

Freitas v City of New York

2023 NY Slip Op 32331(U)

July 11, 2023

Supreme Court, New York County

Docket Number: Index No. 452439/2016

Judge: Judy H. Kim

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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: HON. JUDY H. KIM PART 05RCP

Justice

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MARCOS FREITAS,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF EDUCATION, BIG CITY VOLLEYBALL
LEAGUE, LLC, BIG CITY VOLLEYBALL, INC.,

Defendants.

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INDEX NO. 452439/2016
MOTION DATE 02/07/2023
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109

were read on this motion to AMEND CAPTION/PLEADINGS.

Plaintiff Marcos Freitas commenced this action on April 13, 2016, seeking to recover for personal injuries allegedly sustained when he tripped and fell on a slippery floor of the gymnasium of the High School for Environmental Studies while playing in a private volleyball tournament. Plaintiff's complaint stated that this event occurred on August 20, 2015. Prior to commencing this action, plaintiff served a notice of claim on defendants the City of New York and New York City Department of Education on November 17, 2015, which also represented that this incident occurred on August 20, 2015.

On March 4, 2020, this Court (Hon. Dakota D. Ramseur) ordered that a related action plaintiff had commenced in New York State Supreme Court, Kings County against defendants Big City Volleyball League, LLC and Big City Volleyball, Inc. ("collectively, Big City Volleyball") be consolidated within the instant action (NYSCEF Doc. No. 49).

Plaintiff was deposed on March 29, 2021 and again on May 20, 2019. Plaintiff asserts that at the March 29, 2021 deposition, counsel for Big City Volleyball informed plaintiff that “[counsel] was in possession of information and/or documents indicating that the correct date of the accident was August 27, 2015” (NYSCEF Doc. No. 75 [Gratt Affirm. in Supp. at ¶6]). Nothing in the record indicates that plaintiff took any action in response to this information beyond waiting for Big City Volleyball to complete its document production. Thereafter, the City’s witness was deposed on October 18, 2021 and Big City Volleyball’s witness was deposed on December 30, 2021.

On or about February 17, 2022, Big City Volleyball produced the documentary discovery referenced at plaintiff’s deposition (NYSCEF Doc. No. 75 [Gratt Affirm. in Supp. at ¶9]). At some point after receiving these records, plaintiff confirmed that the date of the incident was, in fact, August 27, 2015 rather than August 20, 2015 (Id. at ¶10).

However, on August 29, 2022, plaintiff moved to restore this case to the Court’s calendar and extend plaintiff’s time to file the Note of Issue and, as part of plaintiff’s motion to restore, plaintiff’s counsel again affirmed that the date of the subject incident was August 20, 2015 (See NYSCEF Doc. No. 63 [Gratt Affirm. in Supp. at ¶3]). This motion was granted, without opposition, to the extent that plaintiff’s time to file the Note of Issue was extended to November 30, 2022 (NYSCEF Doc. No. 67).

On or about November 16, 2022, plaintiff served an Amended and Supplemental Verified Bill of Particulars upon defendants with the corrected date of the accident (NYSCEF Doc. No. 96). Thirteen days later (one day before the note of issue deadline), plaintiff filed the instant motion.

Plaintiff now moves to amend the date of the incident set forth in its notice of claim and complaint, on the grounds that this constitutes the correction of a technical defect that will not

prejudice defendants because Big City Volleyball provided these records indicating the accurate date of accident and all pleadings were served within the applicable statute of limitations.

Defendants the City of New York and New York City Department of Education (collectively, the “City”) oppose the motion, arguing that plaintiff’s motion should be denied because the Court is without discretion to amend the notice of claim, as plaintiff’s motion is beyond the statutory one year and ninety days after the date of incident, and therefore the proposed amendment of the complaint would be futile and without merit. The City also argues that it would be prejudiced if the proposed amendment is permitted because over the six years since this action was commenced “the parties engaged in extensive discovery while operating with an August 20, 2015 accident date” including a records search performed by the City (and exchanged on July 30, 2018) and party depositions (NYSCEF Doc. No. 102 [Harris Affirm. in Opp. at ¶12]). The City further argues that, “[p]laintiff’s failure to comply with the notice requirements of GML §50-e(2), deprived the City of the ability to investigate Plaintiff’s claims, especially because the nature of those claims arose from a transient condition” and that requiring the City to “essentially re-do discovery and look for documents that were not required to be included in the City’s initial document search in accordance with the CSO over seven years later is an undue burden upon, and unfairly prejudicial to, the City” (Id. at ¶¶24, 48).

Plaintiff does not submit reply papers.

DISCUSSION

General Municipal Law §50-e requires that “[i]n 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, a notice of claim stating, inter alia, the nature of the claim and the time and location at which it took place, shall be served upon the public corporation within

ninety days of the accrual of the claim (See GML §50-e[1][a], [2]). This requirement is intended to “to protect the municipality from unfounded claims and to ensure that it has an adequate opportunity to explore the merits of the claim while information is still readily available” but “is not intended to operate as a device to defeat the rights of persons with legitimate claims” (Dubowy v City of New York, 305 AD2d 320, 320-21 [1st Dept 2003] [internal citations and quotations omitted]).

General Municipal Law §50-e(6) provides that “[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” (GML § 50-e[6]).

As a threshold matter, the City’s argument that the instant motion is barred by the expiration of one-year-and-ninety-day statute of limitations set forth in GML §50-i is incorrect. An application to amend a notice of claim under GML § 50-e(6) has no such restriction (See Seise v City of New York, 212 AD2d 467 [1st Dept 1995]). Rather, the inquiry under the statute is whether any prejudice would result from such amendment. Plaintiff bears the burden, on this motion, to establish that defendants would not be prejudice by the proposed amendment (See e.g., Davis v City of New York, 210 AD3d 865, 866 [2d Dept 2022]).

Plaintiff has not met his burden here. “In a case directly on point, the First Department denied a motion to amend a notice of claim made 6 years after the incident where defendant ‘established that the erroneous accident date supplied not only in the notice of claim but also at the General Municipal Law § 50-h hearing, in the bill of particulars and at the examination before trial

prejudiced its investigation” (Molina v City of New York, 2015 WL 13901366 [Sup Ct, NY County 2015]; quoting Siino v New York City Tr. Auth., 248 AD2d 244 [1st Dept 1998]).

Specifically, plaintiff’s failure to promptly move to correct the erroneous date after being informed of such at plaintiff’s EBT on March 29, 2021 and receiving confirmation through discovery on February 17, 2022, together with the repetition of the erroneous date thereafter, “deprived the [City] of an opportunity to timely interview witnesses about the condition of the [gym floor] on the day of the plaintiff’s accident” (Rodriguez v City of New York, 223 AD2d 536, 537 [2d Dept 1996]; see also Davis v New York City Tr. Auth., 234 AD2d 153, 153 [1st Dept 1996]). The foregoing is compounded by the fact that plaintiff made the instant motion a day before discovery was to be concluded. Under these circumstances, plaintiff’s motion to amend his notice of claim is denied (Rodriguez v City of New York, 223 AD2d 536, 537 [2d Dept 1996] [internal citations omitted]; see also Kotler v City of New York, 266 AD2d 355, 355 [2d Dept 1999]). Moreover, as it is undisputed that the current notice of claim contains inaccurate information, in violation of GML §50-e(2), plaintiff has failed to comply with a precondition of suit against the City and this action is, sua sponte, dismissed as against the City (See Reyes v City of New York, 281 AD2d 235, 235 [1st Dept 2001]; see also Santiago v The City of New York, 2020 NY Slip Op 31250[U], 2 [Sup Ct, NY County 2020] [“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’”]; Pollicino v Roemer and Featherstonhaugh P.C., 277 AD2d 666, 668 [3d Dept 2000] [“the law firm's failure to serve a proper notice of claim was an error requiring dismissal, and Kings County Supreme Court, in denying the law firm's motion to amend the notice of claim, dismissed the complaint on that ground”]).

However, plaintiff's motion to amend the complaint is granted without opposition, as the proposed amendment is not palpably insufficient or patently devoid of merit and the remaining defendants do no dispute that no prejudice to them will result from such amendment.

Accordingly, it is

ORDERED that plaintiff's motion to amend its notice of claim is denied; and it is further

ORDERED that this action is dismissed as against the City of New York and New York City Department of Education; and it is further

ORDERED that the action is severed and continued under this index number with respect to the remaining defendants, Big City Volleyball League, LLC and Big City Volleyball, Inc.; and it is further

ORDERED that plaintiff's motion to amend her complaint is granted and plaintiff is directed to file and serve an Amended Complaint in compliance with this order, reflecting the corrected date of the subject incident, within fifteen days of the date of this decision and order; and it is further

ORDERED that since the City is no longer a party to this action, the Clerk of the Court shall reassign this action to the inventory of a non-City Part; and it is further

ORDERED that within twenty days of the date of this decision and order, counsel for the City of New York shall serve a copy of this order with notice of its entry upon all parties and upon the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon all parties, the Clerk of the Court is directed to enter judgment dismissing the complaint in its entirety as against defendant the City of New York and to amend the Court's records to reflect the change in the caption herein.

This constitutes the decision and order of the Court.

Judy H. Kim
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7/11/2023

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE