

Lerner v New York City Tr. Auth.
2020 NY Slip Op 32381(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 157559/2019
Judge: Suzanne J. Adams
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SUZANNE J. ADAMS PART IAS MOTION 21

Justice

-----X INDEX NO. 157559/2019

KARINA LERNER, MOTION DATE N/A

Plaintiff, MOTION SEQ. NO. 001

- v -

NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, JOHN OR JANE DOE DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 42, 44, 45, 46, 49

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, plaintiff's motion by order to show cause is granted to the extent that plaintiff's Notice of Claim dated December 12, 2018, is deemed timely served *nunc pro tunc*; plaintiff may amend the summons and complaint to substitute "Simon Yim" in place of "John or Jane Doe;" and defendants New York City Transit Authority and MTA Bus Company (together, "Transit") are directed to provide plaintiff with Simon Yim's last known address within 30 days. The remainder of the motion is denied.

This matter arises out of an incident that occurred on May 29, 2018, when plaintiff was a passenger on a Transit-owned bus. Plaintiff alleges the bus stopped abruptly in the vicinity of West and Murray Streets in Manhattan, causing her to be thrown about the bus and sustain personal injuries. Plaintiff filed a Notice of Claim dated July 9, 2018, but with the City of New York, not Transit. (Affirmation in Support, Exh. F) Thereafter, plaintiff filed a Notice of Claim with Transit on December 12, 2018, and now seeks to have such notice deemed timely *nunc pro tunc*. She also

seeks to amend the summons and complaint to add the name of the bus operator at the time of the subject incident in place of "John or Jane Doe" and compel Transit to accept service on his behalf, or alternatively, provide his last known address. Transit opposes the motion.

Pursuant to General Municipal Law § 50-e (5), leave may be given to serve a late Notice of Claim at the discretion of the court, taking into particular consideration whether the public corporation, its attorney or its insurance carrier acquired actual knowledge in a timely fashion of the essential facts of the disputed incident. Additional factors to be considered include whether the petitioner made an excusable error as to the public corporation's identity, and whether serving the late Notice would substantially prejudice the public corporation. In this matter, plaintiff timely filed a no-fault claim regarding the incident, and provided a copy of the claim directly to Transit by letter dated June 22, 2018, which was within a month of the incident. (Affirmation in Support, Exh. B) Such notice has been deemed to constitute a sufficient Notice of Claim within the meaning of GML § 50-e (5). *Losada v. Liberty Lines Transit, Inc.*, 155 A.d.2d 337, (1st Dep't 1989). Furthermore, in view of the fact that Transit conducted the statutory 50-H hearing in March 2019 (Affirmation in Support, Exh. D) and served an answer in August 2019 to plaintiff's timely served Summons and Complaint which admitted to the receipt of a Notice of Claim (Affirmation in Support, Exh. E), there is no demonstration of prejudice to Transit. Plaintiff's serving the initial Notice of Claim on the City of New York rather than Transit was also "an excusable error concerning the identity of the public corporation against which the claim should be asserted." GML § 50-e (5). Accordingly, the Notice of Claim dated December 12, 2018, is deemed timely served *nunc pro tunc*.

Plaintiff also seeks to add Simon Yim, the operator of the bus at issue, as a defendant in place of "John or Jane Doe." Pursuant to CPLR 3025(b), "[a] party may amend his pleading, or

supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.” Leave to amend pleadings is generally freely granted, absent prejudice and surprise resulting from the delay. See *Edenwald Contr. Co. v City of New York*, 60 N.Y.2d 957, 959 (1983); *Antwerpse Diamantbank N.Y. v. Nissel*, 27 AD3d 207, 208 (1st Dep’t 2006). Transit’s reference to the recent decision of this court in *Rodriguez v. New York City Transit Authority, et al.*, Index No 160316/2017, is unavailing, as Transit fails to establish how adding Simon Yim as a defendant is a surprise, or in any other way prejudicial to it.

Accordingly, it is hereby

ORDERED that plaintiff’s Notice of Claim dated December 12, 2018, is deemed timely served *nunc pro tunc*; and it is further

ORDERED that plaintiff may amend the Summons and Complaint to substitute “Simon Yim” in place of “John or Jane Doe;” and it is further

ORDERED that the caption in this action is amended to read as follows:

-----X
 KARINA LERNER,

 Plaintiff,

 -against-

 NEW YORK CITY TRANSIT AUTHORITY, MTA
 BUS COMPANY and SIMON YIM,

 Defendants.
 -----X

and it is further

ORDERED that the Amended Summons and Complaint annexed to plaintiff’s moving papers as Exhibit J shall be served upon Simon Yim pursuant to the CPLR upon plaintiff’s learning of his last known address; and it is further

ORDERD that Transit shall provide plaintiff with Simon Yim's last known address within 30 days of the entry of this Order; and it is further

ORDERED that within 30 days of entry of this order plaintiff shall serve a copy, with notice of entry, upon all parties, the County Clerk (Basement of 60 Centre) and the Clerk of Trial Support (Room 148 of 60 Centre), who shall mark their records to reflect the amendment to the caption.

This constitutes the decision and order of the Court.



7/20/2020
DATE

SUZANNE J. ADAMS, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE