Mora v New York City Hous. Auth.
2016 NY Slip Op 30981(U)
February 9, 2016
Supreme Court, New York County
Docket Number: 150380/14
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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BELKYS MORA,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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Index No. 150380/14
Motion Seq. 001

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

Defendant New York City Housing Authority ("Defendant" or "NYCHA") moves pursuant to General Municipal Law ("GML") § 50-e[1] and Public Housing Law ("PHL") § 157(2)[2] for an order dismissing certain theories of liability set forth in Plaintiff Belkys Mora's ("Plaintiff") verified bill of particulars to the extent they alter the nature of Plaintiff's claims and do not comport with the substance of the allegations set forth in Plaintiff's August 8, 2013 verified Notice of Claim ("NOC").[3] Defendant further seeks an order compelling Plaintiff to serve an amended verified bill of particulars which removes all provisions that espouse such

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1 GML § 50-e, entitled "Notice of Claim", provides in relevant part that a notice of claim founded upon a tort and required by law as a condition precedent to the commencement of an action against a public corporation "shall set forth . . . the nature of the claim . . . the time when, the place where and the manner in which the claim arose . . . ." GML § 50-e(2)

2 New York Public Housing Law § 157(2) provides that "[a]n action against an authority for damages for injuries to real or personal property, or for the destruction thereof, or for damages for personal injuries, alleged to have been sustained by reason of the negligence of, or by the creation or maintenance of a nuisance by said authority, or any member, officer, agent or employee thereof, shall be commenced within one year and ninety days after the cause of action therefor shall have accrued, provided that a notice of the intention to commence such action shall have been served upon the authority. All the provisions of section fifty-e of the general municipal law shall apply to such notice. The authority may require any claimant hereunder to be examined as provided in section fifty-h of the general municipal law, and all the provisions of such section shall apply to such examinations."

3 A copy of Plaintiff's NOC is annexed as exhibit A to the moving papers.

theories of liability.

The NOC alleges that on June 15, 2013 at approximately 3:10PM, Plaintiff fell and sustained personal injuries while descending from the second floor to the first floor on staircase A within the NYCHA building located at 201 West 93rd Street in Manhattan (" Premises"). The NOC specifically sets forth, in relevant part, that:

> [Plaintiff] was caused to fall and be injured by reason of the negligence, recklessness and carelessness of above named respondent . . . in causing, permitting and/or allowing said staircase . . . to be, become and remain in a dangerous and hazardous condition, constituting a trap, nuisance and hazard, including, but not limited to, improper, unsafe and defective steps(s) and handrail(s), and in failing to correct said condition.

Annexed to Plaintiff's NOC is a photograph which depicts the stairwell where the accident occurred, looking down to the first floor landing.

Plaintiff appeared for her GML § 50-h statutory hearing on October 3, 2013.[4] She testified that the Premises is a residential building where she worked as a home attendant for one of the tenants and that her accident occurred upon leaving her client's apartment for the day (Transcript pp. 6, 12, 16). Plaintiff first tried to use the elevator but after waiting for about five minutes she decided to take the stairs. She entered the second floor stairwell through an open door, grabbed the handrail on the right side of the staircase with her right hand, and descended about three steps down from the second floor landing when she slipped and fell (*id.* at 17-18). Plaintiff testified that the stairwell had a functioning light but that the concrete stairs did not utilize a left-side handrail (*id.* at 18-19). The photograph attached to the NOC which depicts the stairwell complained of is consistent with Plaintiff's testimony.

Plaintiff commenced this action by e-filing a summons and verified complaint with the

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[4] A copy of the 50-h transcript is submitted as exhibit B to the moving papers ("Transcript").

New York County Clerk on January 15, 2014. NYCHA e-filed its verified answer on February 12, 2014. NYCHA's ninth affirmative defense asserts that the NOC was improper under GML § 50-e(2) and PHL § 157(2) in that it did not provide adequate and timely notice that the Premises lacked a left-side handrail in accordance with applicable building code and law.[5] On or about January 9, 2015 Plaintiff responded to NYCHA's February 12, 2014 demand for a bill of particulars.[6] Plaintiff's Bill of Particular recites, in relevant part, that (pp. 1-5):

> Defendants . . . were negligent, careless and reckless in the following manner . . .fail[ing] to provide a second handrail in the subject stairwell . . .
>
> in failing to display any warning signs of the dangerous conditions; in failing to provide lighting, proper lighting and/or adequate lighting; in failing to place barricades and other warning devices at the place aforesaid to prevent Plaintiff and others from traversing thereat . . .
>
> in failing to post warnings of the dangerous and hazardous condition; in failing to properly maintain, inspect, clean, light, repair the aforesaid staircase; in failing to properly inspect the aforesaid staircase . . .
>
> in failing to properly create, design, erect, maintain, inspect and repair the aforesaid staircase despite such notice of the dangerous and hazardous condition . . .
>
> and the Defendant(s) were otherwise negligent herein.

NYCHA asserts that the Bill of Particulars contains several new and distinct theories of liability not addressed in the NOC, namely that NYCHA failed to provide a second handrail; failed to

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[5] Multiple Dwelling Law § 52(1) provides that "[i]n every multiple dwelling erected after April eighteenth, nineteen hundred twenty-nine, every interior stair, fire-stair and fire-tower and every exterior stair in connection with any dwelling altered or erected after January first, nineteen hundred fifty-one, shall be provided with proper balustrades or railings and all such interior and exterior stairs shall be kept in good repair and free from any encumbrance. Every such stair, fire-stair and fire-tower more than three feet eight inches wide shall be provided with a handrail on each side."

NYC Administrative Code § 27-375(f) provides that "[s]tairs shall have walls, grilles, or guards at the sides and shall have handrails on both sides, except that stairs less than forty-four inches wide may have a handrail on one side only. Handrails shall provide a finger clearance of one and one-half inches, and shall project not more than three and one-half inches into the required stair width.

[6] A copy of Plaintiff's verified bill of particulars is annexed as exhibit F to the moving papers ("Bill of Particulars").

provide lighting, proper lighting and/or adequate lighting; failed to place barricades and other warning devices at the site of the incident; failed to post warnings of the dangerous and hazardous condition; failed to properly design the staircase; and was otherwise negligent. NYCHA argues that these theories of liability must be precluded because they are set forth for the first time in the Bill of Particulars and because Plaintiff's time to amend the NOC has passed.[7] Plaintiff responds that the NOC placed NYCHA on notice that among the dangerous and hazardous conditions of the staircase in question were improper, unsafe, and defective steps and handrails which allowed NYCHA to conduct a meaningful and complete investigation of the Premises.

DISCUSSION

To commence a tort action against NYCHA a claimant must first serve a notice of claim upon it within 90 days of the alleged injury which complies with all of the requirements set forth in section 50-e of the GML. *See* Public Housing Law § 157(2); *Funt v Human Resources Admin. of the City of New York*, 68 AD3d 490, 490 (1st Dept 2009), lv dismissed 15 NY3d 911 (2010).[8] The test of the sufficiency of a notice of claim is "whether it includes information sufficient to enable the city to investigate." *O'Brien v City of Syracuse*, 54 NY2d 353, 358 (1981). "Thus, in determining compliance with the requirements of General Municipal Law § 50-e, courts should

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[7] GML §§ 50-e(5) and 50-i permit a NYCHA claimant to amend its notice of claim within one year and 90 days from the accrual of the claim. *See Urena v New York City Health & Hosps. Corp.*, 35 AD3d 446 (2d Dept 2006).

[8] The filing of a notice of claim is a condition precedent without which an action against NYCHA is barred. *Sialeu v New York City Hous. Auth.*, 124 AD3d 623 (2d Dept 2015); *see also* GML§ 50-e. This statutory requirement is strictly construed. *Varsity Transit, Inc. v Board of Education*, 5 NY3d 532, 536 (2005); *see also Nacipucha v City of New York*, 18 Misc. 3d 846, 854 (Sup. Ct. Bronx. Co. 2008).

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." *Brown v City of New York*, 95 NY2d 389, 393 (2000). "Put another way, the 'plain purpose' of statutes requiring prelitigation notice to municipalities 'is to guard them against imposition by requiring notice of the circumstances . . . upon which a claim for damages is made, so that its authorities may be in a position to investigate the facts as to time and place, and decide whether the case is one for settlement or litigation.'" *Rosenbaum v City of New York*, 8 NY3d 1, 11 (2006) (quoting *Purdy v City of New York*, 193 NY 521, 523 [1908]).

The "intent underlying the notice of claim requirement embodied in General Municipal Law § 50-e is to protect the municipality from unfounded claims and ensure that it has an adequate opportunity to timely explore the merits of the claim while the facts are still 'fresh.'" *Garcia v O'Keefe*, 34 AD3d 334, 335 (1st Dept 2006) (quoting *Adkins v City of New York*, 43 NY2d 346, 350 [1977]). Thus, "[c]auses of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed (*Mazzilli v New York*, 154 AD2d 355, 357 [2d Dept 1989]) because the "addition of such causes of action which were not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of the plaintiffs' claims." *DeMorcy v City of New York*, 137 AD2d 650, 651 (2d Dept 1988). Nonetheless, "a notice of claim does not have to set forth a precise legal theory of recovery" (*Miller v City of New York*, 89 AD3d 612, 612 [1st Dept 2011]) and "[t]he Legislature did not intend that the claimant have the additional burden of pleading causes of action and legal theories, proper for the pleadings, in the notice of claim . . . ." *DeLeonibus v Scognamillo*, 183 AD2d 697, 698 (2d Dept 1992).

Harmonizing these principles, the Appellate Division, First Department has held that while a party's complaint and bill of particulars can serve to amplify the notice of claim (*see Cooke v City of New York*, 95 AD3d 537, 538 [1st Dept 2012]), if there are theories of liability that cannot be "fairly implied" from the statements in a notice of claim they should be dismissed (*see Lewis v New York City Hous. Auth.*, 2016 NY App. Div. LEXIS 87, *2-3 [1st Dept 2016]).

By way of example, the notice of claim in *Lopez v N.Y. City Hous. Auth.*, 16 AD3d 164 (1st Dept 2005) asserted a single allegation that the smoke detector in the apartment plaintiff rented from the defendant failed to alert him to a fire, while plaintiff's bill of particulars asserted sixteen distinct allegations. The First Department let proceed those causes of action which "sufficiently related to the notice of claim", namely "allowing, causing and permitting the smoke detector/alarm to become unsafe, hazardous and dangerous . . . failing to remedy this dangerous and hazardous condition for an unreasonable period of time . . . actually causing plaintiff's injuries . . . failing to inspect and repair the dangerous and hazardous conditions in a timely fashion so as to prevent this occurrence . . . failing to properly inspect the device . . . [and] improperly repairing the device", and struck those allegations which went "beyond mere amplification and are instead new, distinct and independent theories of liability", namely "causing and permitting the existence of defective, dangerous and hazardous conditions . . . leaving such condition unattended for an unreasonable period of time . . . failing to provide a safe apartment . . . failing to keep plaintiff free from injury . . . and failing to comply with statutes and ordinances . . . ." *Id.* at 165.

In *Melendez v N.Y. City Hous. Auth.*, 294 AD2d 243 (1st Dept 2002), the notice of claim alleged that the plaintiff slipped on a NYCHA staircase because of an "accumulation of liquid

and debris upon the surface of the steps and lack of a proper handrail." *Id.* at 243. The First Department held that the notice of claim "fairly implies" the statements in the bill of particulars except insofar as plaintiff alleged that NYCHA "negligently hired, trained, retained and supervised others with respect to the maintenance and repair of the property, staircase, and handrail, and . . . did not provide adequate illumination in the stairway. . . both of which are correctly challenged as new theories first asserted in plaintiff's bill of particulars." *Id.* By contrast, in *White v N.Y. City Hous. Auth.*, 288 AD2d 150 (1st Dept 2001), the plaintiff's notice of claim alleged only that she slipped and fell on a foreign substance while her bill of particulars attributed her fall to inadequate lighting. The court struck the inadequate lighting claim because it was raised for the first time in the bill of particulars and could not be fairly implied from her notice of claim.

Also, in *Cambio v City of New York*, 118 AD3d 577 (1st Dept 2014), a blind plaintiff alleged in his notice of claim that he fell at a street corner because of a traplike condition in the roadway which the City of New York negligently failed to prevent. At his GML § 50-h hearing he testified that the curb was higher than expected. In his bill of particulars he alleged that he fell due to an unexpected sudden and excessive drop of the curb to the roadway. The First Department found that because plaintiff's notice of claim solely alleged negligent maintenance, it did not place the City on notice of plaintiff's intention to hold it liable on a negligent design theory. *Id.* at 578.

And in the Second Department case of *Kane v Triborough Bridge & Tunnel Auth.*, 8 AD3d 239 (2d Dept 2004), the plaintiff alleged that the vehicle in which he was a passenger crossed the metal grating on a bridge operated by the Triborough Bridge & Tunnel Authority

("TBTA") and skidded over the center line where it was struck by an oncoming vehicle. Plaintiff's only contention in his notice of claim was that the TBTA negligently maintained the bridge's metal grating in a worn and slippery condition. The court held that evidence regarding the TBTA's failure to install warning signs should not have been presented to the jury because a failure to warn theory of liability was not included in the notice of claim. *Id.* at 239.

In this case, the NOC alleges that NYCHA allowed the staircase in question to "become, and remain in a dangerous and hazardous condition" because of "improper, unsafe and defective steps(s) and handrail(s)". In the face of *Lopez, Melendez, White, Cambio,* and *Kane*, it is clear that Plaintiff's failure to warn, inadequate lighting, and design defect theories of liability cannot be fairly implied from such language and such theories of liability must therefore be stricken from Plaintiff's Bill of Particulars. Plaintiff's allegation that NYCHA was "otherwise negligent" must be stricken as well, not only because it cannot be reasonably implied from the NOC, but because it is overbroad and vague. *See Hayes v Kearney*, 237 AD2d 769, 770 (3d Dept 1997) (quoting *Schlenker v School Dist.*, 198 Misc. 775, 776 (Sup. Ct. Albany Co. 1950) (use of broad words or phrases in a bill of particulars "'destroys its most essential functions, to wit; to limit proof and to prevent surprise to an adverse party'"); *Elfenbein v Freeberg*, 2011 N.Y. Misc. LEXIS 4106, *7 (Sup. Ct. Nassau Co. Aug. 2, 2011) ("'otherwise negligent' is not an acceptable response to a bill of particulars . . . .").

However, it is clear from the photograph attached to and made a part of the NOC that the stairwell complained of was missing a left-side handrail. The question then is whether sufficient notice of such condition was given to NYCHA for GML 50-e purposes. NYCHA argues that it does not, but the only case upon which it relies for support is *Frankel v New York City Tr.*

Auth.,134 AD3d 440 (1st Dept 2015) which does not in fact support its position. In *Frankel* the plaintiff served a notice of claim which alleged that she slipped and fell on a stairway leading to a subway platform due to debris and water on the stairway, while her complaint alleged that her injuries were caused by a missing piece of handrail. Relying on *O'Brien, supra*, among others, the First Department held that the plaintiff could only pursue the allegations related to water and debris as limited by her notice of claim. *Id.* at *1. That is not the case here.

At issue here is Plaintiff's NOC allegation that the staircase itself was dangerous and hazardous, not just the right-side handrail; both the bill of particulars theory of liability of which NYCHA complains and the theory of liability as presented in Plaintiff's NOC clearly involve the handrails (or in this case lack thereof) within the stairwell; the photograph of the entire stairwell annexed to the NOC unambiguously depicts a right-side handrail and a missing left-side handrail; and the NOC causally relates Plaintiff's injuries not to a single handrail, but to multiple "improper, unsafe and defective steps(s) and handrail(s)." Taken together, Plaintiff's missing left-side handrail claim contained within the Bill of Particulars amplifies what can be fairly implied from the NOC, that is the alleged defective condition of the stairs by reason of the missing handrail. *See Cooke*, 95 AD3d at 538.[9]

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[9] Courts have implicitly recognized structures and equipment to be defective solely because of missing components. *See Williamson v Ogden Cap Props., LLC*, 124 AD3d 537, 538 (1st Dept 2015) ("plaintiff's testimony, coupled with the notice witness's statement, raised an issue of fact as to whether the screws on the right side of the mailbox panel were missing or loose and whether the alleged defect existed for a sufficient period of time before the accident to enable defendants to discover and repair it."); *Gonzalez v New York City Tr. Auth.*, 87 AD3d 675, 676 (2d Dept 2011) (plaintiff "alleged that the accident was caused by a defect in the stair–a missing piece of metal and concrete ledge."); *Jaikran v Shoppers Jamaica, LLC*, 85 AD3d 864, 867 (2d Dept 2011) (defendant "may be held liable to the plaintiffs if it created or had actual or constructive notice of the alleged defective condition, i.e., the missing escalator handrail brush guard . . . ."); *Garcia v Stickel*, 37 AD3d 368, 369 (1st Dept 2007) (plaintiff's testimony was "insufficient to raise an issue of fact as to notice of the alleged defective condition, a 'missing' ladder rung . . . ."); *Orphanoudakis v Dormitory Auth. of the State of New York*, 40 AD3d 502 (1st Dept 2007) (ladder with missing rubber shoes is defective); *Church v Callanan*

The court rejects NYCHA's argument, raised for the first time in reply, that the missing handrail could not have contributed to Plaintiff's injuries because she descended the right side of the staircase using her right hand. There being no evidence to the contrary, it is reasonable to assume Plaintiff might have used a left-side handrail had one been properly installed.

Accordingly, it is hereby

ORDERED that NYCHA's motion is granted in part and denied in part; and it is further

ORDERED that NYCHA's motion is granted only with respect to Plaintiff's failure to warn claim(s), inadequate lighting claim(s), design defect claim(s), and claim that NYCHA was "otherwise negligent", and such theories of liability are hereby stricken from Plaintiff's Bill of Particulars; and it is further

ORDERED that NYCHA's motion is otherwise denied; and it is further

ORDERED that, within 20 days of the date hereof, NYCHA is directed to serve a copy of this decision and order with notice of entry upon Plaintiff by first class mail; and it is further

ORDERED that, within 30 days of such service, Plaintiff is directed to amend the Bill of Particulars in accordance with this decision and order and E-file a copy thereof.

This constitutes the decision and order of the court.

DATED: 2-9-16

SHERRY KLEIN HEITLER, J.S.C.

Indus., 285 AD2d 16, 25 (3d Dept 2001) (missing 100 feet of guiderail was an open and apparent defect).