SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

---------- X

PAMELA GRACE,

Plaintiff,

- against -

Index No. 150049/2017
(Motion Sequence No. 001)

METROPOLITAN TRANSIT AUTHORITY and
NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

---------- X

Kalish, J.:

On three separate occasions in 2015, plaintiff allegedly fell in a New York City subway station, resulting in personal injuries. One of the incidents occurred on December 29, 2015 at a station located in the Bronx. The other two incidents occurred on October 30, 2015 and November 18, 2015, at a station located in Manhattan. Plaintiff filed a separate notice of claim for each incident as follows.

In a notice of claim filed on or about March 23, 2016, plaintiff alleged that, on December 28, 2015, at approximately 9:00 a.m., she sustained personal injuries as a result of slipping in the gap between the subway train and the platform "while boarding a #2 train" at the downtown "Prospect Avenue, #2 IRT Station" (Notice of Claim, Defendants' Notice of Motion, Exhibit A). Although the #2 Prospect Avenue IRT Station is located in Bronx County, the notice of claim erroneously states that it is located in New York County. It also states that the accident occurred on December 28, 2015, whereas it actually occurred on December 29, 2015.

On or about May 4, 2016, plaintiff filed a "second amended notice of claim" with respect to the incident that occurred on October 30, 2015, alleging that on that date, she sustained personal injuries as a result of slipping/tripping on debris on the top step of the "U-2 " stairway at

"the 181st Street and St. Nicholas Avenue, #1 Downtown IRT Station, in the County, City and State or New York" (Second Amended Notice of Claim, Defendants' Notice of Motion, Exhibit C). On or about May 4, 2016, plaintiff also filed an "amended notice of claim" with respect to the incident that occurred on November 18, 2015, alleging that on that date, she sustained personal injuries as a result of slipping/tripping on debris on the same stairway at the same IRT station (Amended Notice of Claim, Defendants' Notice of Motion, Exhibit D).[1]

On August 15, 2016, a hearing was conducted pursuant to General Municipal Law § 50-h in TA 2015-12-28-0021-001. As relevant here, plaintiff testified that the December 2015 incident occurred on December 29, 2015, not December 28, 2015 (50-h Hearing Transcript [8-15-16], at 24:10; 54:20-22, Defendants' Notice of Motion, Exhibit E). Plaintiff also indicated that the accident occurred at the Prospect Avenue subway station, located in Bronx County (*id.* at 53:18-21).

By summons and complaint, dated January 3, 2017, plaintiff initiated the instant action against defendants to recover damages allegedly arising from all three incidents (Complaint, Defendants' Notice of Motion, Exhibit G). The first, second, and third causes of action seek to recover damages related to, among other things, defendants' negligent maintenance and/or improper design of the subway stations involved in the October 30, November 18, and December 29 incidents, respectively. The fourth cause of action seeks to recover damages for, among other things, negligent hiring and supervision related to all three incidents.

The complaint erroneously identifies the date of the December 2015 accident as

[1]The amendments were permitted in a prior special proceeding brought by defendants/petitioners against plaintiff/respondent under index number 155432/2016.

December 28, 2015. It also identifies the location of the accident as the subway station "designated as #2 Downtown IRT Station, located in the vicinity of Prospect Avenue, in the *County of New York*, City and State of New York" (Complaint, at 20-28 [emphasis added]).

On August 15, 2017, a second General Municipal Law § 50-h hearing was conducted regarding all three alleged incidents. During the second hearing, plaintiff again testified that the December 2015 incident occurred on December 29, 2015, not December 28, 2015 (50-h Hearing Transcript [8-15-17], at 95:18, Plaintiff's Notice of Cross Motion, Exhibit H).

Defendants now move to strike the notice of claim pertaining to the December 2015 incident on the ground that it fails to adequately describe the location of the accident. They also seek to strike all three notices of claim as untimely. In addition, defendants move, pursuant to CPLR 603, to sever the third cause of action and, pursuant to CPLR 510 and 505(b), to change venue for that cause of action to Bronx County. Plaintiff cross-moves, pursuant to General Municipal Law § 50-e (6), for leave to amend the notice of claim pertaining to the December 2015 incident. For the following reasons, defendants' motion is granted in part and denied in part. Plaintiff's cross motion is granted.

DISCUSSION

"To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim" (*Brown v City of New York*, 95 NY2d 389, 392 [2000]). "A Notice of Claim serves an important public purpose, enabling authorities to promptly investigate the site of an alleged accident and assess municipal exposure to liability" (*id.* at 394).

General Municipal Law § 50-e (1) (a) provides that a notice of claim must be served

"within ninety days after the claim arises." Pursuant to General Municipal Law § 50-e (2), the notice of claim must set forth the following information:

> " (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."

It is not necessary for "those things to be stated with literal nicety or exactness" (*Brown v City of New York*, 95 NY2d at 393 [internal quotation marks and citations omitted]). A notice of claim is adequate so long as it "includes information sufficient to enable the city to investigate. Nothing more may be required. Thus, in determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a 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" (*id.* [internal quotations marks and citations omitted]). "Whether the notice of claim substantially complies with the requirements of the statute depends on the circumstances of each case" (*Ingle v New York City Tr. Auth.*, 7 AD3d 574, 575 [2d Dept 2004]).

General Municipal Law § 50-e (6) provides that "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" (General Municipal Law § 50-e [6]; *see also Gonzalez v New York City Hous. Auth.*, 107 AD3d 471, 471 [1st Dept 2013]; *Donaldson v New York City Hous. Auth.*, 91 AD3d 550, 551 [1st Dept 2012]; *Delaney v Town of Islip*, 63 AD3d 658, 660 [2d Dept 2009]). "In making this determination of prejudice, the court may look to evidence adduced at a section 50-h hearing, and to such other evidence as is properly before the court" (*D'Alessandro v New*

York City Tr. Auth., 83 NY2d 891, 893 [1994]).

General Municipal Law § 50-e (6) does not authorize "'substantive changes in the theory of liability'" (*Matter of Corwin v City of New York*, 141 AD3d 484, 488 [1st Dept 2016], quoting *Van Buren v New York City Tr. Auth.*, 95 AD3d 604, 604 [1st Dept 2012]). Therefore, "amendments that create new theories of liability do not fall within the purview of General Municipal Law § 50-e (6)" (*id.*). Where an amended notice of claim seeks to add a new theory of liability, or to change the initial theory of liability, the claimant may move for leave to file a late notice of claim under General Municipal Law § 50-e (5). However, the claimant must do so within 1 year and 90 days after the happening of the event upon which the claim is based (*see* General Municipal Law § 50-e [5]; General Municipal Law § 50-i [1] [c]). "The court is without power to consider an application to file a late notice of claim after expiration of that limitations period" (*Turner v City of New York*, 94 AD3d 635, 635 [1st Dept 2012]).

The Notice of Claim Pertaining to the December 2015 Incident

Defendants contend that the notice of claim apprising them of the December 2015 incident does not comply with the General Municipal Law § 50-e (2) because the address provided for the location of the accident does not exist – i.e., there is no Prospect Avenue subway station in New York County. They point out that there is a Prospect Avenue subway station in both Brooklyn and the Bronx. Further, they highlight that the notice of claim sets forth the incorrect date for the accident and that the complaint repeats the mistakes contained in the notice of claim.

In response, plaintiff contends that this court is authorized to grant leave to serve an amended notice of claim with respect to the December 2015 incident inasmuch as the errors were

made in good faith and defendants suffered no prejudice being that there is only one #2 Prospect Avenue subway station and it is located in the Bronx. She contends that defendants cannot claim ignorance with regards to the location of their own subway stations. Plaintiff also points out that she testified at the first General Municipal Law 50-h hearing that the accident took place in the Bronx. She asserts that in light of the foregoing, no credible claim can be made that defendants were not on notice of the location of the accident.

