Matter of DiMattia v City of New York
2018 NY Slip Op 33033(U)
October 4, 2018
Supreme Court, Richmond County
Docket Number: 85126/2018
Judge: Thomas P. Aliotta

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

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In the Matter of the Application of Maryellen DiMattia,
for Leave to Serve an Amended Notice of Claim,
in connection with the commencement of an action,

Petitioner,

- *against* -

THE CITY OF NEW YORK,

Respondent.

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Present:
Hon. Thomas P. Aliotta

DECISION and ORDER

Index No. 85126/2018
Motion No. 1859 - 001

The following papers numbered 1 to 4 were fully submitted on the 15th day of August 2018.

	Papers Numbered
Order to Show Cause by Petitioner Maryellen DiMattia for Leave to Amend the Notice of Claim, with Supporting Papers (dated June 20, 2018)	1
Verified Petition, with Supporting Papers (dated June 4, 2018)	2
Defendant's Affirmation in Opposition (dated July 26, 2018)	3
Petitioner's Affirmation in Reply (dated July 31, 2018)	4

Upon the foregoing papers, petitioner's Order to Show Cause dated June 20, 2018 for leave to amend the Notice of Claim is denied in accordance with the following.

This is an action to recover damages for personal injuries allegedly sustained by petitioner Maryellen DiMattia on April 18, 2017 when she tripped and fell on a broken and

defective sidewalk. A Notice of Claim was filed and served on July 10, 2017, within ninety days of the accrual of petitioner's cause of action as required by General Municipal Law § 50-i. The New York City Comptroller's Office held a 50-h hearing on May 2, 2018. Pertinently, in the Notice of Claim, the location of the incident is stated to be "near 165 Seagate Court, Staten Island, New York".

In the present application, petitioner alleges that the address and location set forth in the Notice of Claim is incorrect and that the mistake was "inadvertent". Leave is sought to amend the Notice of Claim solely to identify "the exact location…just a few feet away," at 165 Father Capodanno Boulevard, Staten Island, New York. In support of her application, petitioner avers that the photographic evidence of the defective sidewalk and surrounding area introduced at her 50-h hearing is sufficient to establish the incident's location, i.e., 165 Father Capodanno Boulevard.

Petitioner further maintains that timely notice was given, *i.e.*, of the manner in which the claim arose, the items of injury claimed, and the medical information necessary for respondent to conduct its investigation. She offered an adequate explanation for her initial misidentification of the accident location, *i.e.*, in effect, that she was confused and in pain as a result of her fall. Petitioner points out that the City did not raise an objection at the time. She further argues that the proposed amendment does not prejudice the municipality since the defect present at the time of the incident (at the correct location) still exists, as depicted in the Sanborn Map, thereby satisfying the prior written notice requirement.

In opposition to the application, respondent contends that petitioner's failure to correctly identify the correct location of the incident in the original Notice of Claim results in substantial

prejudice to the municipality's ability to conduct a proper investigation and obtain information that was readily available at the time of the incident. The City points out that the two locations are more than half a block apart, and around the corner from each other. Such an error has allegedly hindered the respondent's ability to defend this action. The City disputes petitioner's contention that the photographic evidence introduced at the 50-h hearing provided sufficient notice of the defective sidewalk at the accurate location. Pertinently, the photographs relied upon were admittedly taken one day before the hearing, *i.e.*, almost one year after the incident. Respondent further maintains that a reasonable excuse for petitioner's failure to timely comply with General Municipal Law § 50-e, or to comply within a reasonable time thereafter, has not been proffered.

"A notice of claim must state the time when, the place where and the manner in which the claim arose (General Municipal Law § 50-e[2])...The purpose of the statutory notice of claim requirement is to afford the public corporation an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available" (*Bowers v. City of New York*, 147 AD3d 894, 894-895 [2d Dept 2017] [internal citations and quotation marks omitted]; *Avery v. New York City Transit Authority* 138 AD3d 770, 770-771 [2d Dept 2016]). It is worthy to note that "General Municipal Law § 50-e was not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious ones" (*Bowers v. City of New York*, 147 AD3d at 895).

Here, the relevant inquiry is set forth in General Municipal Law § 50-e (6), which provides, in pertinent part, that "a mistake, omission, irregularity or defect made in good faith...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" (*see Avery v. New York City Transit Auth.*, 138 AD3d 770, 771 [2d Dept 2016]).

In making a determination as to whether the municipality has been prejudiced, the Court may consider the evidence adduced at a hearing conducted pursuant to General Municipal Law § 50-h, and any such other evidence that is properly before the Court (*see D'Alessandro v. New York City Transit Auth.*, 83 NY2d 891, 893 [1994]; *Fast v. County of Nassau*, 150 AD3d 827, 828 [2d Dept 2017]).

Consonant with the foregoing, viewing the testimony presented at the 50-h hearing, the Court finds that petitioner's erroneous identification of the accident site was a good faith mistake. Nevertheless, petitioner failed to prove that the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter (*Matter of Nurse v. City of New York*, 87 AD3d 543, 544 [2d Dept 2011]). Moreover, she failed to establish that the delay has not substantially prejudiced the City's ability to conduct a proper investigation and to assess the merits of the claim (*see Matter of Maldonado v. City of New*, 152 AD3d 522, 522 [2d Dept 2017]). The mistaken accident location in the Notice of Claim was not an inconsequential defect that could have been cured without prejudice to the City nearly one year later at the 50-h hearing.

Petitioner's attorney argues, to no avail, that photographs were introduced at the 50-h hearing depicting the defective sidewalk condition as not having changed since the date of the accident. This is a mischaracterization of the testimony and the evidence presented. Only three photos (Exhibits' "A", "B" and "C") of the accident location were introduced into evidence at the hearing. Each photograph was admittedly taken the day before. Petitioner's attorney points

to no portion of the transcript to substantiate his assertion that photographs of the defective sidewalk *at the time of the accident* were introduced, nor are any such photographs submitted in support of the instant application. As such, petitioner has failed to substantiate her assertion that the City still has the opportunity to investigate the defective sidewalk condition at the correct site and is, therefore, not prejudiced by the error.

Her remaining contentions have been considered and are without merit.

Accordingly, it is

ORDERED, that petitioner's Order to Show Cause dated June 20, 2018 for leave to amend the Notice of Claim is denied.

ENTER,

HON. THOMAS P. ALIOTTA, J.S.C.

Dated: October 4, 2018