Ritchie v Felix Assoc., LLC
2008 NY Slip Op 33683(U)
December 17, 2008
Supreme Court, New York County
Docket Number: 101038/06
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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BRIAN RITCHIE and HELEN RITCHIE,

Plaintiffs,

- against -

FELIX ASSOCIATES, LLC, JUDLAU CONTRACTING, INC. THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, LIRO GROUP LTD, LIRO ENGINEERS INC. and LIRO CONSULTING ENGINEERS, P.C.,

Defendants.

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CONTI ENTERPRISES, INC.

Third-Party Plaintiff,

- against-

GRANIT HALMAR/SCHIAVONE JV., CO., GRANITE HALMAR CONSTRUCTION COMPANY, INC. a/k/a GRANITE CONSTRUCTION NORTHEAST, INC., SCHIAVONE CONSTRUCTION COMPANY, INC. and P.C.M. CONTRACTING CO.,INC.,

Third-Party Defendants.

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Mtn. Seq. 005

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NEW YORK

Third-Party
Index No. 509464/07

WALTER B. TOLUB, J.:

This is Defendants' motion to reargue this Court's decision dated August 12, 2008.

Facts

The underlying action stems from Plaintiff's claims that he was injured when he stepped off a sidewalk curb, located on State Street, in New York City. Plaintiff claims that the curb was approximately 90 feet west of the south-west corner of the

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intersection of State Street and Whitehall Street. Plaintiff claims that on the day that he fell, the City of New York was involved in a construction project at the accident site.

In the Notice of Claim, dated May 23, 2005, Plaintiff claimed that the accident occurred on March 15, 2005. On October 18, 2005, Plaintiff testified at a 50 (h) hearing that the accident occurred on March 15, 2005. In addition, the amended verified complaint, dated June 13, 2006, and the verified bill of particulars, dated April 19, 2007, indicate that the accident occurred on March 15, 2005.

In his affidavit (Defendants Ex. G), Plaintiff stated that he retained his counsel in April 2005 and mistakenly advised them that the accident occurred on March 15, 2005. Specifically, Plaintiff stated that it was his honest recollection that the accident occurred on March 15, 2005. According to Plaintiff, he learned from his attorneys that his medical records indicated that his first visit to the doctor was on March 3, 2005. For awhile Plaintiff maintained that the physician's records were inaccurate. However, after following up with his health care provider, it was confirmed that payment was made to Plaintiff's physicians for a March 3, 2005 visit. Plaintiff then advised his attorneys that he had made an honest mistake as to the date of the accident and that the date of the Accident was indeed March 2, 2005.

In motion sequence 004, Plaintiffs sought leave to amend the complaint and all subsequent pleadings in order to correct the date of the accident and his injuries from March 15, 2005 to March 2, 2005. Defendants Felix Associates, LLC (Felix), The City of New York and the City of New York s/h/a New York City Department of Transportation (collectively the City of New York) cross-moved for: (1)leave to amend the verified answer of the City of New York to include an affirmative defense, namely that Plaintiffs failed to satisfy the condition precedent to commence an action required under General Municipal Law § 50 (CPLR § 3025); and

(2) for an order dismissing Plaintiffs' complaint and cross claims with prejudice for Plaintiffs' failure to satisfy the condition precedent required under General Municipal Law § 50 (CPLR § 3212).

The Liro Defendants, Conti Enterprises, Inc., the Granit Halmar defendants, P.C.M. Contracting Co, Inc, and Schiavone Construction Co, Inc., all opposed Plaintiffs' motion to amend and argued that they would be prejudiced by such an amendment.

By decision dated August 12, 2008, this court granted Plaintiff's motion to amend and denied Defendants' cross-motions. Defendants now seek to reargue the decision dated August 12, 2008.

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Discussion

The only question on a motion to reargue is whether the court overlooked or misapprehended fact or law in determining a prior motion. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very same questions previously decided. (Foley v. Roche, 68 A.D.2d 558, 418 NYS2d 588, 593-94 [1st Dept. 1979]) *citing* Fosdick v. Town of Hempstead, 126 NY 651; CPLR 2221).

A party is entitled to summary judgment if the sum total of the undisputed facts establishes the elements of a claim as a matter of law (Barr, Altman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:80). For a claim or defense to be established as a matter of law, the proponent of the summary judgment motion must come forward with facts to establish each element of the claim or defense Barr, Altman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:81). If the movant fails to establish each element of the claim or defense as a matter of law, then it is not entitled to summary judgment (Id.) Additionally, on a motion for summary judgment, the court will draw from the evidence all reasonable inferences that favor the opponent of the motion (Barr, Altman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:111

citing Airco Alloys Division, Airco, Inc. v. Niagra Mowhawk Power Corp., 76 AD2d 68 [4th Dept 1980]).

To recover in tort against a municipality, a Notice of Claim must be filed so that the appropriate authorities may investigate, collect evidence and evaluate the merits of a claim, (Brown v. City of New York, 95 NY2d 389 [2000]).

General Municipal Law § 50-e (2) states in relevant part:

> "[t]he notice [of claim] shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose ...."

"Reasonably read, the statute does not require 'those things to be stated with literal nicety or exactness'" (Brown v. City of New York, 95 NY2d 389 [2000] *citing* Purdy v. City of New York, 193 NY 521, 523). The test of the sufficiency of a Notice of Claim is whether it "includes information sufficient to enable the city to investigate" (Id. *citing* O'Brien v. City of Syracuse, 54 NY2d 353, 358). "Nothing more may be required" (Schwartz v. City of New York, 250 NY 332, 335).

The legislature has taken into account that mistakes are made. General Municipal Law § 50-e (6) governs applications to correct defects in Notices of Claim and provides:

> "[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

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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."

Leave to correct a mistake is left to the sound discretion of the court (Matter of Puzio v City of New York, 24 AD3d 679 [2d Dept 2005]). No one factor is dispositive.

As such, it is Defendants' initial burden, as movants, to establish as a matter of law that the court. overlooked or misapprehended its argument that, as a matter of law, Plaintiff's motion to amend the date of the accident was made in bad faith and, if permitted, will prejudice the Defendants (*See generally* Baez-Sharp v. New York City Transit Authority, 38 AD3d 229 [1st Dept 2007]).

In determining compliance with the requirements of General municipal Law §50-e, courts focus on the purpose served by the Notice of Claim, whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident (Brown v. City of New York, 95 NY2d 389 [2000] *citing* Purdy v. City of New York, 193 NY 521).

Here, Plaintiff claims that Defendants were negligent in how they maintained the curb where there was ongoing construction because the area was in poor condition and Defendants failed repair and/or to warn pedestrians of the condition of the curb (Defendants' Ex. A). Plaintiff specifically identified the area

as the "sidewalk on State Street, approximately 90' West of the South-West corner of the intersection of State Street and Whitehall Street" (Defendants' Ex. A). The place must be stated with sufficient particularity to enable the city to investigate the claim of negligence (Schwartz v. City of New York, 250 NY 332 [1929]). It is the circumstances in each case which are determinative.

Here, the information provided to the Defendants was sufficient as to the location providing the Defendants some opportunity to investigate the claim.

Defendants argue that they will be prejudiced because construction is an ongoing process and because it will be difficult to identify people who were on the site the *day* of the incident.

First, the Court notes that in determining whether a mistake made in a Notice of Claim may be corrected, prejudice resulting from such a correction will not be presumed (Santiago v. County of Suffolk, 280 AD2ed 594 [2d Dept 2001]; Evers v. City of New York, 90 AD2d 786).

Second, in making a determination as to prejudice, the court may look to evidence adduced throughout the proceeding (D'Alessandro v. New York City Transit Authority, 83 NY2d 891 [1993]; Fabian v. New York City Transit Authority, 271 AD2d 244 [2d Dept 2005]). Here, the 13 day difference in time does not

appear to prejudice the Defendants. Plaintiff claims that he tripped and fell on a defective curb which was the product of an ongoing construction project near the Staten Island Ferry. The entity which actually caused and created the condition will likely be revealed through discovery, which has been held up by the parties because of motion practice. Defendants argue that the Plaintiff's mistake rendered the City incapable of investigating the claim. However it is unclear at this juncture whether the defect was of a transitory nature. The status of the construction on the date in question may be ascertainable by reference to the progress and work records of the contractors and subcontractors who were doing the work.

Moreover, there does not appear to be any bad faith on Plaintiff's part in making the amendment. The Plaintiff made a mistake. Unlike Defendants, the Plaintiff did not maintain notes or records of his activities until several weeks after the incident. Plaintiff swore in his February 20, 2008 affidavit (Defendants' Ex. G) that he made an honest mistake as to the date of the accident. The substance of his claims remains unchanged.

There is nothing in the record to suggest that the incorrect date was provided in bad faith. While plaintiffs seek to amend the mistake three years after the accident, the statute states that corrections may be permitted at any time, as long as the mistake was in good faith and there is no prejudice (Fabian v New

York City Tr. Auth., 271 AD2d 244 [1st Dept 2000]).

Defendants' failed in their initial burden, as movants, to establish as a matter of law that the court overlooked or misapprehended its argument that Plaintiff's motion to amend the date of the accident was made in bad faith and, if permitted, will prejudice the Defendants. As Defendants have not demonstrated bad faith or prejudice, the motion for reargument is granted and upon reargument the Court adheres to its prior decision and denies the cross motion for summary judgment.

Accordingly, it is

ORDERED that Defendants motion to reargue is granted; and it is further

ORDERED that upon reargument the court adheres to its prior decision of August 12, 2008; and it is further

ORDERED that the Clerk of the Court enter Judgment accordingly.

Counsel for the parties are directed to appear for a

conference on January 23, 2009 at 11:00AM in room 335 at 60 Centre Street.

Dated: 12/17, 2008

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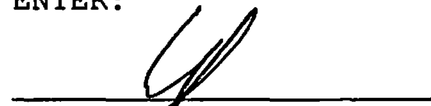

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