

Novillo v New York City Hous. Auth.

2011 NY Slip Op 32326(U)

August 26, 2011

Supreme Court, New York County

Docket Number: 114850/09

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C.

PART 2

Franco Morillo
N.Y.C.H.A.

INDEX NO. 114850/09
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

Cross-Motion: Yes No

AUG 30 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

Dated: 8/26/11

Ley
LOUIS B. YORK 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: IAS PART 2

----- X
FRANCO NOVILLO,

Index No. 114850/09

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

FILED

Defendant.

AUG 30 2011

----- X
LOUIS B. YORK, J.:

NEW YORK
COUNTY CLERK'S OFFICE

This decision addresses plaintiff Franco Novillo's (hereafter Novillo) motion by Order to Show Cause dated April 13, 2011, requesting (1) permission to amend the Notice of Claim pursuant to GML § 50-e(6), and (2) permission to amend the Verified Complaint and Verified Bill of Particulars pursuant to CPLR § 3025(b) & ©. For the reasons discussed *infra*, the motion is denied.

FACTS

The present controversy involves a slip and fall alleged to have occurred on January 18, 2009 as Novillo walked down the front steps of a building owned by the defendant, New York City Housing Authority (hereafter Housing Authority). In the notice of claim, complaint, and bill of particulars, Novillo has alleged that his injuries were the result of a dangerous condition caused by Housing Authority's negligence regarding snow and ice that had accumulated on the building's stairway. Novillo now seeks to amend the notice of claim and pleadings to include, for the first time, allegations regarding Housing Authority's negligence for failing to provide proper lighting for the outside stairwell. A note of issue was filed by Novillo on April 13, 2011.

Novillo contends that Housing Authority had notice of the alleged improper lighting based on a statutory hearing conducted on September 15, 2009. A careful examination of the

transcript from this hearing reveals only two references to the lighting at the time of the accident. First, when asked whether the lamp located above the entrance to the building was illuminated at the time of the accident, Novillo stated that it was off. Novillo also indirectly mentioned the lighting later in the examination. When asked whether he had seen the ice on the step before he fell, Novillo stated that he had not "because at that time it was dark."

In addition, Novillo argues that discovery was conducted regarding the lighting issue, which should have put Housing Authority on notice of the claim. Specifically he notes two written demands requesting maintenance and repair records for the lighting at the subject premises, which Housing Authority responded to. The first, a Demand for Discovery and Inspection, dated July 19, 2010, requested, *inter alia*, all maintenance and repair records for lightbulb or light fixtures for the two year period prior to the accident. The second, A Notice for Discovery and Inspection dated September 23, 2010, requested, *inter alia*, maintenance, repair and inspection records for interior and exterior lighting and complaints related to that lighting. The information provided by Housing Authority regarding the lighting appears to be limited to Building Inspection Reports dated December 8, 2008 and January 8, 2009 and a statement that Housing Authority did not maintain records regarding the changing of light bulbs.

DISCUSSION

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." However, the amendment provision "merely permits correction of good faith, non-prejudicial, technical mistakes, defects or omissions, not substantive changes concerning the theory of liability" (*Mahase v Manhattan & Bronx Surface Tr. Operating Auth.*, 3

AD3d 410, 411 [1st Dept 2004]). Furthermore, "[w]hile evidence adduced at the statutory hearing can rectify deficiencies in a notice of claim's descriptions of location and injuries, information supplied at the hearing may not be used to amend the theory of liability set forth in the notice of claim where, as here, amendment would change the nature of the claim (*Figueroa v New York City Hous. Auth.*, 271 AD2d 238, 238-239 [1st Dept 2000] [citations omitted]).

Here, the delay in seeking to amend the notice of claim has substantially prejudiced Housing Authority. The significant delay in raising this new allegation has deprived Housing Authority of the opportunity to commence a timely investigation. An inquiry by Housing Authority at this point would have to rely heavily on interviews with employees and tenants whose memories of the lighting at the time of the accident may have diminished significantly. In addition, as the notice claim alleged liability solely based on the existence of a dangerous snow and ice condition on the apartment stairs, the addition of an allegation of a poor lighting condition would create a new theory of liability which is outside the scope of General Municipal Law § 50-3 (6) (*see White v New York City Hous. Auth.*, 288 AD2d 150 [1st Dept 2001]).

Furthermore, Novillo's reliance on *Cruz* during oral arguments is misplaced. In *Cruz v New York City Housing Authority*, the First Department affirmed the Supreme Court's order granting a motion to amend the notice of claim (261 AD2d 296 [1st Dept 1990]). In that case, despite the notice of claim alleging only a snow and ice condition, it was revealed during General Municipal Law § 50-h hearing that a large hole in the sidewalk, concealed by the snow and ice, in fact contributed to the plaintiff's fall. The First Department ruled that the testimony in the 50-h hearing, which took place less than five months after the accident, and which had been reiterated in the allegations in the complaint and bill of particulars, was sufficient to give the defendant timely notice of the plaintiff's claim. Thus, as there was no showing that the

defendant was prejudiced, the First Department ruled that amendment of the notice of claim was properly allowed.

The facts of the present case differ significantly. Novillo's testimony at the General Municipal Law § 50-h hearing was too vague give Housing Authority notice of the additional claim as it fails to state that the lack of lighting was a causative factor in the fall and as such (*see Hunt v New York City Hous. Auth.*, 280 AD2d 391 [1st Dept 2001]). Furthermore, Novillo offers no reason why he failed to allege the condition in either the complaint or bill of particulars or why he waited until discovery was completed to seek amendment of the notice of claim. The fact that Novillo sought discovery on the lighting despite his failure to include the allegations in his pleadings, rather than appearing to alleviate any prejudice to Housing Authority, smacks of gamesmanship.

The Court also notes that the amendment cannot be granted by deeming the amendment of the notice of claim served late pursuant to General Municipal Law § 50-e (5). GML § 50-e (5) specifically prohibits extension of the time to serve beyond the expiration of the statute of limitations which has already passed.

Therefore, for the reasons stated *supra*, Novillo's motion to amend the Notice of Claim is denied. In addition, as the inadequate lighting claim is a new theory that was not alleged in Novillo's Notice of Claim, the court also denies Novillo's motion to amend the Verified Complaint and Verified Bill of Particulars (*see e.g. Melendez v New York City Hous. Auth.*, 294 AD2d 243 [1st Dept 2002]).

Based on the foregoing, it is

ORDERED that the motion by Order to Show Cause, dated April 13, 2011, seeking to amend Novillo's Notice of Claim, Verified Complaint and Verified Bill of Particulars is denied.

Dated: 8/26/11

ENTER:

FILED

AUG 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

Luy

Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**