

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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JUSTIN RIVERA,

Plaintiff(s),

- against -

NEW YORK CITY HOUSING AUTHORITY,

Defendant(s).
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DECISION AND ORDER

Index No: 300994/14

In this action for the negligent maintenance of a premises, defendant moves for an order seeking dismissal of the instant action pursuant to CPLR § 3211(a)(7) on grounds that the notice of claim and amended notice of claim filed by plaintiff did not specify the correct location of his accident and that, therefore, plaintiff failed to comply with GML § 50-e. Plaintiff opposes the instant motion asserting that the notice of claim filed sufficiently identified the location where he alleges to have fallen and that, thus, the notice of claim is compliant under prevailing law. Plaintiff also cross-moves seeking leave to amend his amended notice of claim to reflect the correct location of his accident and also moves pursuant to CPLR § 3025 seeking leave to amend her complaint to reflect foregoing location. Defendant opposes plaintiff's cross-motion, asserting that the amendment sought is substantive, prejudicial and, thus, precluded by law.

For the reasons that follow hereinafter, defendant's motion is granted and plaintiff's cross-motion is denied.

The instant action is for alleged personal injuries sustained by plaintiff within defendant's premises. The complaint, filed February 21,

2014, alleges that on May 22, 2014, plaintiff was injured within premises located at 365 Ford Street, Bronx, NY (365 Ford Street), when while therein, he had an accident. Plaintiff alleges that the foregoing premises was owned and maintained by defendant, that it was negligent in failing to properly maintain the same, and that he sustained injuries as a result.

Defendant's Motion

Defendant's motion is treated as one for summary judgment[1] and granted insofar as it establishes that plaintiff failed to comply with GML § 50-e(2). Specifically, defendant establishes that plaintiff failed to provide defendant with the correct situs of his accident in both his notice of claim, amended notice of claim and hearing pursuant

[1] The Court notes that defendant conflates the burdens of proof imposed by CPLR § 3211(a)(7) and CPLR § 3212; utilizing CPLR § 3211(a)(7) as the basis for dismissal while nevertheless making arguments and submitting proof appropriate to a motion for summary judgment pursuant to CPLR § 3212. A motion to dismiss pursuant to CPLR 3211(a)(7) is directed at the pleadings where all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). Accordingly, on a motion to dismiss for failure to state a cause of action the court usually doesn't concern itself with evidence beyond the four corners of the complaint. The only exception to the foregoing is that promulgated by the Court of Appeals in *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]), namely that extrinsic evidence can be used to negate the allegations in the complaint, and when that is the case, dismissal will eventuate because the, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v Martinez, 84 NY2d 83, 88 [1994]). Here, however, as will be discussed below, defendant submits testimony, documents and the notice and amended of claim in support of its motion, which to the extent it can pursuant to CPLR § 3212, is clear indicia that it seeks summary judgment.

to GML § 50-h and that, thus, defendant was prevented from performing a timely investigation at the location of this accident, was caused to investigate the wrong location, and has, therefore, been irreparably prejudiced.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets the initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

The primary purpose of the notice of claim requirement is to permit the municipality[2] to conduct a prompt investigation of the facts and circumstances from which a claim arose while the information is still fresh and readily available (*O'Brien v City of Syracuse*, 54 NY2d 353, 358

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[2] Pursuant to Public Authorities Law § 157(2), the notice of claim requirement prescribed by GML § 50-e also applies to actions brought against the New York City Housing Authority.

[1981]; *Adkins v City of New York*, 43 NY2d 346, 350 [1977]). Thus, a delay is often prejudicial insofar as the passage of time often "prevent[s] an accurate reconstruction of the circumstances existing at the time the accident occurred" (*Vitale v City of New York*, 205 AD2d 636, 636 [2d Dept 1994] [internal quotation marks omitted]). Similarly, a delay can impact a municipal defendant's ability to "locate and examine witnesses while their memories of the facts were still fresh" (*Gilliam v City of New York*, 250 AD2d 680, 681 [2d Dept 1998]; *see also* Kim at 84). Thus, GML § 50-e provides a municipality with "safeguards devised by law to protect municipalities against fraudulent and stale claims for injuries to persons or property" (*Mills v County of Monroe*, 59 NY2d 307, 310-311 [1983]).

Pursuant to General Municipal Law (GML) §50-e, the timely filing of a notice of claim is a statutory precondition to the initiation of personal injury suits against a municipality. GML §50-e(a) reads

> In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply and be served with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

Thus, a party has 90 days from the date the claim arises to file a notice of claim and when a notice of claim is served beyond the required ninety-day period, without leave of court, it is deemed a nullity (*Wollins v New York City Bd. of Educ.*, 8 AD3d 30, 31 [1st Dept 2004]; *De*

La Cruz v City of New York, 221 AD2d 168, 169 [1st Dept 1995]).

GML §50-e(2), requires that a notice of claim

> be in writing, sworn to by or on behalf of the claimant, and shall set forth: (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

With regard to the location of an accident, a claimant must identify the location of an accident within his notice of claim not with "with literal nicety or exactness" (*Brown v City of New York*, 95 NY2d 389, 393 [2000] [internal quotation marks omitted]; *see also Purdy v City of New York*, 193 NY 521, 523-524 [1908]), but merely, with "sufficient [specificity] to enable the city to investigate the claim" (*O'Brien* at 358). Accordingly, if the location alleged within a notice of claim is such that it prevents the municipality from locating the defect alleged and investigating the same, the requirement prescribed by GML § 50-e(2)(2) has not been satisfied (*Harper v City of New York*, 129 AD2d 770, 771 [2d Dept 1987] ["Initially, we note that the plaintiff's original notice of claim, which merely stated that the accident occurred 'at Crown Street and New York Avenue', failed to describe the location of the alleged defect with sufficient particularity to enable the defendant to conduct a proper investigation and otherwise assess the merits of the plaintiff's claim."]; *Faubert v City of New York*, 90 AD2d 509. 509 [2d Dept 1982] [Notice of claim defective when it missated the location of the sidewalk alleged to have caused plaintiff's accident. Specifically, "the notice of claim erroneously described the accident site as 'the sidewalk located

on Parsons Boulevard between Jewel Avenue and 65th Street', when the actual location of the accident was on Parsons Boulevard between Jewel Avenue and 65th Avenue."]; *Caselli v City of New York*, 105 AD2d 251, 253 [2d Dept 1984] ["Manifestly, the mere statement in the instant notice that the incident occurred on "the public roadway at the intersection of Queens Boulevard and Woodhaven Boulevard", a major intersection, was too vague to enable the city to locate the alleged defect."]).

Even when the location within a notice of claim is insufficient to permit the municipality to locate the defective condition and investigate, however, "[i]n passing on the sufficiency of a notice of claim in the context of a motion to dismiss, courts are not confined to the notice of claim itself" (*D'Alessandro v New York City Tr. Auth.*, 83 NY2d 891, 893 [1994]). Instead, whether such motion should be granted hinges on whether the municipality was prejudiced by any deficiency in the description of the location within the notice of claim (*id.*). If any deficiency was ameliorated by virtue of testimony at a hearing pursuant to GML § 50-h, or by any other relevant evidence, a motion to dismiss for failure to comply with GML 50-e(2), should be denied (*id.*; *Rivera v City of New York*, 169 AD2d 387, 388 [1st Dept 1991] ["At the outset, it should be noted that even assuming that plaintiff's counsel might have prepared a more comprehensive notice of claim, the fact remains that this case hardly presents an example of a vague negligence claim being foisted upon the City of New York, the examination in the Comptroller's office narrowed the possible accident site to one of two places, and the photographs not only show the pothole to have been so large that anyone inspecting these spots could hardly have missed it but also served to put

the defect in a readily identifiable location."]).

Here, defendant's evidence establishes the following: On June 20, 2013, plaintiff served a notice of claim served upon defendant indicating that his accident occurred on May 20, 2013 within 365 Ford Street, within the "F" stairway located therein. On August, 14, 2013, plaintiff served defendant with an amended notice of claim wherein he altered the date of his accident, asserting it occurred on May 22, 2013, but again, identifying the situs of his accident as the stairway located within 365 Ford Street. On August 13, 2013, plaintiff appeared and testified at a GML § 50-h hearing, wherein he again indicated that his accident occurred within the "F" stairway located at 365 Ford Street. In his complaint filed February 21, 2014, plaintiff again alleged that his accident occurred within 365 Ford Street. He made the same allegation within his bill of particulars dated November 5, 2014. On April 15, 2015, plaintiff was deposed and testified, for the first time, that his accident had, in fact, occurred within 365 East 183rd Street, Bronx, NY (365 East 183rd Street). As per defendant's internal documents - a letter written by counsel to the New York City Police Department on June 25, 2013 and an investigation report dated July 2, 2013 - its investigation of this accident was limited to 365 Ford Street. On April 22, 2015, defendant's Supervisor of Caretakers, William Sanabria (Sanabria) was deposed and testified that 365 Ford Street and 365 East 183rd Street are connected on some floors and comprise a complex known as Twin Parks West. Moreover, Sanabria testified that the stairways within 365 Ford Street are designated as A, B1, B2, and C, whereas the stairways within 365 East 183rd Street are designated as D, E1, E2, and F.

Based on the foregoing, defendant establishes prima facie entitlement to summary judgment insofar as the evidence tendered demonstrates that the notices of claim served upon it did not identify the correct location of this accident, that based upon the notices of claim it conducted a fruitless investigation, and that by the time it was apprised of the correct location of the accident - almost two years after its occurrence - any investigation would have most certainly been fruitless.

As noted above, the primary purpose of the notice of claim requirement is to permit the municipality to conduct a prompt investigation of the facts and circumstances from which a claim arose while the information is still fresh and readily available (*O'Brien* at 358; *Adkins* at 350) and, any delay is often prejudicial insofar as the passage of time often "prevent[s] an accurate reconstruction of the circumstances existing at the time the accident occurred" (*Vitale* at 636 [internal quotation marks omitted]). Here, not only was defendant prevented from investigating the actual situs of the accident at a time when it could have obtained valuable information, it was, in fact, caused to investigate the wrong location based on the errors in the notice amended notice claim. To the extent that deficiencies as to location within a notice of claim can be ameliorated by virtue of testimony at a hearing pursuant to GML § 50-h, or by any other relevant evidence (*D'Alessandro* at 893; *Rivera* at 388), here, plaintiff's testimony at his 50-h hearing compounded the errors in the notice and amended notice of claim because his testimony provided the wrong location for the instant accident.

Nothing submitted by plaintiff raises any issues of fact sufficient to preclude summary judgment. Significantly, plaintiff accords substantial and dispositive weight to the fact that within his notice and amended notice of claim he identified the situs of this accident by the correct block and lot numbers because 365 Ford Street and 365 East 183rd Street are connected buildings and arguably one single building. Plaintiff, thus, contends that defendant was sufficiently apprised of the actual situs of the accident so as to enable it to conduct a meaningful and prompt investigation. This argument lacks merit. To be sure, Sanabria testified that the foregoing locations, while connected are two different buildings bearing and designated by different addresses and that 365 Ford Street - the location initially alleged by plaintiff did not have stairways designated by the letter "F." Thus, here, designating the situs of the accident by block and lot number did not identify the correct situs of the instant accident so as to enable defendant to properly investigate (*Harper* at 771).

Plaintiff's Cross-Motion

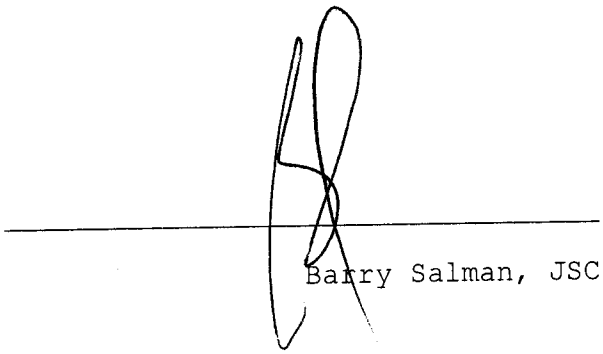
Inasmuch as defendant's motion is granted, plaintiff's cross-motion is denied as moot. It is hereby

ORDERED that the complaint be dismissed, with prejudice. It is further

ORDERED that defendant serve a copy of this Decision and Order with Notice of Entry upon the City within thirty (30) days hereof

Dated : November 30, 2016

Bronx, New York



Barry Salman, JSC