

Gazzaley v City of New York

2012 NY Slip Op 30402(U)

February 17, 2012

Sup Ct, NY County

Docket Number: 108295/07

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE *Jaffe*
J.S.C. *Justice*

PART 5

Jack Wazalek
City of NY

INDEX NO. 108295/07
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for amend pleadings

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

FEB 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/17/12
FEB 17 2012

[Signature]
BARBARA JAFFE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----x
JACK GAZZALEY,

Index No. 108295/07

Plaintiff,

Argued: 11/15/11

-against-

Motion Seq. No.: 003

DECISION AND ORDER

THE CITY OF NEW YORK, EMIGER REALTY
ASSOCIATION, LLC and BELLA CUCINA, INC.,

FILED

Defendants.

FEB 23 2012

-----x
BARBARA JAFFE, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

For plaintiff:
Stanley Schechter, Esq.
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For City:
Margaret Kerr-Meyering, ACC
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By order to show cause dated October 11, 2011, plaintiff moves pursuant to General Municipal Law (GML) § 50-e(6) and CPLR 3025(b) for an order granting him leave to amend the caption and his notice of claim, complaint, and bill of particulars. Defendant City opposes only as to his notice of claim.

I. BACKGROUND

On May 10, 2006, plaintiff tripped on a curb on the north side of East 87th Street, 12 feet east of its intersection with Lexington Avenue and adjacent to 1293 Lexington Avenue, in Manhattan. (Affirmation of Stanley Schechter, Esq., dated Oct. 4, 2011 [Schechter Aff.], Exh. A). A Lenox Hill Hospital ambulance call report pertaining to the accident lists East 87th Street and Lexington Avenue as the accident site. (*Id.*, Exh. K).

On July 13, 2006, plaintiff served City with a notice of claim. (*Id.*). In paragraph one,

plaintiff relates that his accident occurred at the sidewalk and curb adjacent to East 87th Street, south of 1243 Lexington Avenue, approximately 12 feet east of the east side of Lexington Avenue at the curb and just north of the curb on the north side of East 87th Street. (*Id.*) In paragraph three, he describes the location but omits “Lexington” before “Avenue,” and he annexed portions of the Big Apple Map not including 1243 Lexington Avenue. (*Id.*)

At a GML § 50-h hearing held on September 19, 2006, petitioner testified that his accident occurred at the “northeast corner of 87th Street and Lexington Avenue.” (*Id.*, Exh. B).

On or about June 14, 2007, plaintiff served defendants with a summons and verified complaint, asserting negligence claims arising from their ownership, control, and maintenance of the subject sidewalk and curb. (*Id.*) In paragraph nine, he describes his accident as follows: “[W]hile the plaintiff was lawfully and properly crossing, in a designated crosswalk, East 87th Street from the south side of the [n]orth side of the easterly side of Lexington Avenue” (*Id.*) In paragraph 11, he identifies defendant Emiger Realty Association, LLC (Emiger) as the owner of 1243 Lexington Avenue. (*Id.*) Sometime thereafter, plaintiff served City with an amended bill of particulars in which he identifies 1243 Lexington Avenue as the adjacent premises. (*Id.*)

On or about April 8, 2009, plaintiff provided City with photographs of the accident location. (*Id.*, Exh. I). One of the photographs depicts Bella Cucina’s awning, on which “1293” is written. (*Id.*)

At an examination before trial (EBT) held on April 15, 2009, plaintiff again testified that his accident occurred on the northeast corner of East 87th Street and Lexington Avenue. (*Id.*, Exh. H).

Sometime before November 30, 2009, defendants Emiger and Bella Cucina, Inc. successfully moved for summary judgment. (*Id.*, Exh. C).

On or about May 5, 2010, plaintiff served City with an expert report identifying the “[n]orth[e]ast [c]orner of Lexington Avenue and 87th Street” as “[t]he area of concern.” (*Id.*, Exh. J).

On or about October 14, 2011, plaintiff served City with the instant order to show cause, annexing thereto, *inter alia*, an amended notice of claim reflecting the abutting premises’ correct address and including “Lexington” before “Avenue” in paragraph three, an amended complaint reflecting the abutting premises’ correct address and replacing “from the south side of the [n]orth side” in paragraph nine with “from the south side to the [n]orth side,” and an amended bill of particulars reflecting the correct address. (*Id.*, Exhs. L, M, N).

On October 27, 2011, City served plaintiff with its opposition papers, annexing thereto print-outs dated July 31, 2006 from the Geosupport Online Address Translator and the New York City Division of Finance online database pertaining to 1243 Lexington Avenue and 145 East 84th Street, respectively. (Affirmation of Margaret Kerr-Meyering, ACC, in Opposition, dated Oct. 26, 2011 [Kerr-Meyering Opp. Aff.], Exh. A)

II. CONTENTIONS

Plaintiff asserts that his proposed amendments will not prejudice City, as he consistently identified the location of his accident such that City could investigate his claim notwithstanding the typographical error as to the abutting premises’ address. (Schechter Aff.). He also asks that Emiger and Bella Cucina be removed from the caption to avoid juror confusion. (*Id.*).

City concedes that there is no evidence of bad faith on the part of plaintiff but argues that

it has been prejudiced by the error in his notice of claim, as the July 31 print-outs reflect that the New York City Comptroller's Office investigated his accident as though it had occurred adjacent to 1243 Lexington Avenue by searching for the address of that record owner. (Kerr-Meyering Opp. Aff.). It also denies that plaintiff's error was cured by his photographs of the accident site, his description of same in his pleadings and during his GML § 50-h hearing and EBT, or the ambulance call report. (*Id.*).

In reply, plaintiff contends that City has failed to demonstrate prejudice, as the print-outs are insufficient evidence of an investigation, and that the photographs and his repeated identification of the accident site cured his error as to the abutting premises' address. (Affirmation of Stanley Schechter, Esq., in Reply, dated Nov. 12, 2011).

III. ANALYSIS

A. Notice of claim

Pursuant to GML §§ 50-e(1)(a) and 50-i, a tort action against a municipality must be commenced by service of a notice of claim upon the municipality within 90 days of the date on which the claim arose. "The purpose of the notice of claim is to give a municipal authority the opportunity to investigate (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 67 [1st Dept 2007]), and a notice of claim is sufficient "if it includes information that enables a municipal agency to investigate and evaluate the merits of a claim" (*Bennett v New York City Tr. Auth.*, 4 AD3d 265, 266 [1st Dept 2004], *affd* 3 NY3d 745 [2004]).

Pursuant to GML § 50-e(6):

[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.

As prejudice is not presumed from an error in a notice of claim, the municipality must establish same. (*Goodwin*, 42 AD3d at 68; *Williams v City of New York*, 229 AD2d 114, 117 [1st Dept 1997]).

Here, plaintiff provided a detailed description of the accident location in his notice of claim, complaint, and bill of particulars, specifying the distance between the corner of the intersection and the section of curb on which he tripped, and the portions of the Big Apple Map annexed to his notice of claim are consistent with this description. Moreover, his EBT and 50-h testimony, the ambulance call report, and the expert report refer to this intersection as the accident location, and the photographs plaintiff provided to City show the correct address. As all of the evidence provided to City reflects that plaintiff tripped at the same intersection he described in his notice of claim and notwithstanding his error as to the address of the abutting premises, City could have, with very little effort, ascertained the existence of a typographical error and investigated the correct location. (*See Kaminsky v City of New York*, 238 AD2d 380 [2d Dept 1997] [where plaintiff misidentified address but “gave exact location of the accident site with measurements . . . and provided a photograph of the scene,” no prejudice to defendant, as “inclusion of the reference to a street address was superfluous”]; *Singer v City of New York*, 226 AD2d 325 [1st Dept 1996] [defendant not prejudiced where plaintiff inadvertently transposed digits of address in question and otherwise identified correct location, testifying to same at GML § 50-h hearing five months after accident, specifying cross-streets, and providing photographs, to defendant]).

As the July 31, 2006 print-outs reflect only that someone searched for 1243 Lexington Avenue in the online databases and provide no indication as to the details of City's investigation, they are insufficient to demonstrate that it investigated the wrong accident location. (*See Kaminsky*, 238 AD2d 380 [attorney's affirmation providing that City sent investigator to wrong site insufficient to demonstrate prejudice absent affidavit from "an investigator who actually visited the site"]; *see also Seraita v City of Yonkers*, 292 AD2d 456 [2d Dept 2002] [investigator's affidavit insufficient to demonstrate prejudice, as he failed to detail his efforts to ascertain accident location therein]).

Absent any allegation of bad faith on the part of plaintiff, he is entitled to leave to amend his notice of claim.

B. Caption, complaint, and bill of particulars

Pursuant to CPLR 3025(b), a party may amend its pleadings at any time by leave of court, "which shall be freely given upon such terms as may be just" It is well-settled that leave to amend pleadings under this section should be liberally granted unless the amendment plainly lacks merit or would prejudice or surprise the other parties. (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 499 [1st Dept 2010]).

As plaintiff's proposed amendments are neither patently meritless nor prejudicial to City (*see supra*, III.A.), he is entitled to leave to amend the caption, his complaint, and his bill of particulars.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to amend his notice of claim, complaint, and bill of

particulars is granted, and the amended notice of claim, amended complaint, and amended bill of particulars annexed to his order to show cause are deemed served upon plaintiff's service of a copy of this order with notice of entry; and it is further

ORDERED, that plaintiff's motion to amend the caption by removing defendants Emiger Realty Association, LLC and Bella Cucina, Inc. is granted; and it is further

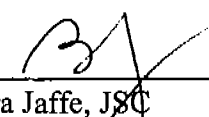
ORDERED, that plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and upon the Clerk of the Trial Support Office (60 Centre Street, Room 158), who are directed to mark the court's records to reflect the change in caption herein.

FILED

ENTER:

FEB 23 2012

NEW YORK
COUNTY CLERK'S OFFICE


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: February 17, 2012
New York, New York

FEB 17 2012