

Holly v Dynamic Fitness NYC LLC
2021 NY Slip Op 33086(U)
November 17, 2021
Supreme Court, Queens County
Docket Number: Index No. 702506/20
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35



-----X
JOANNE HOLLY,

Plaintiff,

-against-

Index No. 702506/20
Motion Date: 8/24/21
Motion Seq. 1 and 2

DYNAMIC FITNESS NYC LLC and 110-30
DUNKIRK LLC,

Defendants.

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The following papers were read on the motion by defendant 110-30 Dunkirk LLC (Dunkirk) for an order, pursuant to CPLR 3212, dismissing plaintiff’s Complaint and all cross-claims as against it; on the cross-motion by plaintiff Joanne Holly for an order, pursuant to CPLR 3025(b) and 3025(c), permitting plaintiff to amend her Complaint to reflect the correct dangerous condition that caused her accident; on the cross-motion by defendant Dynamic Fitness NYC LLC d/b/a Dynamic Martial Arts Inc. (Dynamic) for an order, pursuant to CPLR 3212, dismissing plaintiff’s Complaint with prejudice; on the cross-motion by defendant Dunkirk for an order striking plaintiff’s Amended Bill of Particulars (Motion Sequence No. 1); and, on the motion by defendant Dynamic for an order, pursuant to CPLR 3212, dismissing plaintiff’s Complaint and all cross-claims as against it (Motion Sequence No.2).

PAPERS
NUMBERED

Mot. Seq. 1

Notice of Motion-Affidavits-Exhibits.....	EF 28-44
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 63-75
Answering Affidavits in Opp to Cross-Mot.-Exhibits.....	EF 91-93
Answering Affidavits in Opp to Cross-Mot.-Exhibits.....	EF 94-103
Replying Affidavits-Exhibits.....	EF 104-107
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 108-122
Replying Affidavits.....	EF 132-133

Mot. Seq. 2

Notice of Motion-Affidavits-Exhibits.....	EF 46-60
Answering Affidavits-Exhibits.....	EF 76-87
Replying Affidavits.....	EF 90
Answering Affidavits-Exhibits.....	EF 134-138

As an initial matter, the motions, marked as Motion Sequence Nos. 1 and 2 are hereby joined solely for purposes of disposition of the instant motions.

Upon the foregoing papers, it is ordered that the motion by Dunkirk is denied, without prejudice, with leave to renew; the cross-motion by plaintiff Joanne Holly is granted, and the cross-motion by defendant Dynamic is denied (Motion Sequence No. 1); and it is further ordered that the motion by defendant Dynamic is denied, without prejudice, with leave to renew (Motion Sequence No. 2).

The underlying action is one brought by plaintiff Joanne Holly to recover for serious personal injuries, allegedly sustained by her on November 22, 2019, when she tripped and fell on the premises, located at 110-60 Dunkirk Street, Queens, New York. Plaintiff maintains that she sustained the injuries as a result of the defendants’ negligence.

Turning first to the plaintiff’s cross-motion, plaintiff seeks to amend her Complaint to reflect the correct dangerous condition that caused her accident, pursuant to CPLR 3025(b) and 3025(c) (Motion Sequence No. 1). She initially believed she fell due to a defective condition, but now seeks to assert that she fell due to not seeing the single step outside the entrance door.

It is well settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025(b); *Wirhouski v Armoured Car & Courier Serv.*, 221 AD2d 523 [2d Dept 1995]); and the proposed amendment is not “palpably insufficient” or “patently devoid of merit” (*Sheila Props., Inc. v A Real Good Plumber, Inc.*, 59 AD3d 424 [2d Dept 2009]). “Leave to amend a complaint to add additional theories of law based upon facts formerly alleged should be freely given.” (*Stuart v Board of Directors of the Police Benevolent Association of the New York State Police, Inc.*, 86 AD2d 721 [3d Dept 1982][internal citations omitted]). “It is necessary that the defendant have had notice of the facts out of which the original and new cause of action arose.” (*Allied Bank v. Fireman’s Fund Ins. Co.*, 522 NYS2d 421 [Sup Ct, NY Cty 1987][internal citations omitted]). As the new

dangerous condition is based upon facts formerly alleged, as the defendants had notice of such facts, as the record reveals no prejudice, and as the proposed amendment is not “palpably insufficient” or “patently devoid of merit”, the plaintiff’s cross-motion shall be granted. Plaintiff shall serve and file a Supplemental Summons and an Amended Verified Complaint, as proposed in her papers (*see* Exhibit I), as directed below.

Turning now to the main motion by Dunkirk, its motion seeking summary judgment, pursuant to CPLR 3212, dismissing plaintiff’s Complaint and all cross-claims as against it, is denied, without prejudice, with leave to renew, as the Court has now granted the plaintiff leave to file and serve amended pleadings (Motion Sequence No. 1). Dunkirk is free to re-make the motion for summary judgment after service of the amended pleadings.

In light of the above, the motion by defendant Dynamic seeking summary judgment, pursuant to CPLR 3212, dismissing plaintiff’s Complaint and all cross-claims as against it, is denied, without prejudice, with leave to renew, as the Court has now granted the plaintiff leave to serve amended pleadings (Motion Sequence No. 2). Defendant Dynamic is free to re-make the motion for summary judgment after service of the amended pleadings.

Lastly, turning to the cross-motion by defendant Dunkirk for an order striking plaintiff’s Amended Bill of Particulars, same is denied (Motion Sequence No. 1). It is undisputed that the plaintiff served an Amended Bill of Particulars, dated June 15, 2021, wherein the plaintiff asserts, *inter alia*, a different dangerous condition that caused her accident. Pursuant to CPLR 3042(b), the plaintiff is permitted to amend the Bill of Particulars one time as a matter of right as long as the Note of Issue has not yet been filed. As the Note of Issue has not yet been filed, and as the plaintiff has not previously served an Amended Bill of Particulars, the Amended Bill of Particulars shall not be stricken.

Accordingly, it is

ORDERED that the motion by defendant Dunkirk, for an order dismissing plaintiff’s Complaint and all cross-claims as against it is denied, without prejudice, with leave to renew (Motion Sequence No. 1) ; and it is further

ORDERED that the motion by defendant Dynamic, for an order dismissing plaintiff's Complaint and all cross-claims as against it, is denied without prejudice, with leave to renew (Motion Sequence No. 2) ; and it is further

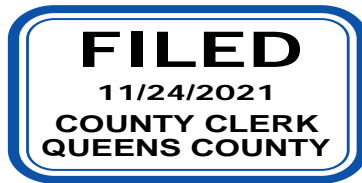
ORDERED that the cross-motion by plaintiff for an order, pursuant to CPLR 3025(b) and 3025(c), permitting her to amend the Complaint to reflect the correct dangerous condition that caused her accident, is granted (Motion Sequence No. 1); and it is further

ORDERED that the plaintiff shall file and serve upon the defendants, a Supplemental Summons and an Amended Verified Complaint, as proposed, within thirty (30) days of the date that this Order appears in the minutes of the Office of the Queens County Clerk–NYSCEF system; and it is further

ORDERED that the cross-motion by defendant Dunkirk for an Order striking plaintiff's Amended Bill of Particulars, is denied (Motion Sequence No. 1).

The foregoing is constitutes the decision and order of the Court

Dated: November 17, 2021



TIMOTHY J. DUFFICY, J.S.C.