

Pasha v City of New York

2013 NY Slip Op 30084(U)

January 8, 2013

Sup Ct, New York County

Docket Number: 100866/2011

Judge: Kathryn E. Freed

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

HON. KATHRYN FREED
PRESENT: JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 100866/2011
PASHA, CARL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
COMPEL CAL: 14 94

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

FILED

JAN 18 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1-8-13
JAN 08 2013


_____, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
CARL PASHA,

Plaintiff,

-against-

THE CITY OF NEW YORK, CON EDISON,
JOSEPH TRAIOR and BAH IBRAHIMA,

Defendants.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR § 2219(a), OF THE PAPERS CONSIDERED IN THE
REVIEW OF THIS MOTION.

DECISION/ORDER
Index No.: 100866/2011
Seq. No.: 001

PRESENT:
Hon. Kathryn E. Freed

J.S.C.
FILED

JAN 18 2013

NEW YORK
COUNTY CLERK'S OFFICE

PAPERS

NUMBERED

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1,2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....3,4.....
REPLYING AFFIDAVITS.....5.....
EXHIBITS.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS
AS FOLLOWS:

Plaintiff moves for an Order compelling defendant City of New York, (hereinafter, the "City"),
to accept an amended notice of claim. The City cross-moves for an Order dismissing the instant action
pursuant to C.P.L.R. §3211 based on plaintiff's failure to comply with G.M.L. §§ 50[i] and 50[e].
Defendants' Traidor and Ibrahima oppose the City's cross-motion.

After a review of the papers presented, all relevant statutes and case law, the Court grants plaintiff's motion and denies defendant City's cross-motion.

Factual and procedural statement:

According to plaintiff, the instant case emanates from injuries sustained when a taxicab in which he was a passenger, became involved in an accident on December 2, 2010 at 23rd Street in the vicinity of the intersection of 23rd Street and First Avenue, New York New York. Said taxicab was owned by defendant Tridor and operated by defendant Ibrahima. Plaintiff asserts that Tridor and Ibrahima were negligent in that the cab was operating in "a rapid and unlawful rate of speed," causing it to strike a large "open and obvious" pothole and depression in the roadway. Plaintiff asserts that the City was also negligent in failing to provide a barricade or other warning of this dangerous condition; in failing to properly maintain and inspect the roadway and in permitting this condition to exist for an unreasonable length of time. Plaintiff additionally asserts that defendant Con Ed was negligent by failing to provide a barricade or other warning of this "dangerous and hazardous" condition; and in failing to complete work done at this location.

Positions of the parties:

Plaintiff asserts that he served a notice of claim which "inadvertently" noted 21st Street and First Avenue, instead of 23rd Street and First Avenue. He appends a copy of plaintiff's 50-H hearing transcript, wherein plaintiff testified that 23rd Street was the correct location. He also appends a copy of the verified complaint and bill of particulars, which also indicate 23rd Street as the correct location.. Lastly, plaintiff appends an amended notice of claim. Plaintiff urges the Court to compel the City to accept same, arguing that the City would not be prejudiced in that it has been aware of the correct address throughout the pendency of the case.

The City argues plaintiff's deadline to seek leave to materially amend his notice of claim has passed. It provides a procedural time line. On September 2, 2010, plaintiff commenced the instant action via Summons and Complaint. The Summons is dated September 2, 2010, while the Complaint is dated December 15, 2010. The City stamped receipt of same on February 4, 2011. On February 23, 2011, issue was joined when it served its Answer. The City argues that March 2, 2011 was plaintiff's deadline to seek leave to materially amend his notice of claim. It asserts that on March 28, 2012, its investigator sent plaintiff a letter apprising plaintiff that it would not exchange discovery until the "correct location of incident is determined" and requesting that he amend his notice of claim to reflect the correct location. On April 5, 2010, plaintiff replied with an amended Notice of Claim.

Defendants' Traidor and Ibrahima oppose the instant motion, arguing that even if the Court dismisses the direct action against the City, the cross claims seeking indemnification and contribution from the City should not be dismissed but rather, should be converted by the Court to third party claims.

Conclusions of law:

G.M.L. § 50-e (6) authorizes a court, in its discretion, to grant leave to serve an amended notice of claim where the error in the original notice of claim was made in good faith, and where the other party has not been prejudiced thereby. It specifically provides that "[a] mistake, omission, irregularity or defect" in the notice of claim may be "corrected, supplied or disregarded" in the court's discretion, provided that the mistake, omission, irregularity, or defect, was made in good faith, and the public corporation was not prejudiced thereby" (*see also* (D'Alessandro v. New York City Tr. Auth., 83 N.Y.2d 891, 893 [1994]; Palmieri v. New York City Tr. Auth., 288 A.D.2d 361, 362 [2d Dept.2001]; Cyprien v. New York City Tr. Auth., 243 A.D.2d 673 [2d Dept. 1993]).

G.M.L. §50-e(5), is more restrictive in permitting service of a late notice of claim (*see* Holmes-

Thompson v. New York City Tr. Auth., 17 Misc.3d 1123(A), 851 N.Y.S.2d 69, 2007 Slip Op. 521304 (N.Y. Sup. 2007)). The test of the sufficiency of a notice of claim is whether it includes information sufficient to enable the municipal agency to investigate the allegations contained in the notice of claim (Canelos v. City of New York, 37 A.D.3d 637 [2d Dept. 2007]). To determine if there has been compliance with the requirements of General Municipal Law § 50-e(2), the court must focus on whether, based on the claimant's description, the relevant municipal authorities can locate the place, fix the time, and understand the nature of the accident (*Id.*; see also Brown v. City of New York, 95 N.Y.2d 389, 393 [2000], *lv dismissed* 96 N.Y.2d 936 [2001]; O'Brien v. City of Syracuse, 54 N.Y.2d 353, 358 [1981]).

In the case at bar, the Court finds the City's contention that it "remains prejudiced in that it is unable to identify the correct accident location or exactly where on the correct street the accident occurred," to be unavailing. Indeed, the proposed notice of claim merely corrects a "mistake, omission, irregularity or defect," and does not impermissibly allege a new theory of liability (*see gen.* Barksdale v. New York City Tr. Auth., 294 A.D.2d 210 [1st Dept. 2002]).

At his administrative hearing held on February 24, 2010, which was held only 40 days after the filing of the notice of claim and actually within the statutory 90 day notice of claim notification period, plaintiff testified that the incident occurred "on 23rd Street between 2nd and 1st Avenue, Manhattan." The police report appended to plaintiff's motion papers as Exhibit "A," indicates that the incident occurred on "23rd St. & 1st Ave." Therefore, the City has in no way been prejudiced.

The Court finds Seise v. City of New York, 212 A.D.2d 467 [1st Dept. 1995], to be on point. In that case, the notice of claim incorrectly stated that the accident occurred at the intersection of 125th Street and 3rd Avenue, New York, New York. However, the accident actually occurred at 124th Street and 3rd Avenue. That plaintiff testified as to the correct address at her subsequent 50-h hearing, which was conducted 53 days after the expiration of the statutory notice of claim period. That court reversed the

lower court's decision, granted plaintiff leave to file an amended notice of claim and dismissed the City's cross motion to dismiss.

In the case at bar, since plaintiff is not alleging a new theory of liability, the instant motion is not governed by the standards for seeking to serve a late notice of claim (*see Halperin v. City of New York*, 127 A.D.3d 461, 462 [1st Dept. 1987]; *Holmes-Thompson v. New York City Tr. Auth*, 17 Misc.3d 1123(A), 851 N.Y.S.2d 69, 2007 Slip Op. 521304 (N.Y. Sup. 2007)). Indeed, G.M.L. § 50-e (5) states in pertinent part that "in determining whether the Court may grant an extension to file a notice of claim the Court shall consider, in particular, whether the public corporation.....acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including...whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining a defense on the merits...."

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion compelling the City of New York to accept plaintiff's amended notice of claim is granted and it is further

ORDERED that defendant City of New York's cross-motion is denied and it is further

ORDERED that this constitutes the decision an order of the Court.

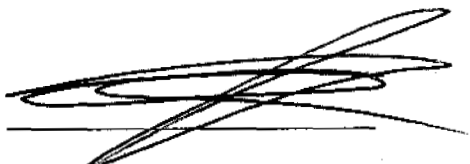
DATED: January 8, 2013

JAN 08 2013

FILED

JAN 18 2013

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Hon. Kathryn E. Freed
HON. KATHRYN E. FREED
JUSTICE OF SUPREME COURT