Burnes v City of New York
2022 NY Slip Op 31809(U)
June 6, 2022
Supreme Court, New York County
Docket Number: Index No. 161477/2021
Judge: J. Machelle Sweeting
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v

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

---X

LEON BURNES,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Defendants.

---X

INDEX NO. 161477/2021

MOTION DATE 01/17/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17

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

Pending before the court is a motion in which plaintiff seeks an order permitting plaintiff to: (1) amend and supplement his previously-served Notice of Claim, *nunc pro tunc*, pursuant to General Municipal Law §50(e)(6), to correct a good faith error and omission; and (2) supplement the notice of claim to clarify the condition which caused his accident. Defendants the City of New York and the New York City Department of Transportation (collectively, the "City") oppose.

Arguments Made by the Parties

Plaintiff's counsel argues that the original Notice of Claim (the "Original NOC") served upon the City was prepared by the plaintiff *pro se*, and that the proposed supplemental Notice of Claim (the "Proposed NOC") is intended to clarify the "exact defective condition which caused the accident." Plaintiff's counsel also argues that the Original NOC contained an error in that it

alleged that plaintiff had rented the electric scooter he was riding from The City of New York, which is not the case, and that the Proposed NOC removes the erroneous language.

Plaintiff's counsel further clarifies the theory of liability as follows (see Affirmation of Counsel, NYSCEF Document # 3):

> 3. […] At some point prior to 2009, the CITY had widened the west sidewalk of Broadway on the south side of Spring Street, such that there was a small section of extended sidewalk, or a traffic island, within the intersection, north of the crosswalk on Broadway, on the south side of Spring Street, in line with the parking and bus lane on the north side of Spring Street. The CITY had initially placed reflective delineators/bollards upon the middle of the small traffic island, (Exhibit C) but those delineators/bollards had been moved to a different location, leaving the small traffic island poorly marked and less visible (Exhibit D). Other similar traffic islands nearby also have three delineators where this island has only two (Exhibit E). It is Claimant's theory of liability that the CITY failed to follow its own design and created the defective condition by either placing two, rather than three, reflective delineators at this island, and by repositioning the two bollards that had been originally placed from their positions atop the island and close together near the center of the island (Exhibit C), to new positions further apart and on the pavement in front of the island (Exhibit D), making the island less visible to traffic coming down Broadway. The small traffic island is otherwise unmarked, which would be a deviation from the requirements of the Manual of Uniform Traffic Control Devices (MUTCD) as applicable to the City of New York.

The City does not oppose plaintiff's request to amend and supplement the Original NOC insofar as removing the language alleging that plaintiff had rented the electric scooter he was riding from The City of New York.

However, the City opposes plaintiff's request to "clarify' the exact condition which caused the accident" on the basis that plaintiff is attempting to assert a new theory of liability that otherwise would be time-barred.

The Original NOC and Proposed NOC set forth, in relevant part, as follows:

Original NOC	Proposed NOC
6. PLACE OF OCCURRENCE: The southwest corner of the intersection of Broadway and Spring Street, in the County, City and State of New York, specifically the extra curb/bumper which protects the enlarged sidewalk/bus stop waiting area on Broadway at the southwest corner at the intersection of Spring Street as depicted in the attached photograph.	6. PLACE OF OCCURRENCE: The southwest corner of the intersection of Broadway and Spring Street, in the County, City and State of New York, specifically the ***traffic island***/extra curb/bumper which protects the enlarged sidewalk/bus stop waiting area on Broadway at the southwest corner at the intersection of Spring Street as depicted in the attached photograph. [emphasis added]
7. MANNER CLA1M AROSE: Due to the negligent and neglectful ownership, operation, maintenance, management, design, construction, installation and control of the *street and intersection located in the vicinity of the place of occurrence detailed in paragraph 6*, by the CITY OF NEW YORK and/or NEW YORK CITY DEPARTMENT OF TRANSPORTATION, claimant LEON BURNES was caused to be violently projected to the ground, striking his face and body, causing LEON BURNES to sustain severe and grievous physical, psychological and economic damages, including knocked out teeth, lacerations to face requiring stitches, multiple abrasions to the face and body, additional scrapes, bruises and lacerations, multiple fractured fingers and both hands, requiring multiple surgeries and the insertion/removal of pins severely strained, sprained and bruised back, shoulders, neck, and head, mental and psychological impairment. At the time of the occurrence, LEON BURNES was driving an electric scooter *rented from the CITY OF NEW YORK and/or the NEW YORK CITY DEPARTMENT OF TRANSPORTATION* and was lawfully traveling southbound on Broadway in the City, County and State of New York. [emphasis added]	7. MANNER CLA1M AROSE: Due to the negligent and neglectful ownership, operation, maintenance, management, design, construction, installation and control of the ***street and intersection located in the vicinity of the place of occurrence detailed in paragraph 6, including specifically the design, installation and maintenance of the delineators/bollards placed at said traffic island/extra curb/bumper and the marking of said traffic island/extra curb bumper*** by the CITY OF NEW YORK and/or NEW YORK CITY DEPARTMENT OF TRANSPORTATION, claimant LEON BURNES was caused to be violently projected to the ground, striking his face and body, causing LEON BURNES to sustain severe and grievous physical, psychological and economic damages, including knocked out teeth, lacerations to face requiring stitches, multiple abrasions to the face and body, additional scrapes, bruises and lacerations, multiple fractured fingers and both hands, requiring multiple surgeries and the insertion/removal of pins, severely strained, sprained and bruised back, shoulders, neck, and head, mental and psychological impairment. At the time of the occurrence, LEON BURNES was driving an electric scooter and was lawfully traveling southbound on Broadway in the City, County and State of New York. [emphasis added]

Specifically, the City argues that the Original NOC alleges only that the City was negligent insofar as the "street and intersection" located at the southwest corner of the intersection of Broadway and Spring Street. The City argues that because of this language, any investigation initiated based on the Original NOC would have inspected the accident location only for potential defects in the *roadway*, and not for any delineators or bollards. The City argues that the proposed addition of "delineators/bollards" is a theory of liability that is wholly different than the negligence in relation to the "street and intersection" that was described in the Original NOC.

In Reply, plaintiff's counsel argues that the proposed amended notice of claim does not change the accident location or allege any new theory of liability, as it was always the claim that because of the defective condition of the extra curb/bumper, claimant was caused to be violently precipitated to the ground. Plaintiff's counsel also argues that at plaintiff's 50-h hearing, plaintiff testified that he had struck the extra curb/bumper/island because it was improperly marked, and that the placement of the bollards were not in compliance with the City's plan and design for them or with the City's own design standards.

Standard Under General Municipal Law § 50–e(6)

General Municipal Law § 50–e(6) provides as follows:

> Mistake, omission, irregularity or defect. At 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.

The statute "authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability" (Van Buren v New York City Tr. Auth., 95 AD3d 604 [Sup. Ct., App. Div. 1st Dept 2012]).

"Traffic Island"

Here, this court finds, after reviewing the record, including the transcript from plaintiff's 50-h hearing, (NYSCEF Document #9), that the thrust of the plaintiff's allegation has always been that while riding his electric scooter, he encountered a structure that caused him to fall. In the Original NOC, plaintiff referred to this structure as "the extra curb/bumper which protects the enlarged sidewalk/bus stop waiting area." However, during his 50-h hearing, both plaintiff and all counsel repeatedly referred to the structure as an "island."

Based on the record, by adding the words "traffic island," plaintiff is not seeking to change the location of the accident, but merely seeking to conform the NOC to the language that both plaintiff and counsel had been using to describe the structure that plaintiff alleges caused him to fall. Therefore, this court finds that plaintiff's request to add the words "traffic island" constitutes a nonprejudicial, technical change in language only, and the request to amend on this ground is granted.

"Delineators" or "Bollards"

With respect to plaintiff's request to add in language about delineators or bollards, it is undisputed that the Original NOC makes no mention of either of these.

With respect to counsel's argument that the City was given notice about delineators/bollards via plaintiff's testimony at the 50-h hearing, caselaw from the First

Department makes clear that testimony at the 50-h hearing is only permitted to clarify the location of an accident or the nature of injuries, not to amend the theory of liability set forth in the notice of claim. *See* Scott v City of New York, 40 AD3d 408 (1st Dept 2007) ("Nor may plaintiff rely on his testimony at his General Municipal Law § 50–h hearing to rectify any deficiencies in the notice. While such testimony has been permitted to clarify the location of an accident or the nature of injuries, information supplied at the hearing may not be used to amend the theory of liability set forth in the notice of claim where, as here, amendment would change the nature of the claim"); Lewis v New York City Hous. Auth., 135 AD3d 444, 445 (1st Dept 2016) ("Contrary to plaintiff's contention, he may not rely on his testimony at his General Municipal Law § 50–h hearing to rectify any deficiencies in the notice of claim, because he never testified that there was an issue with the step itself and traditionally such testimony has only been 'permitted to clarify the location of an accident or the nature of injuries, it may not be used to amend the theory of liability set forth in the notice of claim where, as here, amendment would change the nature of the claim'").

The court finds that while plaintiff did testify at his 50-h hearing that he collided with an "island," and noted that the bollards on a similar island further down the street were different, there is no indication, on this record, that plaintiff was alleging that the bollards or their placement actually contributed to his accident. The court therefore finds that plaintiff's proposed language with respect to delineators/bollards constitutes a substantive change in the theory of liability, which is disallowed. *See also* (Corwin v City of New York, 141 AD3d 484 [Sup. Ct. App. Div 1st Dept 2016]) ("With respect to the defect that caused petitioner to fall from the bicycle, we agree with the City that the proposed amendments substantively change the initial theory of liability from one that focuses on the camouflaged wheel stop to one that more broadly alleges that the City failed to design the station in a manner that provided adequate clearance between the station and vehicular

traffic"); Perez v City of New York, 193 AD3d 432 (Sup. Ct. App. Div. 1st Dept 2021) ("Plaintiff served a timely notice of claim on the City which simply alleged that he 'was injured due to a pothole located at 155th Street between Broadway and Riverside Avenue in Manhattan,' but asserted no theory of liability […] Contrary to plaintiff's contention, the complaint alleges merely that the City negligently maintained the accident location; it does not allege that the City's employees committed an affirmative act of negligence that created the subject pothole."); Cambio v City of New York, 118 AD3d 577 (Sup. Ct. App. Div. 1st Dept 2014) ("Plaintiff, who is legally blind, alleged in his notice of claim that he fell at a street corner because of defects in the roadway that the City negligently failed to prevent from becoming a 'traplike condition.' In his complaint, however, plaintiff alleged that the City negligently failed to maintain the sidewalk, curb and roadway, negligently caused and permitted damage thereto, rendering the location dangerous, and failed to properly inspect and repair the location […] The City correctly argues that plaintiff raised a new theory of liability in the complaint and bill of particulars by alleging that the City caused and created the defect, since the notice of claim alleged negligent maintenance and did not alert the City that plaintiff would allege a theory of affirmative negligence, or negligent design").

Conclusion

For all the aforementioned reasons, plaintiff's motion is **GRANTED IN PART** and **DENIED IN PART** and it is hereby:

ORDERED that plaintiff's motion is **GRANTED** to the extent that:

(a) plaintiff may amend and supplement his previously served Notice of Claim, *nunc pro tunc*, to remove the language alleging that plaintiff had rented the electric scooter he was riding from The City of New York; and

(b) plaintiff may amend and supplement his previously served Notice of Claim, *nunc pro tunc*, by clarifying that the condition which allegedly caused the accident was the "traffic island"; and it is further

ORDERED that plaintiff's motion is **DENIED** to the extent that plaintiff may not amend or supplement his previously served Notice of Claim by adding any theory of liability with respect to delineators/bollards or their placement.

6/6/2022				J. MACHELLE SWEETING, J.S.C.		
DATE						
CHECK ONE:	[ ] CASE DISPOSED			[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[ ] DENIED		[X] GRANTED IN PART		[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER			[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN			[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE