Consolidated Edison Co. of N.Y., Inc. v City of New York
2020 NY Slip Op 33320(U)
October 7, 2020
Supreme Court, New York County
Docket Number: 158225/2016
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART 5**

Justice

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

- v -

CITY OF NEW YORK,

Defendant.

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INDEX NO. 158225/2016

MOTION DATE 10/7/20

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number, were considered on this motion to dismiss: (sequence 001): 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24.

Plaintiff Consolidated Edison Company of New York, Inc. commenced this action against Defendant City of New York (the "City") to recover for damage to Plaintiff's property, alleging that a tree owned and maintained by the City broke and caused damage to five Con Ed utility poles on September 22, 2015. The City moves: (1) pursuant to CPLR 3211 and 3212, to dismiss the complaint, arguing that the Notice of Claim did not adequately set forth the facts constituting the claim; and (2) to vacate Plaintiff's note of issue as premature (*NYSCEF 6*).[1] For the reasons below, after oral argument, the Court denies the motion.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff served its notice of claim on October 6, 2015 (*NYSCEF 10* [the "Notice of Claim"]). The entire substance of the Notice of Claim alleged "[d]amage to claimant's facilities…[o]n September 22, 2015 at 10:59AM claimant's facilities were damaged by agents, servants and/or employees of the City of New York while excavating in the vicinity of 425 Hoyt Avenue, Brooklyn, New York.[2] Furthermore, the City failed to adequately maintain its trees on public property" (*Notice of Claim* ¶¶ 2-3). The "items of damage or injuries claimed" were "[u]nable to be determined at this time (*id.* at ¶ 4). The City argues that the Notice of Claim failed to adequately apprise the City of the location of the subject incident because it identified 425 Hoyt Avenue (not Street) in Brooklyn, a non-existent location, and failed to specify fallen branches and utility poles as the cause and target of the harm, respectively.

DISCUSSION

In relevant part, General Municipal Law (GML) § 50-e[2] requires that a notice of claim set forth "the time when, the place where and the manner in which the claim arose" (*Phillipps v NY City Tr. Auth.*, 68 AD3d 461, 462 [1st Dept 2009]). To satisfy the requirements

[1] The parties stipulated to vacate the note of issue, rendering that portion of the motion moot (*NYSCEF 17*).
[2] At oral argument, Con Edison's counsel clarified that "facilities" refers primarily to utility poles and wires.

of the statute, the notice of claim must describe the accident with sufficient particularity to enable the defendant to locate the defect, conduct a proper investigation, and assess the merits of the claim (*Wai Man Hui v Town of Oyster Bay*, 267 AD2d 233, 234 [2d Dept 1999] [finding a notice of claim deficient where it alleged that plaintiff's car "went over a 'dip, hole, excavation, elevation, obstruction, depression in the road at the intersection of Bethpage Sweet Hollow Road and Round Swamp Road,'" which "failed to describe the nature of the alleged defect or its location with sufficient particularity to allow the defendants to locate it and conduct a timely investigation"]). "Reasonably read, the statute does not require those things to be stated with literal nicety or exactness" (*Brown v City of NY*, 95 NY2d 389, 393 [2000]). Rather, "[t]he test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable the city to investigate" (*Phillipps*, 68 AD3d at 462, quoting *Brown*, 95 NY2d at 393); "Nothing more may be required" (*id.*).

Accordingly, "prejudice will not be presumed" (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 68 [1st Dept 2007]). "[M]unicipal authorities have an obligation to obtain the missing information if that can be done with a *modicum of effort* rather than rejecting a notice of claim outright" (*Phillipps*, 68 AD3d at 462 [holding that claim of prejudice based on failure of notice of claim to identify whether bus was M1, 2, 3, or 4 route or to recall driver's identifying information was not deficient where defendant did not provide "any factual information bearing on either the number of buses that would have stopped at 33rd Street and Fifth Avenue during this time period or the number of those buses that were of the type identified by plaintiff"], quoting *Goodwin v NYC Hous. Auth.*, 42 AD3d 63, 69 [1st Dept 2007]).

Here, the Notice of Claim placed the City on notice of a limited universe of possibilities; that is, that at a specific date and time, Con Edison's facilities were damaged by either the City's excavation or failure to "adequately maintain its trees on public property" (or both).[3] Though the City argues that 425 Hoyt Avenue exists in Staten Island, not Brooklyn, and therefore that the Notice of Claim is defective, the City does not claim that it attempted an inspection at either location or to seek further clarification; at best, it concedes that there were only two possible locations to investigate (*see Hudson v NY City Tr. Auth.*, 19 AD3d 648, 649 [2d Dept 2005] [affirming denial of motion to dismiss where defendants were not prejudiced by the plaintiff giving two possible bus numbers which, upon investigation , belonged to buses owned and operated by the defendants on other routes, since the information supplied by the plaintiff in the notice of claim was sufficient to enable the defendants to determine the place, time, and nature of the accident]; *see also Phillipps.*, 68 AD3d at 462-463 [rejecting defendants' argument that it would be "overly burdensome for them to search for bus operators for a 30 minute span on all four bus routes alleged in plaintiff's bill of particulars"]; *Goodwin.*, 42 AD3d at 68-69 [1st Dept 2007] [discussing numerous cases in which municipal authorities send requests for supplemental information]).

Cases which have found a notice of claim deficient for failure to specify a location, or specifying an incorrect location, generally find prejudice *after* an inspection or investigation, or some other demonstration of prejudice (*see e.g. Konsker v City of NY*, 172 AD2d 361, 362 [1st Dept 1991] ["...the prejudice suffered by the city because of [plaintiff naming 46th and 6th rather

[3] Indeed, the Complaint, filed on September 29, 2016, appears to allege that it was a combination of the two (*NYSCEF 1*).

than 47th and 6th] is evidenced by the fact that an investigator from the city's Office of the Comptroller examined and photographed the incorrect site promptly after the plaintiff's fall."]; *Williams v New York*, 156 AD2d 361, 362 [2d Dept 1989] [finding notice of claim which named incorrect address deficient where "[t]he assertion by the New York City Transit Authority that records of temporary bus stops on the block of the accident were not available was uncontradicted."]; *Taylor v NY City Hous. Auth.*, 248 AD2d 376, 376 [2d Dept 1998] [notice of claim misidentifying accident location as 332 Georgia Avenue rather than 333 Georgia Avenue prejudicial where NYCHA actually dispatched an investigator who reported that there was no such address as 332 Georgia Avenue]; *Nieves v City of NY*, 262 AD2d 32, 32 [1st Dept 1999] [affirming denial of motion to amend notice of claim to reflect proper location of the public school where infant plaintiff was assaulted because original notice's defect "caused defendants to conduct an investigation at the wrong site"]; *Wilson v NY City Hous. Auth.*, 187 AD2d 260, 261 [1st Dept 1992] ["Although the plaintiff submitted an affidavit that she has always referred to her building interchangeably as 353 or 355, and it thus appears that the error was inadvertent, the misidentification rendered the notice inadequate because the defendant did not become apprised of the correct location of the accident until four and a half years after the event, and was thereby substantially prejudiced in its ability to investigate and defend."]).

Similarly, the City's argument that the notice of claim is deficient because it did not precisely identify the mechanism of harm is also unavailing because the same investigation, if conducted promptly, may have revealed the condition (*see Bartels v City of NY*, 125 AD3d 583, 586 [2d Dept 2015] ["The City does not argue that its investigation of the claim was prejudiced based on the description provided by the plaintiff in the notice of claim. Nor has it articulated how investigating a defective sidewalk would differ from investigating an unsecured tree well at the same location."]). To the extent that the City argues in reply that Plaintiff, as a sophisticated corporate entity, should be expected to better frame its notice of claim (*NYSCEF 23* ¶ 7), the City does not cite any support for this contention.

Finally, the City also attaches to its reply a Google Maps and Street View printout purporting to depict the subject location (*NYSCEF 24*). This is significant, but not, as the City urges, because it proves that the area does not contain any trees or tree pits (*NYSCEF 23* ¶ 5). Rather, setting aside the existence (or not) of trees in the image—which is not an appropriate determination at this juncture, and at best remains an issue of fact—it demonstrates that the City was able to identify where to look, and thus was not prejudiced by any ambiguity or error in the Notice of Claim. Accordingly, and because the parties stipulated separately to vacate the note of issue, the remainder of the motion is denied.

CONCLUSION/ORDER

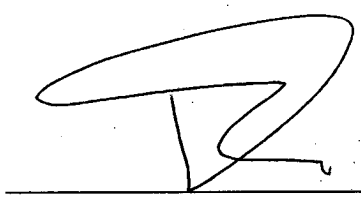
For the reasons above, it is

ORDERED that the City's motion to dismiss is **DENIED**; and it is further

ORDERED that Plaintiff shall, within 30 days, e-file and serve upon all parties a copy of this order with notice of entry; and it is further

ORDERED that within 30 days, the parties shall email Sam Wilkenfeld, swilkenf@nycourts.gov, to confer on a preliminary conference/case scheduling order.

This constitutes the decision and order of the Court.



10/7/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE