

Echevarria v City of New York
2022 NY Slip Op 31770(U)
June 3, 2022
Supreme Court, New York County
Docket Number: Index No. 450480/2020
Judge: J. Machelles Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. J. MACHELLE SWEETING</u></p> <p align="right"><i>Justice</i></p> <p>-----X</p> <p>ERMELINDO ECHEVARRIA,</p> <p align="center">Plaintiff,</p>	<p>PART <u>62</u></p> <p>MOTION SEQ. NO. <u>004 005</u></p> <p>INDEX NO. <u>450480/2020</u></p>
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- v -

CITY OF NEW YORK, NEW YORK CITY HOUSING
AUTHORITY

Defendants.

**DECISION + ORDER ON MOTION
#004 AND INTERIM ORDER ON
MOTION #005**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 99-120
were read on this motion to/for LEAVE TO FILE

The following e-filed documents, listed by NYSCEF document number (Motion 005) 77-98, 121-127
were read on this motion to/for SUMMARY JUDGMENT

In the underlying action, plaintiff claims to have sustained injuries after a trip and fall on
December 31, 2018 in New York, New York.

Pending before the court are two motions:

The first is Motion #004, wherein plaintiff seeks an order: (1) pursuant to General
Municipal Law (“GML”) 50-e(6), permitting plaintiff to serve an amended Notice of Claim
“NOC”) to reflect the proper address of the accident location; and (2) conforming the pleadings to
the proof and evidentiary material in this matter; and

The second is Motion #005, wherein defendants THE CITY OF NEW YORK and THE
NEW YORK CITY HOUSING AUTHORITY (collectively, the “City”) seek an order, pursuant
to CPLR 3212, granting summary judgment in favor of the City. By order of the undersigned,
dated April 26, 2022, this motion was stayed pending a decision on Motion #004.

Relevant Facts and Procedural History

On or about February 11, 2019, plaintiff served a NOC (NYSCEF Document #102) upon defendants the City of New York and the New York City Housing Authority in which plaintiff identified the location of his incident as “the sidewalk at [...] the rear entrance of the senior center facility located at 189 Allen Street, New York, New York 10002.” Hereinafter, this location will be referred to as “Location 1.”

On or about July 18, 2019, plaintiff filed a Summons & Complaint (NYSCEF Document #103) in the Supreme Court in Bronx County. The first and second causes of action in the Verified Complaint, identified the accident location as 189 Allen Street, New York, New York (Location 1), but the Summons identified two different locations: one was Location 1 and the other was 409 East 146th Street, Bronx, New York 104555 (hereinafter referred to as “Location 2”).

On August 29, 2019, plaintiff’s 50-h hearing was conducted (transcript at NYSCEF Document #93). At this hearing, plaintiff first testified that his accident happened on Eldridge Street, between Houston and Stanton (hereinafter referred to as “Location 3”), but then later testified that his accident “might have happened” on Eldridge Street, between Rivington and Stanton (hereinafter referred to as “Location 4”).

On October 2, 2019, defendant New York City Housing Authority moved to change the venue of this action from Bronx County to New York County, and on November 21, 2019, the Bronx County Supreme Court issued an order granting the motion (NYSCEF Document # 37).

On or about March 20, 2020, plaintiff served a Bill of Particulars wherein Location 1 was listed as the accident location (NYSCEF Document #44).

On or about July 26, 2021, plaintiff moved to amend his notice of claim, to change the location of the alleged incident from Location 1 to another location, namely 217 Eldridge Street in the City, County, and State of New York (hereinafter referred to as “Location 5”). This motion was unopposed, and on September 15, 2021, the undersigned issued an order granting the motion (NYSCEF Document #69).

On August 23, 2021, plaintiff testified at an examination before trial (“EBT”) (transcript at NYSCEF Document #114). At his EBT, plaintiff testified that his accident occurred at 217 Eldridge Street (Location 5). Relevant portions of the testimony include the following:

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Q. So, we're going to talk about the date of the accident now, what was the date of the accident?

A. December 31, 2018.

Q. Approximately what time did your accident occur?

A. Around 11:00 a.m.

Q. Where did it occur?

A. 217 Eldridge Street.

Q. Did it occur on the sidewalk, on the roadway, or somewhere else?

A. In the sidewalk.

Motion #004 – Plaintiff’s Motion to Amend

In plaintiff’s instant motion, which was filed on December 17, 2021, plaintiff seeks to amend the Notice of Claim to reflect yet another address as the accident location. In the Notice of Motion (NYSCEF Document #99), plaintiff’s counsel states that the proper address of the accident is “in front of or near the NYCHA LES 1 Playground on Eldridge Street between 713 Stanton Street, New York, New York and 216 Eldridge Street, New York, New York” This location is hereinafter referred to as “Location 6.”

Notwithstanding the above application in the Attorney Affirmation in Support, plaintiff’s counsel included *four* different places as the locations where the accident took place. It referenced Location 3 (Eldridge Street between Houston and Stanton), Location 5 (217 Eldridge Street), and

Location 6 (in front of or near the NYCHA LES1 Playground on Eldridge Street between 713 Stanton Street, New York, New York and 216 Eldridge Street, New York, New York). In addition, the Attorney Affirmation also added yet an additional location, namely “in front of or near the NYCHA LES1 Playground on Eldridge Street between 712 Stanton Street, New York, New York and 216 Eldridge Street, New York, New York” (hereinafter referred to as “Location 7”).

Furthermore, in the Attorney Affirmation in Reply (NYSCEF Document #116), plaintiff’s counsel included *three* different locations where the accident took place. It referenced Location 5 (217 Eldridge Street), but also added on two new and additional locations, namely: (1) “the sidewalk in front of or near the NYCHA LES1 Playground on Eldridge Street between 713 Stanton Street, New York, New York and 216 Eldridge Street, New York, New York” (hereinafter referred to as “Location 8”); and (2) “the sidewalk in front of or near the NYCHA LES1 Playground on Eldridge Street between 712 Stanton Street, New York, New York and 216 Eldridge Street, New York, New York” (hereinafter referred to as “Location 9”).

Conclusions of Law

Plaintiff’s motion to amend the NOC for the second time is DENIED.

First, even if this court were to grant the requested relief, it is unclear on this record what the new accident location would be. As noted above, at least nine different locations are mentioned in the pleadings, which include the original notice of claim, the summons and complaint, the bill of particulars, plaintiff’s testimony and the attorney affirmations in support and in reply. It is unclear which of these locations plaintiff is now alleging is the proper accident location.

Second, of the various locations listed in plaintiff’s motion papers, three of the locations are overly vague or broad: For instance, Locations 6 and 7 refer only to “in front of or near the

NYCHA LES1 Playground,” without providing any further details and Location 3 merely refers to Eldridge Street between Houston and Stanton without clarifying where the alleged defect is on the block.

Third, plaintiff’s instant motion to change the accident location in the NOC was filed on December 17, 2021, almost 3 years after the alleged accident occurred (on December 31, 2018). As the City correctly argues, for plaintiff to once again amend the location of the incident would be highly prejudicial to the City, as the City cannot properly defend this suit should any further amendments be permitted by this court.

The First Department has made clear that when plaintiff fails to properly identify the accident location in a NOC, the court should not dismiss what is otherwise a viable cause of action if plaintiff can meet his burden in showing that there has been no prejudice to defendants. *See, e.g. Santopietro v City of New York*, 50 AD3d 390 (1st Dept 2008) (“While the failure to proffer a reasonable excuse for delay in serving a notice of claim is not alone fatal to a motion for leave to file a late notice, *plaintiffs also failed to demonstrate that the City had timely actual notice of the claim and suffered no prejudice by reason of the delay*”); *Alexander v City of New York*, 2 AD3d 332 (1st Dept 2003) (“Petitioner failed to demonstrate a reasonable excuse for the delay in filing a timely notice of claim, failed to establish that respondents had notice of the facts constituting his claim within 90 days or a reasonable time thereafter, *and failed to show that respondents will not be substantially prejudiced in their ability to investigate this matter and defend the claim on the merits*”).

Here, other than generally asserting that “this error does not prejudice the defendant in anyway as they are the owner of the property at 217 Eldridge Street and had timely and sufficient notice of such claim,” plaintiff makes no arguments regarding how the City is not prejudiced by

the lack of proper notice. In fact, the City argues that based on the new location that plaintiff asserted (i.e. Location 5), the City searched for relevant City records, determined that the property did not belong to either defendant, and moved for summary judgment and dismissal.


Finally, this court notes that there have been what the City describes as “multiple rounds of inconsistent pleadings.” Specifically, there have been at least two prior motions in this case that are the direct result of plaintiff having changed the alleged accident location. The New York City Housing Authority moved on October 2, 2019, to change the venue of this action from Bronx County to New York County, and plaintiff filed a motion to amend the NOC on July 26, 2021, to change the location of the alleged incident from Location 1 to Location 5.

For the reasons stated above, it is hereby:

ORDERED that plaintiff’s motion to serve and amended Notice of Claim (Motion Sequence #004) is DENIED; and it is further

ORDERED that the stay on the City’s motion for summary judgment (Motion Sequence #005) is lifted, effective immediately and a briefing schedule set as follows:

No later than 30 days from the date of this decision and order, plaintiff shall serve and file a Response to the motion and no later than 2 weeks thereafter, the City defendants shall serve and file a Reply. Changes to the briefing schedule require the written consent of all counsel and in the absence of consent, the approval of the court.

<p><u>6/3/2022</u> DATE</p>			 <hr/> <p>J. MACHELLE SWETING, J.S.C.</p>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	