2d 454 [1st Dept 1992].) However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence. (*Simkin v Blank*, 19 NY3d 46 [2012].)

Here, as the amendment sought is a change of the cross street closest to the location of the incident and not a change of the alleged defect or theory of liability of the accident, this court disagrees that the amendment sought is substantive in nature. While each side contends that the other lacked diligence in uncovering the accurate location, to wit: the actual cross street of the alleged accident site, it is clear that neither plaintiffs' counsel nor counsel for the defendants expended the minimum of effort to determine that the photograph annexed to the Notice of Claim, which depicted the location of the accident, could not have been West 30th Street.

Unquestionably, the plaintiffs made the initial error. However, the exact location of the bleachers/benches in front of the picture window at the Highline was information in the City's possession and the City was continuously in a position to properly investigate the incident. So, while plaintiffs failed to verify or confirm this detail, leave to amend would not prejudice or surprise the City as the description of the location and of the defective condition were provided at the outset of the action. Specifically, plaintiffs' Notice of Claim, Complaint, and Bill of Particulars provided a detailed description of the accident location describing it as "wooden bleacher/benches" and included a photograph of same. Moreover, the testimony at the 50-h hearing was consistent with the descriptions provided and further detailed the wooden bleacher/benches as facing a "glass picture window" overlooking the avenue. Thus, between the pleadings, the transcript of the 50-h hearing, and the photographs of the accident location annexed to the Notice of Claim and the Bill of Particulars, the City could have discovered the existence of the error of the cross street/address

closest to the section of the Highline where plaintiff fell and investigated the correct location. (See *Gazzaley v City of NY*, 2012 NY Slip Op 30402[U] [Sup Ct, NY County 2012]), citing *Kaminsky v City of NY*, 238 AD2d 380 [2d Dept 1997] and *Singer v City of NY*, 226 AD2d 325 [1st Dept 1996]). Furthermore, the employees of the Highline recorded the event and generated a report immediately after its occurrence. This incident report detailed the correct cross street of the accident location. This report was in the City's possession and was only provided to plaintiffs in December 2018 during discovery. It is well-settled that prejudice is not presumed from an error in a Notice of Claim and the municipality must establish same. Insofar as the City has failed to establish that it has been or will be prejudiced if leave to amend is granted or that plaintiffs' delay in seeking leave to amend was in bad faith, plaintiffs have established entitlement to the relief sought. (*Gazzaley v City of NY*, supra, citing *Goodwin v NY City Hous. Auth.*, 42 AD3d 63 [1st Dept 2007] and *Williams v City of New York*, 229 AD2d 114, 117 [1st Dept 1997]).

Finally, the court finds that the pleadings were plead with the requisite particularity, putting the City on notice of the claims asserted such that the City could conduct an investigation. As such, the City's motion to dismiss is denied. Accordingly, it is hereby

ORDERED, that plaintiffs' motion to amend the Notice of Claim, Complaint, and Verified Bill of Particulars (Mot. Seq. 003) is granted, and the Amended Notice of claim, Amended Complaint, and Amended Bill of Particulars annexed to the instant order to show cause are deemed served upon plaintiffs' service of a copy of this order with notice of entry; and it is further

ORDERED, that the City's motion to dismiss (Mot. Seq. 004) is denied; and it is further

ORDERED that the City shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a compliance conference on January 7, 2019, at 2 P.M., Part DCM, Room106, 80 Centre Street, New York, New York.

November 6, 2019

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[x]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE