Clark v Town of Yorktown
2017 NY Slip Op 30301(U)
February 15, 2017
City Court of Peekskill, Westchester County
Docket Number: SC-449-16
Judge: Reginald J. Johnson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

PEEKSKILL CITY COURT
COUNTY OF WESTCHESTER: STATE OF NEW YORK
----------x
ANDREW CLARK,

DECISION & ORDER

Plaintiff,

--against--

Index No. SC-449-16

TOWN OF YORKTOWN,

Small Claims Part

Defendant.
----------x

Appearances:
Andrew Clark, pro se
Law Office of Lori D. Fishman
by George R. Dieter for Defendant

HON. REGINALD J. JOHNSON

This is a Small Claims action commenced pursuant to Uniform City Court Act (UCCA), Article 18-A. The Plaintiff appeared pro se and the Defendant appeared by the Law Office of Lori D. Fishman, by George R. Dieter, Esq. The Defendant requested and was granted permission to move to dismiss the Complaint pursuant to General Municipal Law (GML) §50(e) and for summary judgment.

In deciding this motion, the Court considered Defendant's Memorandum of Law with exhibits, Plaintiff's Opposition Papers with

exhibits, and Defendant's Reply Affirmation.

For the reasons that follow, this matter is decided in accordance herewith.

Procedural History

On September 27, 2016, the Plaintiff commenced this Small Claim action against the Defendant for property damage[1]. On November 2, 2016, the parties appeared in court and the matter was adjourned to November 30, 2016. At the November 30th conference, the Defendant submitted a Memorandum of Law with exhibits in support of its motion to dismiss the Complaint. The Court issued the following motion schedule: opposition papers due on December 21, 2017; reply papers, if any, due on January 18, 2017.

On January 18, 2017, the motion was marked fully submitted.

Facts

Plaintiff alleges that on February 20, 2016 in the afternoon, he was riding on his bicycle on Hunterbrook Road, Yorktown Heights, New York between Route 129 and Baptist Church Road "when I felt a strong impact as I hit a pothole which cause [sic] my front wheel to collapse and I was thrown from the bike" (See Plt's Opp. Exh. "C" [Notice of Claim]).

[1] Plaintiff claims that he sustained damage to his clothes and irreparable damage to his bicycle. See Plaintiff's Opp. Exhs. "C" and "D".

Plaintiff further alleges that his bicycle sustained extensive and irreparable damage to the wheels and frame and that his glove and jacket were ruined (Id).

Discussion

I. Notice of Claim

GML §50(e)(2) states, in pertinent part,

> Form of notice; contents. The notice 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; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable….

The primary purpose of the notice of claim requirements is to ensure that a municipality has an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while the information is still available. Leone v Utica, 66 A.D.2d 463, 414 N.Y.S.2d 412, 1979 N.Y. App. Div. LEXIS 10039 (N.Y. App. Div. 4th Dep't 1979), aff'd, 49 N.Y.2d 811, 426 N.Y.S.2d 980, 403 N.E.2d 964, 1980 N.Y. LEXIS 2925 (N.Y. 1980).

In the case at bar, the Court finds that the description of the location of the situs in the notice of claim is sufficient and non-prejudicial to the Defendant. The Court notes that Plaintiff's notice of claim states that the accident occurred on "Hunterbrook Road, Yorktown Heights, New York. Specifically, accident occurred between Route 129 and Baptist Church Road" (Def's Memo of Law, Exh. "A"). Further, the Plaintiff supplemented the description of the accident location by submitting a photograph of the alleged accident scene and his damaged bicycle (Plt's Opp. Exh. "D").[2]

The Defendant argues that "the distance along Hunterbrook Road from its intersection with Route 129 to its intersection with Baptist Church Road is approximately 2 miles" (Def's Memo of Law at p. 2). Based on that the Defendant argues "that on its face that description of the location of the alleged accident is clearly insufficient to meet the requirements of the statute" (Id). Nowhere in the Defendant's Reply Affirmation does it address the photograph (Plt's Opp. Exh. "D") and whether it, in conjunction with the description of the accident location in the notice of claim, sufficiently describes the location of the accident so that the Defendant could investigate claim.

[2] It is not clear whether the Plaintiff presented the photograph of the accident location to the Town prior to this motion. If he did not, he was ill-served for failing to do so.

Index No. SC-449-16

The cases cited by the Defendant are in opposite to the facts in this case. In Bacchus v. City of New York, 134 A.D.2d 393, 521 N.Y.S.2d 27 (2d Dept. 1987), the plaintiff specified the wrong side of the street in the original notice of claim. In this case, there is no evidence that the Plaintiff specified the wrong side of the street in his notice of claim. In Krug v. City of New York, 147 A.D.2d 449, 537 N.Y.S.2d (2d Dept. 1989), the plaintiff provided the wrong address in the notice of claim and the court dismissed the action. In this case, there is no evidence that the Plaintiff specified the wrong address or location in the notice of claim. In Konsker v. City of New York, 172 A.D.2d 361, 568 N.Y.S.2d 620 (1st Dept. 1991), the plaintiff described the wrong street location by one block. In the case at bar, there is no evidence that the Plaintiff gave the Defendant a wrong location.

In Wai Man Hui v. Town of Oyster Bay, 267 A.D.2d 233, 699 N.Y.S.2d 485 (2d Dept. 1999), and Harper v. City of New York, 129 A.D.2d 770, 514 N.Y.S.2d 763 (2d Dept. 1987), those cases involved the description of the accident location in terms of roadways and intersections and was found to be insufficient. Unlike the present case, those cases did not involve a photograph of the location of the accident.

In Mayer v. Du Pont Associates, Inc., 80 A.D.2d 779, 437 N.Y.S.2d 94 (1st Dept. 1981), the Court stated that plaintiff's inadvertent failure to

specify the accident location, which was not calculated to confuse or prevaricate and which did not actually prejudice the city, did not warrant dismissal of the complaint. In the case at bar, the Defendant does not allege that the description of the accident location in the notice of claim prejudiced it in its investigation of the claim.

In Lord v. New York City Housing Authority, 184 A.D.2d 406, 585 N.Y.S.2d 49 (1st Dept. 1992), the Court stated that a municipality served with a notice of claim lacking in specificity regarding the location of the accident is still responsible for knowing the location of property under its control and for reasonably applying that knowledge to supplement information contained in the notice to determine precise location of accident. The Court presumes that the Defendant knows the location of property under its jurisdiction and that if it applies said knowledge together with the notice of claim and photograph provided by the Plaintiff, it could locate the situs of the accident without difficulty. The Defendant does not argue that it attempted to locate the accident scene and was frustrated in its attempts to do so because of the lack of specificity regarding the description of the accident location in the notice of claim.

In Bravo v. City of New York, 122 A.D.2d 761, 505 N.Y.S.2d 647 (2d Dept. 1986), the Court held that a notice of claim did not lack specificity in its description of the accident location where it described

the location as "occurring on 162nd Street between Laburnum and Oak Avenues, in the vicinity of 4724 162nd Street, Queens, New York."

Inasmuch as the Defendant moves for summary judgment to dismiss the Complaint based on an insufficient description of the situs of the accident in the notice of claim,[3] the motion is denied. The Defendant failed to show that the location description in the notice of claim was statutorily defective and/or prejudicial to its investigation.

Summary Judgment

Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact. Russell v. Barton Hepburn Hospital, 154 A.D.2d 796, 546 N.Y.S.2d 239 (3d Dept. 1989). According to the Court of Appeals, "the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (citations omitted). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the opposing papers (citations omitted)." Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); Ayotte v. Gervasio, 81

[3] The Court is of the view that the notice of claim and supplemental photograph of the accident location (Plt's Opp. Exh. "D") taken together make the description of the accident location in the notice of claim sufficiently particular to enable the Defendant to adequately investigate the claim.

N.Y.2d 1062, 1063, 619 N.E.2d 400, 601 N.Y.S.2d 463 (1993); Finklestein v. Cornell University Medical College, 269 A.D.2d 114, 117, 702 N.Y.S.2d 285 (1st Dept. 2000).

In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, and accord the non-moving party the benefit of every reasonable inference. Rizzo v. Lincoln Diner Corp., 215 A.D.2d 546, 626 N.Y.S.2d 280 (2d Dept. 1995); Negri v. Stop and Shop, 65 N.Y.2d 625, 480 N.E.2d 740, 491 N.Y.S.2d 151 (1985). Although summary judgment is an available remedy in the appropriate case, its fatal effects preclude its use except in "unusually clear" instances. Stone v. Aetna Life Ins. Co., 178 Misc. 23, 25, 31 N.Y.S.2d 615 (Sup. Ct., New York County, 1941). Hence, "a remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a day in court." Wagner v. Zeh, 45 Misc.2d 93, 94, 256 N.Y.S.2d 227 (Sup. Ct., Albany County, 1965) *aff'd* 26 A.D.2d 729 (3d Dept. 1966).

Nevertheless, a moving party is entitled to summary judgment if it tenders evidence sufficient to eliminate all material issues of fact from the case. Winegrad v. New York University Medical Center, 64 N.Y.2d at 853; Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 404

N.E.2d 718, 427 N.Y.S.2d 595 (1980).

Having already found that the notice of claim and the supplemental photograph sufficiently depict the situs of the accident to assist the Defendant in adequately conducting a meaningful investigation of the claim, the Defendant is not prejudiced and therefore not entitled to summary judgment dismissing the Complaint. Butler v. Town of Smithtown, 293 A.D.2d 696, 742 N.Y.S.2d 324 (2d Dept. 2002).

Any further arguments not specifically addressed by this Decision & Order have been considered by the Court and found to be without merit.

Based on the aforesaid, it is

Ordered that the Defendant's motion for summary judgment seeking to dismiss the Complaint is denied;

Ordered that the parties are directed to appear in Court on March 22, 2017 at 9:30 a.m. for further proceedings in this matter.

This constitutes the decision and order of the Court.

_____

Hon. Reginald J. Johnson
Peekskill City Court Judge

DATED: Peekskill, New York
February 15, 2017

Index No. SC-449-16

To: Andrew Clark
2261 Hunterbrook Road
Yorktown Heights, New York 10598

Law Office of Lori D. Fishman
Attorney for Defendant
Town of Yorktown
120 White Plains Road, Suite 220
White Plains, New York 10591