In addition, plaintiff asserts that defendants cannot claim they were unaware that the accident occurred on December 29, 2015 inasmuch as she immediately reported the accident to the token booth clerk and the individual responsible for taking incident reports. One of those individuals contacted the NYPD, who arrived at the scene, at which point plaintiff reported the accident to the NYPD. Plaintiff contends that the date is also confirmed by numerous reports and records, including a certified FDNY "Prehospital Care Report Summary" which she attaches as an exhibit to her cross motion, stating the date and location of the accident (Plaintiff's Cross Motion, Exhibit G). In addition, plaintiff points out that she testified at both hearings that the accident occurred on December 29, not December 28. Therefore, she asserts, defendants would not be prejudiced if her motion is granted.

This court concludes that because the notice of claim specified that the accident occurred on the platform of the downtown, # 2 Prospect Avenue IRT subway station, it allowed defendants to locate the place of the accident. Although the notice of claim erroneously stated that the station is located in New York County, there is no Prospect Avenue subway station in New York County. While there is a Prospect Avenue subway station in Brooklyn, it is not on the #2 subway line. As plaintiff points out, there is only one Prospect Avenue subway station on the

#2 line and that station is located in the Bronx. As such, defendants should have been able to discern the location from the description provided (*Williams v City of New York*, 229 AD2d 114, 117 [1st Dept 1997]["Notwithstanding the inclusion of a misdescription of the site of an accident, we have found a notice of claim to be sufficient where defendant, with a modicum of effort, could have discovered the true location, even where the misinformation relates to the wrong building number or the wrong county"][internal quotation marks and citations omitted]). Furthermore, plaintiff testified at the first General Municipal Law § 50-h hearing, that the accident occurred in Bronx County and testified at both hearings that the accident occurred on December 29, 2015 (*see Hollman v 480 Assoc. Inc.*, 138 AD3d 637, 638 [1st Dept 2016]["Taken together, the amended notice of claim, photographs, and 50-h testimony provided the City with sufficient information to investigate plaintiff's claim"]).

In any event, even assuming the notice of claim does not substantially comply with the requirements of General Municipal Law § 50-e (2), this court may, in its discretion, allow the mistake to be corrected pursuant to General Municipal Law § 50-e (6). The defendants do not claim that the mistakes in the notice of claim were made in bad faith. Further, defendants do not demonstrate any actual prejudice and there is no reason to presume the existence of prejudice from this record (*see Gatewood v Poughkeepsie Hous. Auth.*, 28 AD3d 515, 515 [2d Dept 2006]; *Matter of Seraita v City of Yonkers*, 292 AD2d 456, 457 [2d Dept 2002]; *Seise v City of New York*, 212 AD2d 467, 468-469 [1st Dept 1995]; *Mayer v Du Pont Assoc., Inc.*, 80 AD2d 799, 799-800 [1st Dept 1981]).

Defendants contend that since plaintiff failed to identify the proper location for the accident within ninety days of when the claim arose, and did not timely move for leave to serve a

late notice of claim within 1 year and 90 days of when the claim arose, the notice of claim must be stricken as untimely. Defendants seem to be suggesting in this regard that General Municipal Law § 50-e (5), addressing applications for leave to serve a late notice of claim, rather than General Municipal Law § 50-e (6), applies. However, plaintiff is not seeking an extension of time to serve her notice of claim. Rather, she is seeking to correct a timely served notice of claim, which may be accomplished "[a]t any time after the service of a notice of claim and at any stage of an action" (General Municipal Law § 50-e [6]; *see Lomax v New York City Health and Hosps. Corp.*, 262 AD2d 2, 5 [1st Dept 1999]["As General Municipal Law § 50-e (6) clearly gives courts the power to allow corrections in such cases, there was no need to treat the correction as a new claim for which plaintiff needed permission to file a late Notice of Claim"]).

In sum, given the absence of bad faith by plaintiff and the lack of prejudice to defendants, defendants' request to strike the notice of claim pertaining to the December 2015 incident is denied and plaintiff's cross motion for leave to serve an amended notice of claim is granted. Defendants' unopposed request for severance of the third cause of action is granted (*see* CPLR 603), and since the underlying accident occurred in Bronx County, defendants' unopposed request to change the place of trial for that cause of action to Bronx County is also granted (*see* CPLR 505 [b]["The place of trial of an action against the New York city transit authority shall be in the county within the city of New York in which the cause of action arose"]; CPLR 510 [1] ["The court, upon motion, may change the place of trial of an action where . . . the county designated for that purpose is not a proper county"]).

The Notices of Claim Pertaining to the October and November 2015 Incidents

While defendants ask this court in their notice of motion to strike all of the notices of

claim as untimely, they fail to set forth an argument in their motion papers in support of striking the notices of claim related to the October 2015 or November 2015 incidents. In any event, the papers proffered by defendants in support of their motion indicate that the original notices of claim related to these incidents were timely filed (*see* Defendants' Notice of Motion, Exhibit F). Specifically, the papers indicate that the original notice of claim pertaining to the October 30, 2015 incident was filed on or about January 27, 2016 and the original notice of claim pertaining to the November 18, 2015 incident was filed on or about February 12, 2016 (Defendants' Notice of Motion, Exhibit F). Therefore, both were timely filed within the 90-day period set forth in General Municipal Law § 50-e (1) (a). Additionally, by order dated April 28, 2017, the Supreme Court, New York County, in a prior proceeding, granted plaintiff's request to amend the notices of claim pertaining to these incidents pursuant to General Municipal Law § 50-e (6) (*see Matter of Metropolitan Transportation Authority v Grace*, Index No. 155432/2016; Affirmation in Opposition to Plaintiff's Cross Motion, Exhibit A). In that order, the court concluded that allowing the requested corrections did not involve a change in theory and would cause no prejudice to defendants. Furthermore, the court noted that even if the proposed amended notices of claim contained impermissible new theories of liability, it could still grant leave to serve late notices of claim under General Municipal Law § 50-e (5), inasmuch as the request came within 1 year and 90 days after the happening of the incidents upon which the claims are based. In light of the foregoing, to the extent defendants may be understood as asserting that these notices of claim should be stricken as untimely, their contention lacks merit.[2]

---

[2]The instant request to strike the October and November notices of claim as being late has been previously ruled upon, at least implicitly, in the prior proceeding by allowing respondent/plaintiff to file her amended notices of claim. As the court noted, "the respondent's applications were brought within the one year and ninety day period during which there is broad discretion to decide whether or not to allow the untimely filing of a notice of claim"

CONCLUSION

Accordingly, it is

ORDERED that those branches of the motion by defendants Metropolitan Transportation Authority and New York City Transit Authority which seek to strike plaintiff Pamela Grace's notices of claim are denied, and plaintiff's cross motion for leave to serve an amended notice of claim with respect to the December 2015 incident is granted; and it is further

ORDERED that those branches of defendants' motion which seek to sever the third cause of action from the complaint and for a change of venue is granted, the third cause of action is severed and the venue for that cause of action is changed from this Court to the Supreme Court, Bronx County, for the purposes of discovery and trial, and the remainder of the action shall continue here; and it is further

ORDERED that the Clerk of this Court is directed, upon service of a copy of this order with notice of entry and payment of appropriate fees, if any, to transfer all papers filed in this action that pertain to the third cause of action to the Supreme Court, Bronx County.

The foregoing constitutes the decision and order of the Court.

Dated: Dec. 14, 2018

ENTER:

HON. ROBERT D. KALISH
J.S.C.

J.S.C.

(Despas-Barous affirmation, exhibit A, at 7-8).