Lopez-Maldonado v County of Westchester

2018 NY Slip Op 33862(U)

December 31, 2018

Supreme Court, Westchester County

Docket Number: 65799/2016

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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WENDERLY LOPEZ-MALDONADO,

Plaintiff,

-against-

COUNTY OF WESTCHESTER, LIBERTY LINES TRANSIT, INC. and ROBERTO HERNANDEZ,

Defendants.

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DECISION & ORDER
Index No. 65799/2016
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The following papers were read on the defendants' motion seeking leave to amend their answer, pursuant to CPLR 3025:

Notice of Motion/Affirmation/Exhibits A-L	1-14
Affirmation in Opposition/Exhibits A	15-16
Reply Affirmation	17

The plaintiff, Wenderly Lopez-Maldonado commenced this action to recover damages for alleged personal injuries incurred on November 10, 2015, when the Bee-Line bus owned by the defendant, County of Westchester, and operated by the defendant, Roberto Hernandez ("Hernandez"), on which the plaintiff was a passenger, made a sudden stop. The plaintiff alleges that Hernandez braked very hard, causing her to leave her seat and hit a piece of metal on the bus.

The defendants now file the instant motion seeking leave to amend their answer to the plaintiff's complaint, pursuant to CPLR 3025, to include the affirmative defense of the emergency doctrine. In support of their motion, the defendants submit an attorney's

affirmation, a dispatch for aid report, Hernandez's confidential incident report, a supervisor's confidential incident report, a video showing the accident, a consent to change attorney, and copies of the pleadings. The plaintiff opposes the motion.

The defendants argue that they should be permitted to amend their answer, since there would be no prejudice or surprise to the plaintiff and the defendants' attorneys were substituted as counsel on May 29, 2018. The defendants further proffer that even if the Court found the amendment to be prejudicial to the plaintiff, CPLR 3025(b) permits granting the motion upon terms that may be just and the defendants would consent to respond to any written discovery served upon them, due to the amendment and would further consent to producing a witness to testify on behalf of the defendants with respect to the issues raised by the proposed amendment. The defendants also argue that they should be permitted to amend their answer under CPLR 3025(c), to conform the pleadings to the evidence, upon such terms as may be just.

The plaintiff opposes the motion, arguing that the motion is not supported by an affidavit showing reasonable excuse for the extensive delay. The plaintiff contends that the case has been pending for a significant period of time, the note of issue was filed on October 10, 2017, that allowing the amendment on the eve of trial would severely prejudice the plaintiff and a change of attorneys does not constitute a reasonable excuse for delay in making the motion. The plaintiff argues that, although the driver's confidential incident report and his supervisor's confidential report states that the bus driver stopped abruptly to avoid collision with a deer, the accident report prepared by the responding police officer does not mention a deer as the cause of the accident. The plaintiff further argues that the two confidential reports conflict with each other as to if the bus driver actually hit the deer.

The plaintiff additionally argues that the defendants failed to provide the plaintiff with the surveillance video during pre-trial discovery or at the time of the filing of their summary judgment motion and therefore, the video should not be admissible into evidence[1].

In reply, the defendants assert that an affidavit is not required under CPLR 3025 and leave to amend a pleading is to be freely given absent significant prejudice or surprise directly resulting from the delay. The defendants further assert that there is no prejudice to the plaintiff and that a change in attorneys constitutes a reasonable excuse. The defendants also argue that the providence of the emergency doctrine is immaterial, since no evidentiary showing of merit is required under CPLR 3025(b). The only determination to be made is whether the proposed amendment is palpably insufficient to state a cause of action or defense, or is patently devoid of merit.

Discussion

Under CPLR 3025(b), leave to amend a pleading shall be freely granted absent prejudice to the adverse party. On a motion for leave to amend a pleading before trial, the opposing party cannot successfully claim prejudice where the proposed amendment would not change the fundamental nature of the allegations in the original pleading (*Pepe v Tannenbaum*, 262 AD2d 381 [2d Dept 1999]), or where the opposing party has had full knowledge of the facts (*Pejcinovic v City of New York*, 258 AD2d 365 [1st Dept 1999]) and an opportunity to present an opposing theory of the case is allowed. (*Stow v City of New York*, 122 AD2d 45 [2d Dept 1986]). Moreover, the need for additional discovery or additional time to prepare a defense does not constitute prejudice sufficient to justify the

[1]The issue of the admissibility of the surveillance video is not before the Court at this time.

denial of a motion to amend pleadings. (*Harding v Filancia*, 144 AD2d 538 [2d Dept 1988]).

The Court has considered the length of time the plaintiff has been aware of the facts upon which the motion is predicated and the excuse provided by the defendants' attorney and deems the excuse that the attorney was substituted on May 29, 2018 and filed the motion within approximately two months of being hired, to be a reasonable excuse.

The defendants' attorney seeks to amend the answer to conform with the evidence and to include the affirmative defense of the emergency doctrine. The emergency doctrine states "that those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency" (*Id.*).

Here, the plaintiff was fully aware of the relevant facts at the time of the incident and testified at her 50-H hearing that the bus driver braked/stopped suddenly and she remembered him saying that a squirrel had crossed in front of the bus. Although, the bus driver claims that a deer and not a squirrel crossed in front of the bus, the reason for the stop, that an animal crossed in front of the bus, remains the same. Therefore, the plaintiff will not suffer any surprise or prejudice by an amendment of the answer to conform to the evidence. Further, "where the facts relating to the existence of the emergency are known to the adverse party and would not raise new issues of fact not appearing on the face of the prior pleadings, the party seeking to rely on the emergency doctrine would not have to

raise it as an affirmative defense" (*Bello v Transit Authority of New York City*, 12 AD3d 58 [2d Dpet 2004]; *see also* CPLR 3018[b]).

Accordingly, it is

ORDERED that the defendants' motion is GRANTED; and it is further

ORDERED that the defendants shall file an amended answer via NYSCEF within twenty days of the filing of this Decision and Order, and such filing shall be considered proper service upon the plaintiff.

The parties are directed to appear at the settlement conference part in courtroom 1600 on February 5, 2019 at 9:15 a.m. The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
December 31, 2018

HON. SAM D. WALKER, J.S.C.