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

PRESENT: JAFFE BARBARA J. PART 5
Justice

Minnie Franklin-Williams, Et Al

- v -

City of NY, Et Al

INDEX NO. 107677/06

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

SEP 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 9/28/11

SEP 28 2011

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

----------x

MINNIE FRANKLIN-WILLIAMS and WILLIE WILLIAMS,

Plaintiffs,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

----------x

Index No. 107677/06

Arg.: 7/12/11
Motion Seq. No.: 004

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Jarad Lewis Siegel, Esq.
Edelman, Krasin & Jaye, PLLC
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516-742-9200

For defendant City:
Tanisha Joy Byron, ACC
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By order to show cause dated March 17, 2011, plaintiffs move for an order granting them leave to amend their notice of claim and complaint, and vacating the dismissal of the action or restoring the action to the trial calendar. Defendant City opposes.

I. BACKGROUND

On February 14, 2006, plaintiff Minnie Franklin-Williams was allegedly injured after she tripped and fell on the sidewalk on Eighth Avenue between 133rd and 134th Streets in Manhattan. (Affirmation of Jarad Lewis Siegel, Esq., dated Mar. 7, 2011 [Siegel Aff.], Exh. A). On or about April 7, 2006, plaintiffs served City with a notice of claim, and annexed six photographs of the accident location. (*Id.*).

On or about May 24, 2006, plaintiffs served defendants with a summons and complaint, alleging that plaintiff fell on the sidewalk abutting the premises at 2502 Eighth Avenue in

Manhattan. (*Id.*, Exh. B). On or about August 3, 3007, plaintiffs served their bill of particulars in which they again identified the accident location as the sidewalk abutting the premises at 2502 Eighth Avenue in Manhattan. (*Id.*, Exh. F).

By decision and order dated November 15, 2007, plaintiffs were granted leave to amend the complaint to add additional defendants. (*Id.*, Exhs. D, E).

On July 15, 2008, plaintiff testified at an examination before trial (EBT) that she fell on the sidewalk in front of a store on the corner of 134th Street and Eighth Avenue. (*Id.*, Exh. G).

On or about July 17, 2008, plaintiffs served a supplemental bill of particulars in which they identified the accident location as 2508 Frederick Douglass Boulevard a/k/a 2508 Eighth Avenue in Manhattan. (*Id.*, Exh. I).

On May 19, 2009, plaintiffs filed their note of issue. (*Id.*, Exh. J). By decision and order dated September 23, 2009, the complaint was dismissed against all of the defendants except City. (*Id.*, Exh. K).

On March 29, 2010, the parties appeared before a Judicial Hearing Officer (JHO) for trial, and the JHO dismissed the action as plaintiffs were not ready to proceed. (*Id.*, Exh. L).

II. MOTION TO AMEND

A. Contentions

Plaintiffs argue that they should be permitted to amend their notice of claim to reflect the correct location of the accident as the photographs annexed to the notice depicted the location and their misidentification of the location resulted from a typographical error, and assert that City cannot claim any prejudice absent proof that it attempted to investigate the claim and was unable to do so due to the error. (Siegel Aff.).

City argues that plaintiffs' five-year delay in seeking to amend the notice has prejudiced it as discovery has been completed and the action has been dismissed. It observes that the photos annexed to the notice reflected both alleged accident locations, thus failing to provide notice of the correct location, and asserts that it investigated the incident by searching for all relevant records and producing a witness for an EBT related only to 2502 Eighth Avenue and it would be prejudiced by having to conduct a new investigation at this stage of the proceeding. (Affirmation of Tanisha Joy Byron, ACC, dated Apr. 15, 2011 [Byron Aff.]).

In reply, plaintiffs maintain that City has failed to establish actual prejudice absent proof that it conducted a physical investigation of the location, and observe that the two accident locations are only several feet away from each other. (Reply Affirmation, dated June 6, 2011 [Reply Aff.]).

B. Analysis

Pursuant to GML § 50-e(l)(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. Pursuant to GML § 50-e(6):

> At 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.

"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 [1st Dept 2004], *affd* 3 NY3d 745).

Here, although plaintiffs initially misidentified the accident location, the photographs annexed to the notice depicted both locations, and they corrected their error through plaintiff's EBT testimony and service of a supplemental bill of particulars two years after the accident. Moreover, discovery continued for another 10 months thereafter. Thus, City had notice of the correct location within approximately two years of the accident and could have conducted an investigation before discovery was complete, the note of issue filed, and the action dismissed. (*See Matter of Barrios v City of New York*, 300 AD2d 480 [2d Dept 2002], *lv denied* 100 NY2d 534 [2003] [granting motion to amend notice of claim as notice was submitted along with photographs from which correct location could have been ascertained, and City informed of correct location at 50-h hearing five months after notice served]).

City also failed to establish that it cannot now investigate the claim absent proof that any relevant records no longer exist or witnesses cannot be located, and submits no proof that it conducted a physical investigation of the incorrect location. Plaintiffs have thus demonstrated that City has not been prejudiced by their error and will not be prejudiced by permitting amendment of the notice of claim. (*See eg Rodriguez v City of New York*, 38 AD3d 268 [1st Dept 2007] [prejudice established where municipal defendant shows it actually conducted investigation at wrong location due to incorrect information]; *Matter of Zahra v New York City Hous. Auth.*, 16 AD3d 245 [1st Dept 2005], *lv denied* 5 NY3d 706 [absent evidence that defendant undertook investigation, it was unable to demonstrate prejudice]; *Williams v City of New York*, 229 AD2d 114 [1st Dept 1997] [prejudice not shown absent claim that City attempted

to conduct investigation and was unable to do so due to incorrect address]).

III. MOTION TO AMEND COMPLAINT

Having determined that plaintiffs should be permitted to amend their notice of claim, for the same reasons they are permitted to amend the complaint to provide the correct location of the accident.

IV. MOTION TO VACATE DISMISSAL

A. Contentions

Plaintiffs allege that despite having told the JHO two weeks before the case was dismissed that they would be unable to proceed on March 29, 2010 due to the Passover holiday, the JHO nevertheless dismissed it, and they assert that as the JHO's order was never approved or recognized by a Justice of the Supreme Court, the JHO lacked the authority to dismiss and the dismissal is thus a nullity. They thus maintain that they have a reasonable excuse for being unable to proceed to trial, and submit plaintiffs' affidavit to establish a meritorious claim against City. (Siegel Aff.).

City denies that plaintiffs established a reasonable excuse for their failure to proceed as the parties were informed before the trial date that no adjournments would be granted, and alleges that the correct location of the accident, 2508 Eighth Avenue, is not a valid address and that plaintiffs thus cannot demonstrate that City was the abutting landowner which may be held liable here. (Byron Aff.).

In reply, plaintiffs submit proof that in an unrelated judicial proceeding, City conceded being the owner of the premises at 2508 Eighth Avenue, and observe that City does not dispute that the JHO lacked the authority to dismiss the case. (Reply Aff.).

B. Analysis

Absent any evidence that the order of the JHO dismissing the action was confirmed or signed by a Justice of the Supreme Court, the dismissal is a nullity. (*Nguyen v Prime Residential Bronx R & R V*, 307 AD2d 201 [1st Dept 2003] [JHO had no authority to dismiss petition]; *compare Fink v Antell*, 19 AD3d 215 [1st Dept 2005] [dismissal order was issued by court based on record of proceeding before JHO]).

Even if the dismissal order had been authorized, plaintiffs establish a reasonable excuse for the default, as it is undisputed that the case had been set for trial for the first time on March 29, 2010 and plaintiffs' counsel had a religious conflict. (*See eg Parker v Alacantara*, 79 AD3d 429 [1st Dept 2010] [plaintiff entitled to order vacating dismissal of action as there was no indication of willful conduct by counsel in failing to return to courtroom or pattern of seeking repeated adjournments or not complying with court orders]). Plaintiffs also demonstrate a meritorious claim based on their assertion that the accident occurred due to a defect on the sidewalk and proof that City is the abutting property owner.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion to amend is granted, and the amended notice of claim and amended complaint annexed to the motion papers are deemed served upon plaintiffs' service of a copy of this order with notice of entry; it is further

ORDERED, that plaintiffs' motion to vacate or restore is granted; and it is further

ORDERED, that, within 20 days from entry of this order, plaintiffs serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), who is directed

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to restore the case to the trial calendar under the original calendar number.

FILED

SEP 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C

DATED: September 28, 2011
New York, New York

SEP 28 2011