

Santiago v City of New York
2020 NY Slip Op 31250(U)
May 6, 2020
Supreme Court, New York County
Docket Number: 157954/2018
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 62

Justice

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INDEX NO. 157954/2018

CODY SANTIAGO, SCHIFFON WISE

MOTION DATE 03/12/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motions are decided as follows:

Defendant, the City of New York moves to dismiss plaintiff, Cody Santiago’s state law claims based upon his failure to accurately describe the date of the alleged incident in his Notice of Claim and seeks to dismiss plaintiff, Schiffon Wise’s state law claims based upon her alleged failure to file a timely Notice of Claim and her failure to attend a GML 50-h hearing. Plaintiffs oppose and cross-move to amend their summons and complaint to correct the date of incident in the summons and complaint to reflect the date of incident alleged in plaintiff, Cody Santiago’s Notice of Claim.

On December 27, 2017, plaintiff, Santiago, filed a Notice of Claim alleging an October 30, 2017 incident. Thereafter, Santiago attended a GML 50-h hearing on July 19, 2018 and filed the instant action on August 27, 2018 alleging an October 20, 2017 incident. Based upon same, the City seeks dismissal of this action, see, GML § 50-e(2), which requires that an accurate date be included in said Notice of Claim.

Complaints are subject to dismissal when the City receives an inaccurate "indication as to when, where, or how the claim... arose so that it had... an opportunity to investigate." See *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 358 (1981) (dismissing causes of action for which the notice of claim was deficient); *Krug v. New York*, 147 A. D. 2d 449 (2d Dept. 1989) (finding dismissal warranted where the City was unable to timely investigate claims because the notice of claim provided incorrect location of incident); *Konsker v. City of New York*, 568 N.Y.S2d 620 (1st Dept. 1991) (denying Plaintiffs application to amend notice of claim to correct the location of incident where City was misled by the erroneous notice to conduct an investigation at the wrong location); *Parker-Cherry v. New York Hous. Auth.*, 62 A.D.2d 845 (2d Dept. 2009) (finding dismissal warranted where plaintiffs complaint did not clarify the discrepancy in the location and manner of plaintiff's injury between the notice of claim and 50-h testimony).

Here, the Notice of Claim correctly identifies the date of the alleged incident as it matches the alleged date discussed in Santiago's 50-h hearing and his Bill of Particulars. Further, the City conducted its investigation based upon the correct date of occurrence and cannot now claim prejudice based upon same.

It is well settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025(b); *Wirhouski v. Armoured Car & Courier Serv.*, 221 AD2d 523 [2d Dept 1995]); and the proposed amendment is not "palpably insufficient" or "patently devoid of merit" (*Sheila Props., Inc. v. A Real Good Plumber, Inc.*, 59 AD3d 424 [2d Dept 2009]). As defendant's opposition concedes that there is no prejudice, the portion of plaintiff's motion seeking to amend the complaint to identify the correct alleged incident date of October 30, 2018 must be granted.

Defendant further moves to dismiss plaintiff Wise's claims in their entirety based on her failure to submit a timely Notice of Claim and her failure to attend a GML 50-h hearing (which the City did not demand based upon its non-receipt of said Notice of Claim). The timely filing of a notice of claim is a statutory condition precedent to personal injury lawsuits against a municipality, See GML § 50-e; see also *Campbell v. City of New York*, 4 N.Y.3d 200 (2005) (affirming that while one year and ninety day time limitation in GML § 50-i is a statute of limitations, GML § 50-e's notice of claim requirement is a still a condition precedent to filing a claim against the City); *Brown v. City of New York*, 95 N.Y.2d 389, 392 (2000). GML § 50-e(a) states:

In any case founded upon tort where a Notice of Claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the Notice of Claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises...

"Failure to comply with provisions requiring notice and presentment of claims prior to the commencement of litigation ordinarily requires dismissal. " Defendant alleges based upon defendant's counsel's search of the City's Notice of Claim database and confirmed same with a Custodian of Records at the Comptroller's office. Defendant first raised this issue in a letter to plaintiff's counsel, dated January 23, 2019, informing same that the City did not receive a copy of plaintiff Wise's Notice of Claim and requesting that plaintiff stipulate to dismissal of said claims. Plaintiff's counsel responded in a January 29, 2019 letter which included a copy of Wise's facially timely Notice of Claim and a return receipt indicating that said Notice of Claim was received by the Comptroller's office on December 27, 2017. Plaintiff's cross-motion further includes an affidavit from plaintiff's Counsel's office manager, Bonny Ortiz, establishing counsel's office procedure for mailing Notices of Claim and confirming that said procedure was followed in this

case. As such, plaintiff has established the timely mailing of the subject Notice of Claim. However, defendant is still entitled to compel plaintiff Wise to attend a GML 50-h hearing.

Plaintiff's cross-motion further seeks to compel discovery from defendant. In a so-ordered stipulation, dated December 19, 2019, said discovery issues were reserved for a compliance conference to be held after the instant motion was decided.

Defendant's motion is granted solely to the extent that defendant is directed to notice plaintiff, Wise to appear for a 50-h hearing, to be held concurrently with plaintiff's deposition on a date to be agreed upon at the next scheduled compliance conference. Defendant's motion is denied in all other respects.

ORDERED that the plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service.

5/6/2020
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

