

**Grooney v New York City Tr. Auth.**

2023 NY Slip Op 34468(U)

December 19, 2023

Supreme Court, New York County

Docket Number: Index No. 150999/2023

Judge: Denise M. Dominguez

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

INDEX NO. 150999/2023

EMMI GROONEY

MOTION SEQ. NO. 002

Plaintiff

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY,

DECISION AND ORDER ON
MOTION

Defendant

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21,
22, 23, 24, 25, 30, 31, 32, 33

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

For the reasons that follow and following oral arguments, Plaintiff's motion to amend the
notice of claim, pursuant to General Municipal Law § 50-e (6), is denied without prejudice.

This personal injury matter arises out of a July 2, 2022, incident that occurred at the 14th
Street and 8th Avenue subway station in Manhattan. Plaintiff alleges that she tripped and fell due
to a broken condition on a step inside a subway train station.

Plaintiff now moves again (see Motion Seq. 1) for the same relief seeking to amend the
notice of claim. Plaintiff asserts that the amendment is needed to fix a good faith mistake
regarding the subject defective step identified in the initial notice of claim. Defendants oppose the
motion asserting Defendants would be unduly prejudiced. Following oral arguments, Plaintiff was
granted leave to an amended reply affirmation clarifying the location of the accident.

Upon review, Plaintiff has not demonstrated that the mistake in identifying the location of
the alleged defective step was made in good faith and would not prejudice Defendants.

As per the initial notice of claim dated September 19, 2022, the accident is described as
occurring "... on the second step from the top as one descends the stairwell." It is claimed that
Plaintiff tripped and fell on to the top landing as the subject step was broken and defective. The
subject staircase is only identified as the stairwell that leads down to the A train platform at the

14<sup>th</sup> Street and 8<sup>th</sup> Avenue subway station. Five photos identify the subject staircase and/or step are annexed to the initial notice of claim (NYSCEF Doc. 18)

Plaintiff now seeks to amend the notice of claim to describe the accident as occurring “... on the fifteenth step down from the top and approximately the fifth step from the bottom as one descends the stairwell.” It is alleged that Plaintiff “... was caused to trip and fall on said step due to a broken and defective condition on the step.” The amended notice of claim also asserts that the stairwell is identified as “P9B”. Notably, although photos are referenced in the amended notice of claim, no photos were attached to the amended notice of claim filed in support of this motion.

In seeking to prosecute of a claim against a municipality or public corporation, it is vital for a claimant to adhere to General Municipal Law 50-e in both the service of a notice of claim, as well as the requirements for the notice of the claim. “General Municipal Law § 50-e (2) provides, in pertinent part, that notice be given of ‘the time when, the place where and the manner in which the claim arose.’ This requirement is set forth so that public entities may have adequate opportunity to timely investigate and defend (*Wilson v. New York City Hous. Auth.*, 187 AD2d 260 [1<sup>st</sup> Dept 1992]; see *Brown v. City of New York*, 95 NY2d 389 [2000]).

General Municipal Law 50-e(6) permits the amendment of a notice of claim “[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... 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” (N.Y. Gen. Mun. Law § 50-e(6)). However, an amendment of the notice of claim pursuant to General Municipal Law 50-e(6) “... merely permits correction of good faith, nonprejudicial, technical mistakes, defects or omissions, not substantive changes in the theory of liability” (*Mahase v. Manhattan & Bronx Surface Transit Operating Auth.*, 3 AD3d 410 [1<sup>st</sup> Dept 2004]).

Upon review, despite Plaintiff’s characterization of the proposed amended complaint as simply changing the step number, Plaintiff is actually seeking, for the first time, to identify the correct staircase, to change the defective step not from one step or two steps next to each other, but rather from the second from the top to the fifteenth from the top, and to remove the description of Plaintiff falling on to the top landing of the staircase. Collectively, the changes do not appear to be simple technical mistakes or omissions.

In the affirmation in support, Plaintiff asserts that the mistake in the defect's location was only recognized when Plaintiff testified at her statutory hearing on January 26, 2023. However, no explanation is offered as to how or why such a mistake was made, let alone why such mistake was made in good faith.

Based on Plaintiff's testimony at the statutory hearing, she was not confused about the location of the step at issue (NYSCEF Doc. 31). Plaintiff testified that the defective condition existed on a step approximately 15 steps from the top and approximately 5 steps from the bottom. Plaintiff subsequently submitted an affidavit confirming the subject step, as well as the subject staircase, which is supported by four photos, which appear to be additional photos from those annexed to the initial notice of claim and marked for identification at the statutory hearing (NYSCEF Doc. 32).

There is nothing in the within motion to explain why the initial notice of claim identifies the allegedly defective step as the second step from the top or why it is alleged that Plaintiff was caused to fall on to the top landing (NYSCEF Doc. 18). Moreover, that portion of the proposed amended notice of claim identifying the subject staircase as "P9B" is not supported by any explanation as to how, more than six months after the accident, such determination was made. None of the photos submitted in connection with the motion depict a staircase with the identification "P9B" visible (NYSCEF Doc. 32, 37) and there is no explanation in the statutory hearing testimony nor in Plaintiff's subsequently provided affidavit as to how or when Plaintiff identified the staircase as "P9B". Thus, Plaintiff does not provide a clear basis for seeking to amend the notice of claim or why such identification could not have been made at the time the initial notice of claim was filed.

Further Plaintiff's reliance upon *Seise*, and Second Department cases, *Avery*, and *Hernandez* is not persuasive. *Seise* involved the misidentification of a cross street concerning a traffic light failure, but the location was correct on the submitted police report (*Seise v. City of New York*, 212 AD2d 467 [1st Dept 1995]). *Avery*, involved an amended notice of claim which sought to describe the intersection at issue with more detail, not a change of location, and the initial notice of claim included a photo of the correct intersection (*Avery v. New York City Transit Auth.*, 138 AD3d 770 [2d Dept 2016]). *Hernandez* involved the misidentification of the playground at issue by an infant plaintiff, and where the accident was witnessed by the defendants' employees. (*Hernandez v. City of Yonkers*, 74 AD3d 1025 [2d Dept 2010]).

In opposition, Defendants assert that they are prejudiced in their defense of this action because they could not conduct a meaningful investigation of the alleged defective condition close in time to the accident. Defendants submit a diagram of the subject subway station that reflects that there are 10 staircases that would lead to an A train platform (NYSCEF Doc. 23). Defendants show that the initial notice of claim did not identify which staircase at the subway station was involved, either by the identification plate or other identifying information or whether it concerned the Uptown or Downtown track. Thus, Defendants initial investigation pertained to the second step of all 10 staircases that lead to the A train platforms. Defendants also argue that Plaintiff's statutory hearing testimony establishes that the photos annexed to the initial notice of claim do not help identify the alleged defective condition as Plaintiff herself could not identify the subject staircase or subject step in the photos. It is also apparent from Plaintiff's statutory hearing testimony that she had not reviewed the photos annexed to the initial notice of claim until the day of the statutory hearing and that she could not identify the alleged defective step/condition in the photos at the hearing (NYSCEF Doc. 32). Additionally, although a photo was annexed to the initial notice of claim depicting an exterior subway entrance at 8<sup>th</sup> Avenue and 16<sup>th</sup> Street, Plaintiff testified that she did not use such entrance. Perhaps if Plaintiff had reviewed the photos at the time the initial notice of claim was served, this mistake could have been avoided. Thus, it does not appear that any photo that was annexed to the initial notice of claim would have helped identify the specific defective step misidentified in the notice of claim.

Therefore, Plaintiff's argument that despite the mistake in the initial notice of claim, Defendants could have located the staircase and step at issue and duly investigated this incident, with just a "modicum of effort" is unavailing.

Nor has Plaintiff alleged, let alone submitted any evidence, that the current condition of the subject step is the same as it was at the time of the accident. Accordingly, without more, at this time Defendants would be prejudiced by the proposed amended notice of claim (*see Santana v. New York City Transit Auth.*, 88 AD3d 539 [1st Dept 2011]; *Torres v. New York City Hous. Auth.*, 261 AD2d 273 [1<sup>st</sup> Dept 1999]).

Finally, this Court would be remised if it did not acknowledge that the location of the defect was not identified in the complaint. Notably, the complaint, which was filed after Plaintiff's statutory hearing was conducted, and after the mistake in the step was apparently realized, does not identify the staircase or the step and describes the accident as a "slip and fall" incident due to

a slippery, wet, dirt and debris condition, and does not describe a trip and fall due to a broken/cracked condition on a step (NYSCEF Doc. 1).

Thus, since Plaintiff has not shown that the amendment addresses a mistake made in good faith and without prejudice for Defendants to timely investigate, the motion is again denied.

It is hereby

ORDERED that the motion to amend the notice of claim pursuant to General Municipal Law § 50-e (6), is denied without prejudice; and it is further

ORDERED that the Plaintiff shall serve a copy of this order with notice of entry upon the parties within 30 days and upon the Clerk of the Court; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made 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 the court's website).

12/19/2023  
DATE

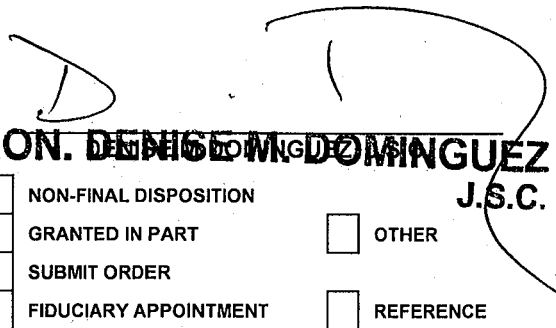
CHECK ONE:

- CASE DISPOSED
- GRANTED
- DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT
- OTHER
- REFERENCE

  
**HON. DENISE M. DOMINGUEZ**  
 J.S.C.