

Belony v Site 4 DSA Retail LLC

2024 NY Slip Op 30435(U)

January 30, 2024

Supreme Court, New York County

Docket Number: Index No. 157472/2023

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

INDEX NO. 157472/2023
MOTION SEQ. NO. 001

BEATRICE BELONY,

Plaintiff,

- v -

SITE 4 DSA RETAIL LLC, SITE 4 DSA OWNER LLC, SITE 4
DSA MARKET LLC, SITE 4 RESIDENTIAL LLC, SITE 4 DSA
RESIDENTIAL MANAGERS LLC, NEW YORK CITY
TRANSIT AUTHORITY, THE CITY OF NEW YORK

Defendants.

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15,
16, 17, 23, 27, 28, 29

were read on this motion to/for LEAVE TO FILE

Upon the foregoing documents, Plaintiff's motion to amend the notice of claim served upon
the municipal Defendants NEW YORK CITY TRANSIT AUTHORITY ("NYCTA") and THE
CITY OF NEW YORK (the "CITY") pursuant to General Municipal Law § 50-e(6) is denied
without prejudice.

This personal injury matter arises out of an August 22, 2022 incident where the Plaintiff,
BEATRICE BELONY, claims to have tripped on a rope that was attached to a metal sidewalk
grate. At issue, and the aspect of the notice of claim that the Plaintiff seeks to amend via the within
motion by order to show cause, concerns the location of the subject grate.

Initially, this Court would note that the location of the subject grate is identified at two
different locations in the initial notices of claim. The Plaintiff's initial notice of claim served on
the CITY, dated September 7, 2022, (NYSCEF Doc. 10) identifies the location of the accident as
the northeast corner of Delancey Street and Suffolk Street in Manhattan. Significantly, no street
address appears to be identified in the initial notice of claim served on the CITY. However, the
initial notice of claim served on NYCTA identifies the location of the accident as at the northeast
corner of Delancey Street and Suffolk Street, and further describes the location as being in front
of 147 Delancey Street. No photographs depicting the location or the alleged defective condition

were annexed to the initial notice of claim served on either the CITY or NYCTA. As the initial notice of claim did not include the time of the accident, the Plaintiff amended the notice of claim to include the time and served NYCTA on November 17, 2022 (NYSCEF Doc. 9). It appears that an amended notice of claim regarding the time of the accident was not served on the CITY as the initial notice of claim served on the CITY included the time.

The Plaintiff now seeks to amend the amended notice of claim to reflect that the grate was actually located at the *southeast* corner of Delancey Street and Suffolk Street, in front 180 Broome Street¹ in Manhattan (NYSCEF Doc. 9). Plaintiff annexes a Google image photo of the alleged location/subject grate to the proposed amended notice of claim. (NYSCEF Doc. 14). The Plaintiff also submits her February 15, 2023 statutory hearing transcript, Plaintiff's June 1, 2023 50-h hearing transcript, and FDNY Prehospital Care Report Summary. (NYSCEF Doc. 11, 12, 13).

The Plaintiff essentially argues that the motion should be granted as amendments are to be freely granted when the error resulted from a good-faith mistake and the Defendants have no actual prejudice. NYCTA opposes the motion. The CITY does not submit any papers in response.

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”. (*see Mahase v. Manhattan & Bronx Surface Transit Operating Auth.*, 3 A.D.3d 410, 411, 771 N.Y.S.2d 99 [1st Dept 2004]).

Upon review, this court finds that the Plaintiff has not established that the mistake was a simple technical error, that the mistake was made in good faith or that the municipal defendants would not be prejudiced by this late change.

¹ As discussed at oral argument, the building at this location runs from Delancey Street to Broome Street and it has used a Broome Street following redevelopment.

This Court takes judicial notice of the following regarding the roadways near where this incident is alleged to have occurred. Delancey Street essentially runs East/West across Manhattan, travels in both directions and its lanes of travel are divided by a large median. Broome Street also travels East/West across Manhattan and is situated one block south of Delancey Street. Suffolk Street is a one-way street, with traffic traveling south. It crosses both Delancey Street and Broome Street. Norfolk Street is one block west of Suffolk Street and Clinton Street is one block east of Suffolk Street. The street address identified in the initial notice of claim served on NYCTA, 147 Delancey Street, is located at the *southwest* corner of Delancey Street and Suffolk Street.

It is clear that the accident locations identified in the initial notice of claim served on the CITY and on NYCTA are different. The location disclosed to the CITY is the *northeast* corner of Delancey Street and Suffolk Street and the location identified to NYCTA is 147 Delancey Street, which is at the *southwest* corner. Thus, from the outset, the municipal defendants were provided with different accident locations, neither of which appears to have been correct.

The Plaintiff claims that the mistake in location was simply the wrong compass direction. However, upon review, it is not as simple as the Plaintiff has presented. The Plaintiff seeks to amend the notice of claim to reflect that the grate was not located at either the *northeast* corner of Delancey Street and Suffolk Street (as identified in the initial notice of claim served on the CITY), nor at the *southwest* corner at 147 Delancey Street (as identified in the initial notice of claim served on NYCTA), but was in fact located at 180 Broome Street, which is at the *southeast* corner of Delancey Street and Suffolk Street.

Thus, the mistake to amend is not merely fixing a typographical or technical error such as the compass direction, but is rather a change of location entirely. A mistake in location may be corrected, and is not in and of itself deemed prejudicial to the defendants. However, where such a mistake is shown to have obstructed the investigation, where there are additional inconsistencies and where the plaintiff fails to timely act to correct the mistakes, prejudice to the defendants may be found. (*Torres v. New York City Hous. Auth.*, 261 A.D.2d 273, 274–75, 690 N.Y.S.2d 257, 259 [1st Dept 1999]; *Santana v. New York City Transit Auth.*, 88 A.D.3d 539, 539–40, 930 N.Y.S.2d 587, 588 [1st Dept 2011]).

Upon review, the Plaintiff has not demonstrated that the mistake in the accident location was made in good faith. Nothing has been presented explaining why or how the mistake was made, when Plaintiff first realized the mistake and what efforts were undertaken to correct same, absent

the instant application. Plaintiff's assertion that the municipal defendants received notice of the "correct" location within a reasonable time after the accident based upon the Plaintiff's testimony at statutory hearing (conducted on behalf of NYCTA) and her 50-h hearing (conducted on behalf of the CITY) is unavailing. Upon review, at the Plaintiff's February 1, 2023 statutory hearing, (NYSCEF Doc. 11), she describes the accident as having occurred along the sidewalk between Delancey Street and Suffolk Street. The Plaintiff does not identify a street address nor a particular corner of Delancey Street and Suffolk Street and does not identify 180 Broome Street. At her June 1, 2023 50-h hearing, (NYSCEF Doc. 13), the Plaintiff describes the accident as occurring at Norfolk Street and Delancey Street, which would be one block west of the location identified in the proposed notice of claim to the CITY. Thus, nothing in the Plaintiff's testimony NYCTA could have put either the CITY or NYCTA on notice that that the accident actually occurred at 180 Broome Street.

This Court is also concerned with the fact that the confusion or mistake over the location of the accident may have been avoided had photographs of the location and/or grate been disclosed in the initial notice of claim. The Plaintiff testified at her February 1, 2023 statutory hearing that photographs and video were taken at the scene of the accident immediately after it occurred and that the photographs/video was provided to counsel. However, no such photographs were annexed to the initial notices of claim. Nor does it appear that the photographs/video were disclosed prior to either the statutory or 50-h hearings. (NYSCEF Doc. 11, 13).

This is not a situation where the wrong address was provided, but the notice of claim was accompanied by photographs identifying the location and condition complained of (*see e.g., Avery v. New York City Transit Auth.*, 138 A.D.3d 770, 29 N.Y.S.3d 499 [2d Dept 2016]) or the misidentification of a cross street, but where the correct street was disclosed in accompanying police/accident reports (*See e.g. Seise v. City of New York*, 212 A.D.2d 467, 622 N.Y.S.2d 941 [1st Dept 1995]). Here, there is a change of location without any evidence that the "correct" accident location was ever made known to the municipal respondents prior to the within application. Nothing has been submitted to show that either the CITY or NYCTA received any notice of this incident or claim prior other than the initial notice of claim. No accident or incident report on behalf of NYCTA or any other agency was submitted and the Plaintiff testified at her statutory hearing that an MTA Supervisor did not come to the scene of the accident (NYSCEF Doc. 11).

Nor has the Plaintiff alleged, let alone submitted any evidence, that the current condition of the grate is in the same as it was at the time of the accident, that the subject rope upon which the Plaintiff tripped still exists (the only photo provided is a July 2022 Google image photo). Thus, Plaintiff has not shown that the Defendants would now be able to conduct a meaningful investigation of the condition complained of. It is not even clear to this Court whether grates are also located at the two previously accident locations identified, the *northeast* corner of Delancey Street and Suffolk Street, and 147 Delancey Street, or the third location identified at the 50-h hearing, Delancey Street and Norfolk Street, which may further complicate any investigation.

In the prosecution 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 the municipality may have adequate opportunity to timely investigate and defend. (*Wilson v. New York City Hous. Auth.*, 187 A.D.2d 260, 261, 589 N.Y.S.2d 425 [1st Dept 1992]; see *Brown v. City of New York*, 95 N.Y.2d 389, 392–94, 740 N.E.2d 1078 [2000]).

Upon review, based upon the multiple accident locations identified in the notice of claim, the failure for the location to be clarified by the Plaintiff at statutory hearings, the lack of any evidence showing that the grate is in the same condition and by the disclosure of this mistake to the municipal Defendants in the within application, made over a year after the accident occurred, the Defendants would be prejudiced by the proposed amended notice of claim. (See *Santana v. New York City Transit Auth.*, 88 A.D.3d 539, 930 N.Y.S.2d 587 [1st Dept 2011]; *Torres v. New York City Hous. Auth.*, 261 A.D.2d 273, 690 N.Y.S.2d 257 [1st Dept 1999]).

Accordingly, it is hereby

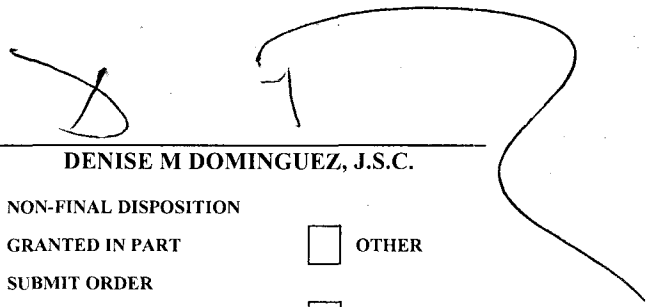
ORDERED that the motion to amend the notice of claim pursuant to General Municipal Law § 50-e (6), is denied without prejudice; and it is further

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 (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records; 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).

1/30/2024

DATE


DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: