To Be Argued By:
Si Aydiner, Esq.
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Supreme Court of the State of New York
Appellate Division: First Department

GREGORY MORRISON,

Plaintiff-Appellant,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Respondent.

Appellate Division Docket No. 2022-01770

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Supreme Court, New York County, Index No. 153970/2019

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... *ii*

PRELIMINARY STATEMENT 1

ARGUMENT 1

I. NYCHA HAS ADVANCED MULTIPLE ARGUMENTS FOR THE FIRST TIME ON APPEAL THAT ARE OTHERWISE INCONSISTENT WITH THE RECORD 1

A) NYCHA's Building Inspection Reports 2

B) NYCHA Advances Subterfuge To Cure The Evidentiary Defect In Its Designee's Affidavit 4

II. NYCHA'S ATTACK ON COEFFICIENT OF FRICTION TESTING PERFORMED BY MORRISON'S ENGINEER HAS BEEN RAISED FOR THE FIRST TIME ON APPEAL AND IS PREDICATED ON INACCURATE FACTS AND SPECULATION 5

III. MORRISON'S NOTICE OF CLAIM ASSERTED INADEQUATE FRICTION AND DID NOT NEED TO PLEAD THE ASTM AND UL VIOLATIONS FOUND HERE 7

CONCLUSION 9

PRINTING SPECIFICATIONS STATEMENT 10

TABLE OF AUTHORITIES

Cases ***Page(s)***

Alden Global Value Recovery Master Fund, L.P. v. KeyBank N.A.,
159 A.D.3d 618, 625, 74 N.Y.S.3d 559, 565 (1st Dep't 2018) 2

Bania v. City of New York,
157 A.D.3d 612, 614, 70 N.Y.S.3d 183, 185-86 (1st Dep't 2018).....6

Gjokaj v. Fox,
25 A.D.3d 759, 760, 809 N.Y.S.2d 156, 157 (2d Dep't 2006).....3

Harrison v. City of New York,
197 A.D.3d 630, 149 N.Y.S.3d 908, (2d Dep't 2021).....7

Migdol v. City of New York,
291 A.D.2d 201, 201, 737 N.Y.S.2d 78, 79 (1st Dep't 2002) 3

Monmasterio v. New York City Hous. Auth.,
39 A.D.3d 354, 833 N.Y.S.2d 498 (1st Dep't 2007) 8, 9

Se Dae Yang v. New York City Health & Hosps. Corp.,
140 A.D.3d 1051, 35 N.Y.S.3d 350 (2d Dep't 2016).....7

Shmueli v. N.Y. City Police Dep't,
743 N.Y.S.2d 871, 871, 295 A.D.2d 271, 271 (1st Dep't 2002) 7

Statutes/Regulations/Miscellaneous

CPLR § 3043(a) 7

PRELIMINARY STATEMENT

In its brief defendant-respondent New York City Housing Authority ("NYCHA") skillfully relies on a series of new arguments—never advanced before the trial court—and claims that more bombast than bombshell. For example, NYCHA challenges plaintiff-appellant Gregory Morrison's ("Morrison") contention that inspection records annexed to NYCHA's motion revealing unsatisfactory treads are not for the specific staircase at issue. This argument, of course, was never raised below and is nonetheless inaccurate. NYCHA also claims Morrison's bill of particulars failed to plead violations of industry standards set forth by the American Society for Testing and Materials ("ASTM") and Underwriters Laboratories ("UL"). Careful review of NYCHA's demand for a bill of particulars reveals that it never demanded engineering standards. NYCHA's arguments are entitled to no weight and the trial court's grant of summary judgment should, therefore, be reversed

ARGUMENT

I. NYCHA HAS ADVANCED MULTIPLE ARGUMENTS FOR THE FIRST TIME ON APPEAL THAT ARE OTHERWISE INCONSISTENT WITH THE RECORD

An argument "raised for the first time on appeal *may* be considered by this Court where the party raising it alleges *no new facts* but, rather, raises a legal argument which appeared upon the face of the record and which could not have

been avoided if brought to the opposing party's attention at the proper juncture." *Alden Global Value Recovery Master Fund, L.P. v. KeyBank N.A.*, 159 A.D.3d 618, 625, 74 N.Y.S.3d 559, 565 (1st Dep't 2018) (emphasis added). In its brief, NYCHA raised two arguments, for the first time on appeal, concerning the issue of whether it met its burden. Both should be rejected.

A) <u>NYCHA's Building Inspection Reports</u>

NYCHA annexed, as an exhibit to its motion, Building Inspection Reports ("BIR")—cataloging repeated antecedent findings that the staircase treads were inadequate—without addressing or acknowledging those findings until its reply. NYCHA provocatively claims here that Morrison "erroneously represents that NYCHA's Building Inspection Reports of May, 2018, May, 2017, December, 2016 and July 7, 2016 are Building Inspection Reports 'for the specific stairwell between 6th and 5th floors." (NYCHA Br. 11-12). NYCHA, of course, *never raised* this argument to the trial court. (Record on Appeal ("R.") 795-96 (failing to raise this argument)). As a corollary, the record demonstrates NYCHA's argument—true to its history—is simply untrue.[1] In discovery, Morrison demanded inspections records for the *specific* stairwell between the Sixth and Fifth floors (*id.* 260 ¶ 10) and NYCHA provided responsive BIRs citing the subject

[1] Morrison addressed this issue, in his opposition to the trial court, that these records were produced in response to a specific demand for the subject stairwell and NYCHA did not rebut this contention on reply. (R. 765 n.4).

staircase. There would, of course, be no reason for NYCHA to provide BIRs for *other*, irrelevant, staircases or floors.

Furthermore, NYCHA's claim that the BIRs only demonstrate a general awareness is improper because this contention was only addressed on reply. Indeed, as this court has previously held, a movant cannot use their reply to "remedy these basic deficiencies in [movant's] prima facie showing rather than respond to arguments in plaintiff's opposition papers." *Migdol v. City of New York*, 291 A.D.2d 201, 201, 737 N.Y.S.2d 78, 79 (1st Dep't 2002). Here, NYCHA followed this sequence: (1) NYCHA attached BIRs with multiple pre-accident findings of unsatisfactory treads to its principal brief, (2) NYCHA ignored the BIRs and made no effort to rationalize or discuss these findings in its principal brief, and (3) waited until reply to argue, in order to meet its burden, that the BIRs evidenced a "mere 'general awareness.'" (NYCHA Br. 11-12). This is exactly the scenario proscribed by *Migdol*.

And though NYCHA argues that the BIR notations of unsatisfactory treads "contained no pertinent information concerning notice of the specific slippery condition alleged herein," it fails to acknowledge that under *Migdol*, NYCHA was obligated to demonstrate this claim thru competent evidence before their reply. *Gjokaj v. Fox*, 25 A.D.3d 759, 760, 809 N.Y.S.2d 156, 157 (2d Dep't 2006) (holding "[w]here a defendant's 'own submissions raised issues of fact requiring a

trial, they did not meet their burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case, and summary judgment was improperly granted.'").

B) NYCHA Advances Subterfuge To Cure The Evidentiary Defect In Its Designee's Affidavit

In order to establish its last inspection, a necessary part of its prima facie case, NYCHA proffered an affidavit from its designee Amados Santos ("Santos").[2] Santos, who testified thru an interpreter, executed an English affidavit at NYCHA's request with no effort by NYCHA to establish that he understood it. In a transparent attempt to justify its failure to submit a competent affidavit, NYCHA argues: "Mr. Santos testified that has been employed by NYCHA for the past 30 years in various capacities. [R 688-89], this extended employment involving communication with other NYCHA personnel as well as tenants, demonstrates Mr. Santos' ability to communicate in English." (NYCHA Br. 16). Here, NYCHA has provided no evidentiary support for its position while assuming that a witness, who required an interpreter for a deposition, can subsequently proffer equivalent written testimony without an interpreter competently.

[2] At the risk of being redundant, this issue is reflective of NYCHA's disingenuity and not its witness. The witness's desire to have an interpreter is irrelevant to the issue of whether once an interpreter is utilized, further testimony from that witness should be thru the interpreter. An affidavit is simply a written form of the oral testimony and of equal importance here.

II. NYCHA'S ATTACK ON COEFFICIENT OF FRICTION TESTING PERFORMED BY MORRISON'S ENGINEER HAS BEEN RAISED FOR THE FIRST TIME ON APPEAL AND IS PREDICATED ON INACCURATE FACTS AND SPECULATION

NYCHA argues that Morrison's prima facie case is defective by focusing on findings made by Morrison's engineer Stanley H. Fein, P.E. ("Fein"), that the subject tread had inadequate coefficient of friction in violation of accepted engineering standards. NYCHA essentially raises three claims: (1) Fein's inspection occurred over two years after the accident, (2) Fein's testimony has been previously rejected in certain cases and he tested the wrong situs, and (3) Morrison did not plead violations of American Society for Testing and Materials ("ASTM") and Underwriters Laboratory ("UL") standards in his bill of particulars. Each argument is addressed in turn.

First, NYCHA argues that Fein's inspection is inadmissible because it occurred over two years after this accident. NYCHA has, again, raised another argument for the first time on appeal because it never argued, to the trial court, that Fein's testing was temporally defective. (*See* R. 783-99). Nor did NYCHA proffer any evidence that the passage of time effects the reliability of a friction coefficient test rather than, properly, informing the weight given by a fact finder.

Second, NYCHA, again for the first time on appeal, argues that Fein's prior preclusions direct that his findings should be rejected.[3] This argument is, of course, relevant to the issue of weight. There are numerous examples where Fein's testimony has been given due weight by this court. *E.g.*, *Bania v. City of New York*, 157 A.D.3d 612, 614, 70 N.Y.S.3d 183, 185-86 (1st Dep't 2018) (reversing summary judgment on Fein's affidavit detailing an improper prior repair of a sinkhole). Likewise, NYCHA argues that the photograph annexed to Fein's affidavit "does not reflect the first step down from the 6th floor landing, but shows an unknown and unidentified staircase." (NYCHA Br. 24). This argument, also raised for the first time on appeal, should be rejected because it is, quite simply, wrong. NYCHA fails to acknowledge that Morrison provided an affidavit to the trial court authenticating the photograph (and situs) annexed to Fein's affidavit. (R. 780).

Third, NYCHA claims that Morrison did not plead the ASTM and UL engineering standards in his bill of particulars. While this is true, careful review of the record reveals that NYCHA's demand for a bill of particulars never requested applicable engineering standards. (*Id.* 197). Rather, NYCHA sought applicable

[3] In a belated effort to discredit Fein, NYCHA resorts to heavy speculation. An instructful example is seen in this passage: "Mr. Fein does not even consider in this affidavit that the gray paint *may be an approved floor paint*." (NYCHA Br. 25 (emphasis added)). Obviously, the word "may," which is passive and hedges, comes with no evidentiary support. While this gray paint *may* or may *not* be suitable for flooring, nothing prevented NYCHA from submitting an affidavit

statutory regulations. (*Id.*). And under CPLR § 3043(a), there is no per se right for NYCHA to demand engineering standards.

III. MORRISON'S NOTICE OF CLAIM ASSERTED INADEQUATE FRICTION AND DID NOT NEED TO PLEAD THE ASTM AND UL VIOLATIONS FOUND HERE

As discussed in Morrison's principal brief, a claimant's notice of claim is only required to "allege any facts from which defendant could have gleaned plaintiff's intention to raise such a claim." *Shmueli v. N.Y. City Police Dep't*, 743 N.Y.S.2d 871, 871, 295 A.D.2d 271, 271 (1st Dep't 2002). Consistent with this, the Second Department has instructively held "'[t]he Legislature did not intend that the claimant have the additional burden of pleading causes of action and legal theories, proper for the pleadings, in the notice of claim.'" *Harrison v. City of New York*, 197 A.D.3d 630, 149 N.Y.S.3d 908, (2d Dep't 2021) (emphasis added) (citing *Se Dae Yang v. New York City Health & Hosps. Corp.*, 140 A.D.3d 1051, 35 N.Y.S.3d 350 (2d Dep't 2016)). The violation of ASTM or UL, as here, is not a theory of liability. Rather, it is the basis for a theory that has been, as NYCHA concedes, pled in the notice of claim—that the staircase has inadequate coefficient of friction. (R. 45 (alleging in the notice of claim "in having a floor without an adequate coefficient of friction.")).

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on reply to rebut Fein's contention.

In support of its position, NYCHA relies extensively on *Monmasterio v. New York City Hous. Auth.*, 39 A.D.3d 354, 833 N.Y.S.2d 498 (1st Dep't 2007). In *Monmasterio*, the notice of claim alleged:

> The claim arose on September 17, 2004 at approximately 11:00 p.m. at or about 1730 Watson Avenue, Bronx, New York and a parking lot and dumpster located thereat; in that infant claimant while lawfully walking in the vicinity of said dumpster was accosted, beaten, assaulted and robbed by unknown assailants who had hidden about said dumpster. That the aforesaid occurred as a result of the negligence of [defendant], its agents and/or employees in the ownership, maintenance and control of said housing project and parking lot and areas thereof; in failing to provide adequate, sufficient and operable lighting at said location with prior knowledge of similar criminal conduct and activity in the immediate vicinity and location where the plaintiff was harmed.

Id. at 355, 833 N.Y.S.2d at 498. The court found, consistent with this passage, that the genesis of plaintiff's claim was rooted in a failure to maintain the premises thru inadequate lighting. *Id.* at 355, 833 N.Y.S.2d at 498. In rejecting plaintiff's claim that this allegation contained a claim for negligent security, the court observed "the crux of the notice of claim is that because defendant had knowledge of similar criminal conduct in the same immediate vicinity and location, 'adequate, sufficient and operable lighting'--not more security personnel--should have been provided." *Id.* at 356, 833 N.Y.S.2d at 498. Stated differently, plaintiff in *Monmasterio* provided no nexus between a negligent security claim as distinct from inadequate lighting.

There is, of course, no such parallel here and *Monmasterio* is inapposite. Here, Morrison's notice of claim specifically pled that NYCHA was negligent "in having a floor without an adequate coefficient of friction." (R. 45). NYCHA's contention that Morrison's failure to assert ASTM or UL violations based on the paint applied to the treads is distinct from the failure in *Monmasterio*. This is because unlike *Monmasterio*, which provided no basis to infer negligent security as a claim, Morrison has asserted inadequate friction which was subsequently demonstrated by Fein thru NYCHA's application of paint in violation of engineering standards.

CONCLUSION

For the reasons stated above, the trial court's decision should be reversed and this matter remanded for a trial on liability and damages.

Dated: 17 August 2022
Mineola, New York

Respectfully submitted,

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159 A.D.3d 618
Supreme Court, Appellate Division, First Department, New York.

ALDEN GLOBAL VALUE RECOVERY MASTER FUND, L.P., etc., Plaintiff–Appellant,
v.
KEYBANK NATIONAL ASSOCIATION, et al., Defendants–Respondents,
Wells Fargo Bank, N.A., etc., Nominal Defendant.

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Index 650928/16
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Entered: March 29, 2018

Synopsis

Background: Certificateholder in loan pooling and servicing agreement brought action against special servicer and master servicer for breach of duties under agreement. The Supreme Court, New York County, Anil C. Singh, J., 2016 WL 6963190, granted servicers' motions to dismiss. Certificateholder appealed.

Holdings: The Supreme Court, Appellate Division held that:

word "default" in agreement was synonymous with "Event of Default," as defined earlier in agreement, and

certificateholder did not demonstrate actionable default, as required to establish standing.

Affirmed.

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Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

Opinion

***618** Orders, Supreme Court, New York County (Anil C. Singh, J.), entered November 29, 2016, which granted defendants KeyBank National Association and Berkadia Commercial Mortgage LLC's motions to dismiss the complaint as against them with prejudice, unanimously affirmed, without costs.

The principal issue before us is whether, in granting defendants' motions to dismiss in this purported derivative action for breach of an Amended and Restated Pooling and Servicing Agreement (PSA), Supreme Court improperly interpreted the term "default," as employed in one provision of the PSA, as synonymous with the term "Event of Default," as defined in a preceding provision of the PSA. We find that Supreme Court's determination was correct, and therefore affirm.

I. *Background*

This appeal arose from the sale of a commercial mortgage loan for allegedly less than "fair value."

In 2007, the Bryant Park Hotel, located at 40 W. 40th Street, borrowed funds from the J.P. Morgan Chase Commercial Mortgage Securities Trust Series 2007–CIBC18 (the Trust), which was created pursuant to a pooling and servicing agreement dated March 7, 2007. Under the terms of that agreement, defendant Wells Fargo Bank was designated as the Trustee and Paying Agent, defendant Berkadia was designated as the Master Servicer and defendant KeyBank was designated as the Special Servicer. The Bryant Park Hotel loan was pooled with other commercial mortgage loans and securitized into the Trust.

Section 6.03 of the PSA limits the potential claims of liability ***619** that may be brought against the servicers of the Trust to willful misfeasance, bad faith, negligence or negligent disregard of their duties under the PSA. That section also provides that the servicers will be indemnified by the Trust for all expenses unless incurred by reason of bad faith, willful misconduct, negligence or negligent disregard.

****561** Article VII of the PSA, entitled "Default," includes alternative definitions of the term "Event of Default" (Section 7.01[a]). The parties agree that the only definition of "Event of Default" applicable to the circumstances presented in this case is the following:

> "[A]ny failure on the part of the Master Servicer [or] the Special Servicer ... duly to observe or perform in any material respect any of its other covenants or obligations contained in this Agreement which continues unremedied for a period of 30 days ... after the date on which *written notice of such failure, requiring the same to be remedied, shall have been given ... to the Master Servicer [or] the Special Servicer* ... as the case may be, *with a copy to each other party to this Agreement,* by the Holders of Certificates evidencing Percentage Interests aggregating not less than 25%" (Section 7.01[a][iii] [emphasis added]).

Section 12.03(c) of the PSA (the "no-action" clause) sets forth the limited circumstances under which a certificateholder may institute suit. Section 12.03(c) provides, in pertinent part:

> "No Certificateholder shall have any right by virtue of any provision of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement or any Mortgage Loan, unless, with respect to any suit, action or proceeding upon or under or with respect to this Agreement, such Holder previously shall have given to the Trustee and the Paying Agent *a written notice of default* hereunder, and of the continuance thereof, *as herein before provided,* and unless also (except in the case of a default by the Trustee) the Holders of Certificates of any Class evidencing not less than 25% of the related Percentage Interests in such Class shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee, for 60 days after its receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding" (emphasis added).

The PSA sets forth no definition of the term "default" as employed in section 12.03(c).

***620** In October 2011, the borrower defaulted on the loan, and Berkadia, which had been responsible for servicing the loan as Master Servicer, transferred that responsibility to KeyBank, as Special Servicer. KeyBank, as Special Servicer, was tasked with determining the "fair value" of the loan, and Berkadia, as Master Servicer, was responsible for reviewing KeyBank's

fair value determination.

Effective February 27, 2012, the original pooling and servicing agreement was amended, restated and replaced by the PSA.

In April 2014, KeyBank obtained an appraisal of the land and building by Cushman & Wakefield of $71 million. Thereafter, KeyBank valued the loan at $65,058,844, even though the amount owed on the loan was $85.5 million. The nonparty Controlling Class Option Holder (the certificateholder with the largest balance of certificates in the "Controlling Class") (CCOH) elected to exercise its option to purchase the loan from the Trust. Later that month, Berkadia, as Master Servicer, approved KeyBank's valuation.

On May 20, 2014, the CCOH consummated the purchase of the loan from the Trust, but the Trust received approximately ****562** $59 million, approximately $6 million less than KeyBank's and Berkadia's valuation. A few weeks later, the loan was restructured and refinanced by a lender for more than $100 million.

On May 18, 2015, plaintiff Alden Global Recovery Master Fund, L.P., a holder of at least 25% of the Class C group of certificates, sent a letter to Wells Fargo as Trustee and Paying Agent notifying them of defaults by KeyBank and Berkadia. In that same letter, plaintiff related the above appraisal history and requested that Wells Fargo institute a suit against both KeyBank and Berkadia and offered Wells Fargo "such reasonable indemnity as it may require."

In mid-July 2015, counsel for Wells Fargo orally advised plaintiff that it would not institute a suit.

On February 23, 2016, plaintiff commenced the instant action, alleging that both KeyBank, as Special Servicer, and Berkadia, as Master Servicer, breached their duties under the PSA by failing to comply with their obligations in determining the fair value of the loan. Specifically, plaintiff alleged that KeyBank placed its reliance on a single appraisal from Cushman and Wakefield and undervalued the loan. Plaintiff further alleged that Berkadia failed in its duty to review KeyBank's valuation by ignoring KeyBank's blatant errors, which should have raised substantial doubts about the reliability of the valuation. Additionally, plaintiff alleged that neither of those defendants ***621** was entitled to indemnification and that KeyBank had failed to act in good faith.

In separate motions, both Berkadia and KeyBank moved to dismiss the complaint. As stated above, by order entered November 29, 2016, Supreme Court granted both motions on both CPLR 3211(a)(1) and (7) grounds.

On this appeal, plaintiff's principal argument is that Supreme Court erred in granting defendants' motions to dismiss based upon its incorrect interpretation of the undefined term "default," as employed in section 12.03(c) of the PSA, as having the same meaning as the term "Event of Default" as defined in section 7.01(a)(iii), in that the cases upon which Supreme Court relied are either legally or factually inapposite to the instant case. Relying on *Teachers Ins. & Annuity Assn. of Am. v. CRIIMI MAE Servs. Ltd. Partnership,* 681 F.Supp.2d 501 [S.D. N.Y.2010], *affd* 481 Fed. Appx. 686 [2d Cir. 2012], *cert denied* 568 U.S. 1010, 133 S.Ct. 616, 184 L.Ed.2d 394 (2012), plaintiff maintains that application of the term "Event of Default" is limited to the removal of a servicer and is, therefore, inapplicable to the initiation of certificateholder litigation. Plaintiff further contends that, in any event, dismissal of the complaint was improper because the language of section 12.03(c) is ambiguous. Additionally, plaintiff argues that there is case law precedent for the principal that uncapitalized, undefined general terms in a contract should not be interpreted to have the same meaning as capitalized terms defined elsewhere in the same contract.

Defendants maintain that there is controlling precedent for upholding Supreme Court's determination that the two terms in question have the same meaning, that plaintiff cannot advance its ambiguity argument on this appeal because it did not raise it before the motion court, and that, in any event, the argument lacks merit because the phrase "as herein before provided" clearly refers to default provisions of the PSA preceding section 12.03(c). Defendants further argue that the cases cited by plaintiff in support of its argument that an uncapitalized contract term should not be interpreted as synonymous with a contractually defined contract term ****563** are neither binding precedent nor factually apposite to the instant case.

II. *Legal Standards*

On a CPLR 3211(a)(1) motion to dismiss based upon documentary evidence, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez,* 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the ***622** complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*see 219 Broadway Corp. v. Alexander's, Inc.,* 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205 [1979]). Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff (*Leon v. Martinez,* 84 N.Y.2d at 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511).

III. *Discussion*

A. *Interpretation of "default" as Employed in "No-action" Clause*

On the issue of whether the word "default," as used in section 12.03(c) of the PSA, is synonymous with the term "Event of Default" as defined in the preceding section 7.01(a)(iii), our precedent is instructive.

In *ACE Sec. Corp. v. DB Structured Prods., Inc.,* 112 A.D.3d 522, 977 N.Y.S.2d 229 [1st Dept. 2013], *affd* 25 N.Y.3d 581, 15 N.Y.S.3d 716, 36 N.E.3d 623 (2015), we were presented with a case involving a pooling and servicing agreement containing language and enumeration of provisions in a manner strikingly similar to the PSA in the instant case. Although we dismissed the action in *ACE* on statute of limitations grounds (and the Court of Appeals affirmed solely on that basis), we also took pains to observe that, "[i]n any event, the certificate holders lacked standing to commence the action on behalf of the trust ... [because] [t]he "no-action" clause in section 12.03 of the PSA sets forth as a condition precedent to such an action that the certificate holders provide the trustee with 'a written notice of default and of the continuance thereof[,]' " and further observed that the " 'defaults' enumerated in the PSA concern failures of performance by the servicer or master servicer only" (112 A.D.3d at 523, 977 N.Y.S.2d 229). In making that observation, we were referring to Article VIII of the pooling and servicing agreement in *ACE,* which is entitled "Default" and enumerates failures of performance under the definition of "Servicer Event of Default." In *ACE,* we concluded that the pooling and servicing agreement did not authorize the certificateholders to issue a notice of default relating to the sponsor's alleged breach of representations.

In order to reach our conclusion in *ACE,* we reasoned that the word "default" as employed in section 12.03 of the pooling and servicing agreement in *ACE* referred to the preceding enumerated definitions of "Servicer Event of Default" in that agreement. (112 A.D.3d at 523, 977 N.Y.S.2d 229). Thus, *ACE* provides support for adherence to similar reasoning in interpreting the strikingly similar PSA in question in this case.

In *ACE,* we cited our earlier decision in ***623** *Walnut Place LLC v. Countrywide Home Loans, Inc.,* 96 A.D.3d 684, 684, 948 N.Y.S.2d 580 (1st Dept. 2012), in which we affirmed the motion court's granting of the defendants' motion to dismiss based on our holding that the action brought by the certificateholders in that case was "barred by the 'no-action' clause[s] in the PSAs, which plainly limit[ ] certificate holders' ****564** right to sue to an 'Event of Default,' which, under section 7.01 of the PSAs, involves only the master servicer."[1] In *Walnut Place,* we rejected the plaintiff's argument that the provision defining "Event of Default" in each of the PSAs in that case did not apply, reasoning that the "[p]laintiff's interpretation of the 'no-action' clause would improperly excise the 'Event of Default' provision and distort the plain meaning of the clause" (96 A.D.3d at 685, 948 N.Y.S.2d 580). Put otherwise, the "no-action" clause and the preceding provisions of the PSA defining "Event of Default" were to be read together. Our reasoning in *Walnut Place* is equally applicable in this case. The applicability of *Walnut Place* to this case is further demonstrated by our adherence to its reasoning in *ACE* notwithstanding the use of the term "default" in the "no-action" clause of the pooling and servicing agreement in that case rather than the term "Event of Default," as in the *Walnut Place* agreements, which made no difference in our reasoning or in our conclusion in both of those cases that the certificateholders lacked standing to sue.

Moreover, section 12.03 of the PSA in this case provides for "a written notice of default hereunder, and of the continuance

thereof, *as herein before provided* " (emphasis added). There is no possible antecedent provision in the PSA to which "a written notice of default" could refer other than the language of section 7.01(a)(iii) requiring provision of a written notice of default to the Special and Master Servicers, as well as to all of the parties to the PSA. Moreover, we have previously concluded that the language "as herein before provided" refers back to a preceding provision of the same agreement (*149 Madison LLC v. Bosco,* 103 A.D.3d 523, 524, 960 N.Y.S.2d 34 [1st Dept. 2013] [holding that the language "as hereinbefore provided," "properly read," refers to a prior portion of a lease agreement], *lv dismissed* 22 N.Y.3d 950, 977 N.Y.S.2d 178, 999 N.E.2d 542 [2013]).

***624** Significantly, further support for interpretation of "default" as used in section 12.03 of the PSA in this case as synonymous with "Event of Default" is found in section 8.02(vii), where the two terms are used interchangeably. Section 8.02(vii) provides, in pertinent part:

> "For all purposes under this Agreement, the Trustee shall not be deemed to have notice of any *Event of Default* unless a Responsible Officer of the Trustee has actual knowledge thereof or unless written notice of any event which is in fact such a *default* is received by the Trustee ..." (emphasis added).

Plaintiff's reliance on *Teachers Ins. & Annuity Assn. of Am. v. CRIIMI MAE Servs. Ltd. Partnership,* 681 F.Supp.2d 501 [S.D. N.Y.2010], *affd* 481 Fed.Appx. 686 [2d Cir. 2012], *cert denied* 568 U.S. 1010, 133 S.Ct. 616, 184 L.Ed.2d 394 [2012]), is misplaced. In *Teachers,* the court reached the conclusion that the "Special Servicer Event of Default" definition section of the pooling and servicing agreement in that case set forth preconditions applicable only to the removal of a ****565** Special Servicer, and not to the initiation of certificateholder litigation, 681 F.Supp.2d at 510. In *Teachers,* however, the notice provisions for a "Servicer Event of Default" were combined with those governing removal of a servicer in a single section of the agreement in question (*id.*). In this case, however, sections 7.01(a)(i) to (x) of the PSA set forth ten events, each of which constitutes an "Event of Default," including section 7.01(a)(iii), which defines "Event of Default" on the part of the Master Servicer or the Special Servicer and sets forth notice requirements as an element of the definition of that term, while a separate section of the PSA, section 7.01(b), provides for removal of a defaulting servicer as a remedy for the default. This remedy "may" be exercised only by the Trustee or the Depositor, or must be exercised by the Trustee "at the written direction of the Directing Certificate holder or the Holders of Certificates entitled to at least 51% of the Voting Rights." There is no language in section 7.01(b) stating removal is the exclusive remedy for any default of the part of a servicer, however. Moreover, as noted, here, the 7.01(a)(iii) notice requirements are the sole antecedent provision to which the phrase "as herein before provided" in the section 12.03© "no-action" clause could possibly be referring. In accordance with our precedent, as evidenced by *149 Madison,* such a reference dictates that we must read those two provisions together. In any event, *Teachers* is not binding precedent in this Court.

In sum, interpretation of the word "default," as used in section 12.03(c) (the "no-action" clause) of the PSA in this case, as synonymous with "Event of Default" as defined in the preceding ***625** section 7.01(a)(iii), is consistent not only with our precedent,[2] but also with the interchangeable use of the two terms in the PSA itself.

Plaintiff also argues, for the first time on this appeal, that the "no-action" clause is ambiguous. An argument raised for the first time on appeal may be considered by this Court where the party raising it alleges no new facts but, rather, raises a legal argument which appeared upon the face of the record and which could not have been avoided if brought to the opposing party's attention at the proper juncture (*Vanship Holdings Ltd. v. Energy Infrastructure Acquisition Corp.,* 65 A.D.3d 405, 408, 884 N.Y.S.2d 24 [1st Dept. 2009]).

Indeed, this appeal revolves around the strictly legal issue of how the PSA should be interpreted. In that regard, we have explained that

> "[t]o be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation (*Ellington v. EMI Music Inc.,* 24 N.Y.3d 239, 244 [997 N.Y.S.2d 339, 21 N.E.3d 1000] [2014]). The existence of ambiguity must be determined by examining the 'entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed,' with the wording to be considered 'in the light of the obligation as a ***626** whole and the intention of the parties as manifested ****566** thereby' (*Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.,* 60 A.D.3d 61, 66–67 [869 N.Y.S.2d 511] [1st Dept. 2008], *affd* 13 N.Y.3d 398 [892 N.Y.S.2d 303, 920 N.E.2d 359] [2009]). Further, in deciding the motion, '[t]he evidence will be construed in the light most favorable to the one moved against' (*Kershaw v. Hospital for Special Surgery,* 114 A.D.3d 75, 82 [978 N.Y.S.2d 13] [1st Dept. 2013], citing ... *Young*

v. New York City Health & Hosps. Corp., 91 N.Y.2d 291, 296 [670 N.Y.S.2d 169, 693 N.E.2d 196] [1998])" (*Perella Weinberg Partners LLC v. Kramer,* 153 A.D.3d 443, 446, 58 N.Y.S.3d 384 [1st Dept. 2017]).

In this case, all that is needed to determine the validity of plaintiff's argument can be found within the four corners of the PSA, which was made part of the record. Here, upon our examining the entire PSA, considering the relation of the parties and the circumstances under which the PSA was executed, viewing the wording of the PSA in light of the obligation as a whole and the intention of the parties, and construing the evidence in the light most favorable to plaintiff, we find that the language of the "no-action" clause of the PSA is susceptible of only one reasonable interpretation, that being that the phrase "written notice of *default* hereunder, and of the continuance thereof, *as herein before provided* " (emphasis added) refers to the term "Event of Default" as defined in section 7.01(a)(iii). Thus, reading the language of 7.01(a)(iii) and 12.03(c) together, that "no-action clause" language is not ambiguous.

Moreover, plaintiff's argument that "default" as used in the section 12.03(c) "no-action" clause does not have the same meaning as "Event of Default" as defined in section 7.01(a)(iii) is not based upon any reasonable interpretation of the term "default" as employed in the "no-action" clause. Indeed, plaintiff provides no reasonable interpretation of the word "default," in the context of the phrase "written notice of default ... as herein before provided," as an alternative to interpreting "default" as synonymous with "Event of Default." In the absence of an explanation of what preceding provision of the PSA other than section 7.01(a)(iii) provides for a written notice of default, both the word "default" and the phrase "as herein before provided" are rendered nothing more than meaningless surplusage. As there is no reasonable interpretation of use of the word "default" in the section 12.03(c) language in question other than that it means "Event of Default" as defined in section 7.01(a)(iii), plaintiff's argument is unavailing.

Plaintiff correctly relies upon *Quadrant Structured Prods. Co., Ltd. v. Vertin,* 23 N.Y.3d 549, 992 N.Y.S.2d 687, 16 N.E.3d 1165 (2014) for the general principles that "no-action" clauses should be read to "give effect to the precise words and language used" and should be "strictly construed" 23 N.Y.3d at 560, 992 N.Y.S.2d 687, 16 N.E.3d 1165 [internal quotation marks omitted]. Application of those principles to the "no-action" clause in this case, however, leads to the conclusion that the phrase "as herein before provided" refers back to the notice requirements of section 7.01(a)(iii) of the PSA, and that that provision and the "no-action" clause are to be read together.

The federal district court and bankruptcy court cases cited by plaintiff in support of its view that a capitalized, defined contractual term cannot have the same meaning as an uncapitalized, undefined term do not involve circumstances or contractual provisions in any way similar to those presented in the instant case (*see* ****567** *Sunbelt Rentals, Inc. v. Charter Oak Fire Ins. Co.,* 839 F.Supp.2d 680, 688–689 [S.D. N.Y.2012, Maas, M.J.] [drawing distinction between "equipment" and defined term ***627** "Equipment" in an equipment rental agreement]; *Metro Funding Corp. v. WestLB AG,* 2010 WL 1050315, *27, 2010 U.S. Dist. LEXIS 26680 [S.D. NY, Mar. 19, 2010, No. 10–Civ–1382 (CM), McMahon, J.] [distinguishing "advances" by Servicer, as employed in one section of a Servicing Agreement, from "Servicer Advances" as defined elsewhere in the agreement]; *In re LightSquared Inc.,* 504 B.R. 321, 345 and n. 37 [Bankr. S.D. N.Y.2013, Chapman, J.] [rejecting argument that the word "subsidiary" as used in a credit agreement should be given the same meaning as the defined term "Subsidiary"]). In any event, none of these cases are binding on this Court.

B. *Conditions Precedent to Plaintiff's Attainment of Standing to Sue*

Because sections 12.03(c) and 7.01(a)(iii) of the PSA are properly read together, in order for plaintiff, a certificateholder, to have attained standing to sue in this case, plaintiff must have met the conditions precedent set forth in both sections.

Section 12.03(c) sets forth four prerequisites to plaintiff's attainment of standing to sue. First, plaintiff must have provided the "Trustee and the Paying Agent a written notice of default hereunder, and of the continuance thereof, as herein before provided." Second, plaintiff must have been a holder of at least 25% of a class of certificates. Third, plaintiff must have made a written request of the Trustee to institute an action and must have offered the Trustee reasonable indemnity against the cost and expense to be incurred in pursuing the action. Fourth, prior to plaintiff's institution of suit, sixty days must have passed during which the Trustee has refused to institute such an action.

Here, a review of the documentary evidence of record, as required by CPLR 3211(a)(1), reveals that plaintiff provided Wells Fargo, the Trustee and Paying Agent, a letter dated May 18, 2015, which served as a written notice of default on the part of both KeyBank, as Special Servicer, and Berkadia, as Master Servicer, thereby meeting the first requirement. It is uncontroverted that, as plaintiff stated in its May 18, 2015 letter, plaintiff was at that time the "Holder of Certificates, with more than twenty-five percent (25%) of the Percentage Interests in Class C," and therefore met the second requirement. In the May 18, 2015 letter, plaintiff "request[ed] that the Trustee institute an action against Key[Bank] and Berkadia so as to hold them liable for the consequences of such default" (*id.*) and "offer[ed] to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred in connection with this proposed action," and thereby ***628** met the third requirement. With respect to the fourth requirement, it is uncontroverted that the Trustee refused to institute suit in mid-July 2015, and the record reflects that plaintiff did not institute the instant action until February 23, 2016, well over sixty days past the Trustee's refusal. Thus, the documentary evidence establishes that plaintiff has met all four of the section 12.03(c) conditions precedent.

In order to have attained standing to sue, however, plaintiff was also required to demonstrate a default that was actionable under the PSA. Section 12.03(c) refers to "a written notice of default hereunder ... as herein before provided" in section 7.01(a)(iii). The latter section defines an Event of Default as

> "[a]ny failure on the part of the Master Servicer [or] the Special Servicer ... ****568** duly to observe or perform in any material respect any of its ... covenants or obligations contained in this Agreement which continues unremedied for a period of 30 days ... *after the date on which written notice of such failure, requiring the same to be remedied, shall have been given ... to the Master Servicer [or] the Special Servicer* " (emphasis added).

Here, the record is devoid of any documentary evidence that plaintiff provided any such written notice to the Master Servicer and the Special Servicer. Furthermore, the May 18, 2015 letter itself does not indicate that copies of that letter were transmitted by plaintiff to any entity or party to the PSA other than the Trustee, as addressee.

Because the uncontroverted and unambiguous documentary evidence demonstrates that plaintiff failed to satisfy the terms of section 7.01(a)(iii) defining the Event of Default here at issue, plaintiff's compliance with the conditions precedent of section 12.03(c) does not suffice to afford it standing to sue, as it has failed to demonstrate an actionable Event of Default under the PSA. Thus, KeyBank and Berkadia have conclusively established a defense to plaintiff's asserted claims as a matter of law (*Leon v. Martinez,* 84 N.Y.2d at 88, 614 N.Y.S.2d 972, 638 N.E.2d 511) and the motion court correctly granted both defendants' CPLR 3211(a)(1) motions to dismiss.

Alternatively, with respect to defendants' CPLR 3211(a)(7) motions, a review of the complaint reveals that plaintiff has stated the manner in which it complied with the first three requirements of section 12.03(c), referencing the May 18, 2015 letter and annexing a copy of that letter to its complaint as Exhibit A (record at 38). Furthermore, in its complaint, plaintiff has averred that the Trustee advised plaintiff of the Trustee's refusal to sue in mid-July 2015 (*id.*), and the record indicates that the complaint was filed on February 23, 2016. Nonetheless, ***629** the complaint is devoid of any allegations that plaintiff provided any written notice of default to KeyBank, Berkadia or any party to the PSA other than the Trustee. Therefore, accepting all of plaintiff's allegations as true, construing those allegations in the light most favorable to plaintiff and giving plaintiff the benefit of all reasonable inferences, we find that plaintiff has failed to plead with sufficiency that it has attained standing to sue and therefore has failed to state any cognizable causes of action. Therefore, the motion court properly granted defendants' motions to dismiss on CPLR 3211(a)(7) grounds (*see Leon v. Martinez,* 84 N.Y.2d at 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *219 Broadway Corp. v. Alexander's, Inc.,* 46 N.Y.2d at 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205).

In light of the foregoing disposition of this appeal, we need not consider defendants' alternative arguments in support of affirmance.

All Citations

159 A.D.3d 618, 74 N.Y.S.3d 559, 2018 N.Y. Slip Op. 02241

Footnotes

[1] The identically worded language of the no-action clauses of two identically worded pooling and servicing agreements at issue in *Walnut Place* provide, in pertinent part:

> "No Certificateholder shall have any right by virtue or by availing itself of any provisions of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, [1] unless such Holder previously shall have given to the Trustee *a written notice of an Event of Default and of the continuance thereof,* as provided in this Agreement ...." (emphasis added) (*Walnut Place,* 2012 WL 13024309, Brief for Plaintiffs–Appellants, at *7).

[2] The fact that the statute of limitations issue was dispositive in *ACE* does not dilute the soundness or significance of our implicit reasoning there that the term "default" as used in the "no-action" clause of a pooling and servicing agreement, is synonymous with "Event of Default" as defined in a preceding section of that agreement. Furthermore, the fact that the "no-action" clauses in *Walnut Place* were differently, and arguably more artfully, drafted than the comparable clause in this case, in that the *Walnut Place* language explicitly referred to "Event of Default" rather than "default," as in this case, does not render our reasoning in *Walnut Place* any less applicable here than it was in *ACE.*

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157 A.D.3d 612
Supreme Court, Appellate Division, First Department, New York.

Gobinjee BANIA, et al., Plaintiffs–Appellants,
v.
CITY OF NEW YORK, Defendant–Respondent.

4935
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Index 100932/12
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ENTERED: JANUARY 25, 2018

Synopsis
Background: Police officers brought action arising out of personal injury after vehicle fell into hole in roadway alleging city created defect through affirmative act of negligence. The Supreme Court, New York County, Margaret A. Chan, J., granted city's motion to dismiss. Officers appealed.

The Supreme Court, Appellate Division held that genuine issue of fact as to whether the city's affirmative repair of sinkhole negligently created defective condition precluded summary judgment.

Reversed and remanded.

Attorneys and Law Firms

***184** Sacco & Fillas, LLP, Astoria (Tonino Sacco of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondent.

Richter J.P., Mazzarelli, Kahn, Moulton, JJ.

Opinion

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered November 14, 2016, which granted defendant City of New York's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the matter remanded to Supreme Court for further proceedings.

Plaintiffs, both of whom are officers of the New York City Police Department, allege that on September 7, 2011, at about 12:40 a.m., while on patrol, they sustained personal injuries after their vehicle's tire fell into a hole in the roadway located on the northbound portion of Saint Nicholas Avenue between 124th Street and 125th Street. It is uncontroverted that defendant City of New York (City) owned and maintained the accident location. Although plaintiffs do not dispute that the City did not receive prior written notice of the roadway defect under the Pothole Law (*see* Administrative Code of City of N.Y. § 7–201[c][2]), they claim that no such notice was required because the City created the defect through an affirmative act of negligence by placing a patch over a hole that was at the subject location about 10 days before the accident.

The motion court erred in dismissing the complaint. At the outset, on a motion for summary judgment dismissing the

complaint against the City alleging personal injury due to a roadway defect or hazard, the City has the initial burden of ***185** establishing that it lacked prior written notice of the defect or hazard under the Pothole Law (*Yarborough v. City of New York*, 10 N.Y.3d 726, 728, 853 N.Y.S.2d 261, 882 N.E.2d 873 [2008]). Where the City meets that initial burden, the burden shifts to the plaintiff, who must demonstrate that the City "affirmatively created the defect [in question] through an act of negligence" (*id.*). The affirmative negligence exception is limited, however, to "work by the City that immediately results in the existence of a dangerous condition" (*id.*, quoting *Bielecki v. City of New York*, 14 A.D.3d 301, 301–302, 788 N.Y.S.2d 67 [1st Dept. 2005]), as opposed to a defect that "developed over time" (*Yarborough*, 10 N.Y.3d at 728, 853 N.Y.S.2d 261, 882 N.E.2d 873).

Here, according to the printed results of a December 16, 2014 computerized search for records of the City's Department of Transportation (DOT) concerning the roadway in the vicinity of the accident location, a complaint was made to the DOT on August 27, 2011, resulting in the issuance of a "Corrective Action Request" (CAR) that day. The DOT printout further reflects that on that same day, in response to the CAR, the roadway in that location was inspected by the City's Department of Environmental Protection (DEP). The DOT printout also includes "CAR Comments" reporting that a "2′×1′ area is caved in and down 6 feet in the bus lane, there are also voided areas that extend beyond the opening, DEP Closed: 9/8/2011 11:10:00 AM."

At a hearing held on December 12, 2011 pursuant to General Municipal Law § 50–h, plaintiff Amey R. Kaminska testified that while on patrol shortly after 7:00 a.m. on August 27, 2011, eleven days prior to the accident, she observed a hole in the roadway in the vicinity of 124th Street and Saint Nicholas Avenue, notified DOT about it, and was told that "they would send somebody." On her drive home later that morning, she observed that there was a DOT car "just sitting" near the hole. At her pre-trial deposition on January 16, 2013, Kaminska testified that she had seen the hole and reported it to the DOT "[l]ess than two weeks prior" to the September 7, 2011 incident and that the hole was "about a foot wide by maybe two feet long." Kaminska's description of the dimensions of the hole is consistent with the "CAR Comments" description of the dimensions of the "caved in" area of the roadway.

In addition, Kaminska submitted an affidavit, sworn July 26, 2013, in opposition to defendant's summary judgment motion. In her affidavit, Kaminska stated that on August 27, 2011, while driving through St. Nicholas Avenue and West 124th Street to her police precinct, she observed two men with orange and green vests standing by a depression in the road. She noted that one of the men was holding a pole or shovel that was placed into the depression. She further states that on the morning of August 28, 2011, while on patrol, she and her partner drove by St. Nicholas Avenue and West 124th Street, where she observed that the depression she had seen the previous day "had been filled with a dark or blackish material like cement or tar."

Plaintiffs also proffered the affidavit of their expert, Stanley H. Fein, sworn August 14, 2015. In his affidavit, Fein, a professional engineer, opined that any attempted patch repair of the sinkhole—"without excavation, proper backfilling and tamping—would begin to fail almost immediately and manifest itself in the recurrence of the sinkhole." Fein further opines that, in the absence of proper excavation, backfilling and tamping, it was "reasonable [to] expect failure of the sinkhole to begin within 24 hours."

***186** Based upon this record evidence, we find that although the City has met its initial burden of establishing the uncontroverted fact that it received no prior written notice of the sinkhole, thereby shifting the burden to plaintiffs, plaintiffs have met their burden of showing that there are triable issues of fact as to whether the City's affirmative negligence created the defect (*see Yarborough*, 10 N.Y.3d at 728, 853 N.Y.S.2d 261, 882 N.E.2d 873 [2008]). Specifically, plaintiff's testimony and affidavit demonstrate that the City attempted to repair the sinkhole on August 27, 2011. Moreover, the City has conceded based on the CAR report that it worked to fill the sinkhole on August 27, 2011 (eleven days prior to the accident) and August 28, 2011 (ten days prior to the accident). The affidavit of plaintiffs' expert raises the issues of whether the City's affirmative repair of the sinkhole negligently created a defective condition causing the repair to fail immediately after it was made. There is nothing in the record here to indicate that the dangerous condition in question developed over time (*cf. Yarborough*, 10 N.Y.3d at 728, 853 N.Y.S.2d 261, 882 N.E.2d 873 [affirming summary judgment dismissing the complaint where City lacked prior written notice and "plaintiff's expert found that ... the condition that caused plaintiff's injury ... developed over time"]; *Speach v. Consolidated Edison Co. of N.Y., Inc.*, 52 A.D.3d 404, 404, 860 N.Y.S.2d 99 [1st Dept. 2008] [same]; *Bielecki*, 14 A.D.3d at 301, 788 N.Y.S.2d 67 [affirming dismissal of complaint against City where there was no record evidence of prior written notice to City and plaintiff's expert opined that defect "developed over time"]). Thus, plaintiffs have sufficiently met

their burden of raising triable issues of fact as to the City's liability. Accordingly, we conclude that Supreme Court improvidently granted the City's summary judgment motion and that the complaint was improperly dismissed.

All Citations

157 A.D.3d 612, 70 N.Y.S.3d 183, 2018 N.Y. Slip Op. 00470

25 A.D.3d 759
Supreme Court, Appellate Division, Second Department, New York.

Tony T. GJOKAJ, appellant,
v.
Jean FOX, et al., respondents.

Jan. 31, 2006.

Synopsis
Background: Plaintiff brought action seeking declaratory judgment that he was owner of real property by adverse possession. The Supreme Court, Westchester County, Barone, J., entered summary judgment in favor of defendants, and plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, held that:

prior owners' statements evincing their belief that they had owned disputed land for prescribed period did not constitute hearsay, and

fact issues remained as to whether prior owner adversely possessed disputed area for prescribed period.

Reversed.

Attorneys and Law Firms

****157** Maron Brodnick & Mazzanti, White Plains, N.Y. (Andrew D. Brodnick of counsel), for appellant.

Cuddy & Feder, LLP, White Plains, N.Y. (Thomas R. Beirne and Andrew P. Schriever of counsel), for respondents.

ANITA R. FLORIO, J.P., HOWARD MILLER, ROBERT A. SPOLZINO, and MARK C. DILLON, JJ.

Opinion

***759** In an action for a judgment declaring that the plaintiff is the owner by adverse possession of a certain parcel of real property, the plaintiff appeals from an order of the Supreme Court, Westchester County (Barone, J.), entered September 17, 2004, which granted the defendants' motion for summary judgment dismissing the complaint and denied his cross motion for leave to amend the complaint.

ORDERED that the order is reversed, on the law, with costs, the motion is denied, the cross motion is granted, and the amended complaint is deemed served.

The plaintiff purchased property from Valerie Nelson in 1993. The defendants own a large parcel of land to the east of and adjacent to the plaintiff's property. The plaintiff's property is bounded on three sides by stone walls, and a fourth stone wall runs outside the eastern border of the land described in the plaintiff's deed. The defendants have record title to a triangular patch of land measuring .411 acres, on the western side of the stone wall. That land is the subject of this adverse possession action.

***760** The plaintiff and his father testified that Valerie Nelson and her former husband made statements evincing their belief that they had owned the disputed land for approximately 40 years. The Supreme Court erred in refusing to consider these statements as evidence of "the nature and extent of the possession and the character and quality of the claim of title" (*Gilmartin v. Buchanan,* 134 App.Div. 587, 588, 119 N.Y.S. 489). Used for such a purpose, these statements are not hearsay and are properly admissible (*see Morss v. Salisbury,* 48 N.Y. 636; *Peattie v. Gabel,* 155 App.Div. 786, 140 N.Y.S. 993).

Accordingly, the Supreme Court erred in granting the defendants' motion for summary judgment dismissing the complaint. The Nelsons' statements, along with evidence that Valerie Nelson placed a garden and sheds in the disputed area, used another portion of the disputed area as a dump, and mowed her lawn up to the eastern stone wall which enclosed the area as part of her main property, raised issues of fact as to whether Valerie Nelson adversely possessed the disputed area for the prescribed period, and thereafter transferred her interest to the plaintiff (*see* RPAPL 522; *Belotti v. Bickhardt,* 228 N.Y. 296, 127 N.E. 239; *City of Tonawanda v. Ellicott Creek Homeowners Assn.,* 86 A.D.2d 118, 449 N.Y.S.2d 116; *Bassett v. Nichols,* 26 A.D.2d 569, 271 N.Y.S.2d 33). The fact that the deeds for the plaintiff's property do not contain a description of the disputed area does not compel a different result (*see Bradt v. Giovannone,* 35 A.D.2d 322, 315 N.Y.S.2d 961; *Rasmussen v. Sgritta,* 33 A.D.2d 843, 305 N.Y.S.2d 816). As the defendants' own submissions raised issues of fact requiring a trial, they did not meet their burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case, and summary judgment was improperly granted (*Winegrad* ****158** *v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642).

The Supreme Court also erred in denying the plaintiff's cross motion for leave to amend the complaint to include a cause of action for a prescriptive easement. Leave to amend a pleading is to be freely given where, as here, there is no showing of prejudice or surprise to the nonmoving party, and the proposed amendment is not totally devoid of merit (*see* CPLR 3025[b]; *Consolidated Payroll Servs. v. Berk,* 18 A.D.3d 415, 794 N.Y.S.2d 410).

All Citations

25 A.D.3d 759, 809 N.Y.S.2d 156, 2006 N.Y. Slip Op. 00627

197 A.D.3d 630
Supreme Court, Appellate Division, Second Department, New York.

Nikeya HARRISON, respondent,
v.
CITY OF NEW YORK, et al., defendants,
New York City Health and Hospitals Corporation, et al., appellants.

2019–01458
|
(Index No. 514613/17)
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Argued—June 3, 2021
|
August 18, 2021

Attorneys and Law Firms

Georgia M. Pestana, Corporation Counsel, New York, N.Y. (Fay Ng and Barbara Graves–Poller of counsel), for appellants.

Zaremba Brown, PLLC, New York, N.Y. (Pollack, Pollack, Isaac & DeCicco, LLP [Brian J. Isaac, Jillian Rosen, and Christopher J. Soverow], of counsel), for respondent.

REINALDO E. RIVERA, J.P., SYLVIA O. HINDS–RADIX, ROBERT J. MILLER, PAUL WOOTEN, JJ.

DECISION & ORDER

***630** In an action to recover damages for medical malpractice, the defendants New York City Health and Hospitals Corporation, Kings County Hospital, Tim Schwartz, Leon Boudourakis, and Valery Roudnitsky appeal from an order of the Supreme Court, Kings County (Marsha L. Steinhardt, J.), dated November 19, 2018. The order, insofar as appealed from, denied that branch of those defendants' motion which was pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them on the ground that the plaintiff failed to serve an adequate notice of claim in accordance with the requirements of General Municipal Law § 50–e.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff was admitted to the defendant Kings County Hospital from May 2, 2016, to September 7, 2016, and underwent several surgical procedures that led to the amputation of her right leg below the knee. The plaintiff subsequently commenced this action to recover damages for medical malpractice. The defendants New York City Health and Hospitals Corporation, Kings County Hospital, Tim Schwartz, Leon Boudourakis, and Valery Roudnitsky (hereinafter collectively the defendants) moved, among other things, pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them ****909** on the ground that the plaintiff failed to serve an adequate notice of claim in accordance with the requirements of General Municipal Law § 50–e. In an order dated November 19, 2018, the Supreme Court, inter alia, denied that branch of the defendants' motion. The defendants appeal.

"A timely and sufficient notice of claim is a condition precedent to asserting a tort claim against a municipality or public benefit corporation" (*Matter of Johnson v. County of Suffolk,* 167 A.D.3d 742, 743, 90 N.Y.S.3d 84 [internal quotation marks omitted]; *see* General Municipal Law § 50–e[1][a]). General Municipal Law § 50–e, in pertinent part, "requires that the claimant state the nature of the claim and the time when, the place where, and the manner in which it arose" (*Se Dae Yang v. New York City Health & Hosps. Corp.,* 140 A.D.3d 1051, 1052, 35 N.Y.S.3d 350; *see* 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 ***631** surrounding the [claim] and to explore the merits of the claim while information is still readily available" (*Carroll v. City of New York,* 149 A.D.3d 1026, 1027, 52 N.Y.S.3d 465 [internal quotation marks omitted]). Thus, the "requirements of the statute are met when the notice describes the [claim] with sufficient particularity so as to enable the defendant to conduct a proper investigation thereof and to assess the merits of the claim" (*Conn v. Tutor Perini Corp.,* 174 A.D.3d 680, 681, 105 N.Y.S.3d 508 [internal quotation marks omitted]).

Moreover, "[t]he Legislature did not intend that the claimant have the additional burden of pleading causes of action and legal theories, proper for the pleadings, in the notice of claim....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" (*Se Dae Yang v. New York City Health & Hosps. Corp.,* 140 A.D.3d at 1052, 140 A.D.3d 1051 [internal quotation marks omitted]). As such, "a claimant need not state a precise cause of action in haec verba in a notice of claim" (*id.* [internal quotation marks omitted]).

Here, the notice of claim alleges that the defendants were negligent over the course of the plaintiff's admission at Kings County Hospital from May 2, 2016, to September 7, 2016, and describes several of the injuries that the plaintiff allegedly sustained during that period. As the notice of claim was sufficient to enable the defendants to conduct a proper investigation and assess the merits of the claim, the Supreme Court properly denied that branch of the defendants' motion which was pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them (*see Se Dae Yang v. New York City Health & Hosps. Corp.,* 140 A.D.3d at 1052–1053, 35 N.Y.S.3d 350; *DeLeonibus v. Scognamillo,* 183 A.D.2d 697, 698, 583 N.Y.S.2d 285).

RIVERA, J.P., HINDS–RADIX, MILLER and WOOTEN, JJ., concur.

All Citations

197 A.D.3d 630, 149 N.Y.S.3d 908 (Mem), 2021 N.Y. Slip Op. 04703

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291 A.D.2d 201
Supreme Court, Appellate Division, First Department, New York.

Kenneth MIGDOL, Plaintiff–Respondent,
v.
CITY OF NEW YORK, et al., Defendants,
and
Empire City Subway, Defendant–Appellant.

Feb. 5, 2002.

Synopsis
Pedestrian allegedly injured in a trip and fall on a public roadway sued city and subway company. The Supreme Court, New York County, Marcy Friedman, J., denied company's motion for summary judgment. On review, the Supreme Court, Appellate Division, held that genuine issues of material fact existed as to whether the company owned or maintained an open utility hole where the pedestrian allegedly tripped and fell.

Affirmed.

Attorneys and Law Firms

***79** Anita Nissan Yehuda, for Plaintiff–Respondent.

Robert M. Ortiz, for Defendant–Appellant.

TOM, J.P., ANDRIAS, RUBIN, BUCKLEY and FRIEDMAN, JJ.

Opinion

Order, Supreme Court, New York County (Marcy Friedman, J.), entered March 19, 2001, which, in an action for personal injuries allegedly sustained in a trip and fall on a public roadway, denied defendant-appellant's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The motion was properly denied on the ground that defendant-appellant's showing did not conclusively establish its claim that it did not own or maintain the open utility hole where plaintiff allegedly tripped and fell (*see, Tiles v. City of New York,* 262 A.D.2d 174, 692 N.Y.S.2d 326; *Buckle v. Buhre Ave. Foods,* 232 A.D.2d 269, 648 N.Y.S.2d 100). Appellant's employee, whose testimony was submitted in support of the motion, admitted that he could not say with certainty whether appellant had any utility holes similar to the one described by plaintiff as the cause of his accident, and his testimony did not address whether there were no such holes at the location. The affidavit of another employee submitted with appellant's reply papers was properly rejected by the motion court since it sought to remedy these basic deficiencies in appellant's prima facie showing rather than respond to arguments in plaintiff's opposition papers (*see, Lumbermens Mut. Cas. Co. v. Morse Shoe Co.,* 218 A.D.2d 624, 625–626, 630 N.Y.S.2d 1003).

All Citations

291 A.D.2d 201, 737 N.Y.S.2d 78, 2002 N.Y. Slip Op. 01030

39 A.D.3d 354
Supreme Court, Appellate Division, First Department, New York.

Jorge MONMASTERIO, etc., et al., Plaintiffs–Respondents,
v.
NEW YORK CITY HOUSING AUTHORITY, Defendant–Appellant.

April 19, 2007.

Synopsis
Background: Juvenile who was assaulted and robbed in housing project parking lot brought negligence action against city housing authority, alleging inadequate security. Housing authority moved to dismiss on the grounds that claim constituted new theory of liability not asserted in notice of claim given to city. The Supreme Court, Bronx County, John A. Barone, J., denied motion. Housing authority appealed.

Holding: The Supreme Court, Appellate Division, held that claim of inadequate security was a new distinct theory of liability not asserted in notice of claim, and should have been dismissed.

Reversed; motion to dismiss granted.

Attorneys and Law Firms

****498** Cullen and Dykman LLP, Brooklyn (Joseph Miller of counsel), for appellant.

Kafko, Schnitzer & Sheeger, Bronx (Neil R. Kafko of counsel), for respondents.

ANDRIAS, J.P., MARLOW, NARDELLI, SWEENY, McGUIRE, JJ.

Opinion

***355** Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about June 19, 2006, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss so much of the complaint as alleges inadequate security, unanimously reversed, on the law, without costs, the motion granted and the claim of inadequate security dismissed.

Plaintiffs' notice of claim states, in pertinent part, that:

> "The claim arose on September 17, 2004 at approximately 11:00 p.m. at or about 1730 Watson Avenue, Bronx, New York and a parking lot and dumpster located thereat; in that infant claimant while lawfully walking in the vicinity of said dumpster was accosted, beaten, assaulted and robbed by unknown assailants who had hidden about said dumpster. That the aforesaid occurred as a result of the negligence of [defendant], its agents and/or employees in the ownership, maintenance and control of said housing project and parking lot and areas thereof; in failing to provide adequate, sufficient and operable lighting at said location with prior knowledge of similar criminal conduct and activity in the immediate vicinity and location where the plaintiff was harmed."

Plaintiffs allege in the complaint that defendant failed to maintain its premises in a reasonably safe condition in that it did not provide adequate lighting and security ****499** in the area where the incident occurred. With respect to the inadequate security

claim, plaintiffs allege that although defendant employed security personnel for the premises generally, it "provided inadequate and improper security for said parking lot and adjacent areas ... in relation to the prior criminal activity within its premises." Defendant moved, among other things, to dismiss the claim of inadequate security on the ground it constituted a new theory of liability not asserted in the notice of claim. Plaintiffs countered that the inadequate security claim simply "expound[ed]" a specific claim of negligence. Supreme Court denied that aspect of the motion.

The notice of claim describes the location of the incident, the time it occurred, the circumstances surrounding it, and indicates a particular theory of liability—that defendant negligently failed "to provide adequate, sufficient and operable lighting" at the scene of the incident. To be sure, the notice of claim does refer ***356** to defendant's alleged "prior knowledge of similar criminal conduct and activity in the immediate vicinity and location where the plaintiff was harmed." But this allegation, which appeared in the same clause of the notice of claim that specified the failure to provide adequate lighting as the basis of defendant's negligence, is not connected to any claim that defendant's negligence was a failure to provide adequate security. Instead, the crux of the notice of claim is that because defendant had knowledge of similar criminal conduct in the same immediate vicinity and location, "adequate, sufficient and operable lighting"—not more security personnel—should have been provided.

The notice of claim satisfies the requirements of General Municipal Law § 50–e because the information supplied is sufficient to have enabled defendant promptly and adequately to investigate the claim of inadequate lighting (*see Brown v. City of New York,* 95 N.Y.2d 389, 718 N.Y.S.2d 4, 740 N.E.2d 1078 [2000]). However, nothing in the notice of claim would have alerted defendant to the need to investigate the number and adequacy of the security personnel it employed, and plaintiffs were not free subsequently to interject a new, distinct theory of liability without leave of court. The inadequate security claim, which differs substantially from the inadequate lighting claim, is a new, distinct theory of liability and must be dismissed (*see Melendez v. New York City Hous. Auth.,* 294 A.D.2d 243, 741 N.Y.S.2d 866 [2002]; *White v. New York City Hous. Auth.,* 288 A.D.2d 150, 734 N.Y.S.2d 11 [2001]).

All Citations

39 A.D.3d 354, 833 N.Y.S.2d 498, 2007 N.Y. Slip Op. 03332

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140 A.D.3d 1051
Supreme Court, Appellate Division, Second Department, New York.

SE DAE YANG, etc., et al., appellants,
v.
NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, respondent.

June 22, 2016.

Synopsis
Background: Patient brought action against hospital alleging medical malpractice and wrongful death. The Supreme Court, Queens County, Kerrigan, J., 2015 WL 4992390, dismissed. Patient appealed.

The Supreme Court, Appellate Division, held that patient's notice to hospital of its claim was sufficient with regard to wrongful death claim.

Reversed.

Attorneys and Law Firms

****351** Sim & Record, LLP, Bayside, N.Y. (Sang J. Sim of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York, N.Y. (Fay Ng and Victoria Scalzo of counsel), for respondent.

REINALDO E. RIVERA, J.P., SHERI S. ROMAN, JOSEPH J. MALTESE, and COLLEEN D. DUFFY, JJ.

Opinion

***1051** In an action, inter alia, to recover damages for medical malpractice and wrongful death, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Kerrigan, J.), entered July 16, 2015, as granted that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the cause of action alleging wrongful death on the ground that the plaintiffs failed to serve an adequate notice of claim pursuant to General Municipal Law § 50–e.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the ***1052** cause of action alleging wrongful death on the ground that the plaintiffs failed to serve an adequate notice of claim pursuant to General Municipal Law § 50–e is denied.

A timely and sufficient notice of claim is a condition precedent to asserting a tort claim against a municipality or public benefit corporation (*see* General Municipal Law § 50–e[1][a]; *Brown v. City of New York,* 95 N.Y.2d 389, 393, 718 N.Y.S.2d 4, 740 N.E.2d 1078). With respect to most torts, service of the notice of claim must be made within 90 days after the claim arises, but "in wrongful death actions, the [90] days shall run from the appointment of a representative of the decedent's estate" (General Municipal Law § 50–e[1][a]).

General Municipal Law § 50–e(2) sets forth the criteria for the contents of a notice of claim. In pertinent part, the statute requires that the claimant state the nature of the claim and the time when, the place where, and the manner in which it arose

(*see* General Municipal Law § 50–e[2]). The purpose of providing this information in a timely manner is so that the defendant can conduct a proper investigation and assess the merits of the claim while the information is still readily available (*see O'Brien v. City of Syracuse,* 54 N.Y.2d 353, 359, 445 N.Y.S.2d 687, 429 N.E.2d 1158; *Steins v. Incorporated Vil. of Garden City,* 127 A.D.3d 957, 959, 7 N.Y.S.3d 419; *DeLeonibus v. Scognamillo,* 183 A.D.2d 697, 698, 583 N.Y.S.2d 285).

"The Legislature did not intend that the claimant have the additional burden of pleading causes of action and legal theories, proper for the pleadings, in the notice of claim ... ****352** 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" (*DeLeonibus v. Scognamillo,* 183 A.D.2d 697, 698, 583 N.Y.S.2d 285, citing *Schwartz v. City of New York,* 250 N.Y. 332, 333, 165 N.E. 517; *see generally Baker v. Town of Niskayuna,* 69 A.D.3d 1016, 1017–1018, 891 N.Y.S.2d 749). Accordingly, a claimant need not state "a precise cause of action in haec verba in a notice of claim" (*DeLeonibus v. Scognamillo,* 183 A.D.2d at 698, 583 N.Y.S.2d 285; *see Steins v. Incorporated Vil. of Garden City,* 127 A.D.3d at 959, 7 N.Y.S.3d 419; *Bartley v. County of Orange,* 111 A.D.3d 772, 774, 975 N.Y.S.2d 170).

Contrary to the Supreme Court's determination, the plaintiffs' notice of claim adequately apprised the defendant that the claimant would seek to impose liability under a wrongful death theory of recovery (*cf. Steins v. Incorporated Vil. of Garden City,* 127 A.D.3d at 959, 7 N.Y.S.3d 419; *Crew v. Town of Beekman,* 105 A.D.3d 799, 800, 962 N.Y.S.2d 677; *see generally Bartley v. County of Orange,* 111 A.D.3d at 774, 975 N.Y.S.2d 170; *Miller v. City of New York,* 89 A.D.3d 612, 933 N.Y.S.2d 36; *Baker v. Town of Niskayuna,* 69 A.D.3d at 1017–1018, 891 N.Y.S.2d 749). Accordingly, the Supreme Court should have denied that branch of ***1053** the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the cause of action alleging wrongful death on the ground that the plaintiffs failed to serve an adequate notice of claim pursuant to General Municipal Law § 50–e.

All Citations

140 A.D.3d 1051, 35 N.Y.S.3d 350, 2016 N.Y. Slip Op. 04929

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295 A.D.2d 271
Supreme Court, Appellate Division,
First Department, New York.

Sarit SHMUELI, Plaintiff–Appellant,
v.
NEW YORK CITY POLICE DEPARTMENT, Defendant,
New York County District Attorney Robert M. Morgenthau, etc., Defendant–Respondent.

June 27, 2002.

Attorneys and Law Firms

Andrew M. Moskowitz, for Plaintiff-Appellant.

Michael S. Morgan, for Defendant-Respondent.

Opinion

Order, Supreme Court, New York County (Joan Madden, J.), entered on or about January 18, 2001, which granted defendant District Attorney Robert M. Morgenthau's motion to dismiss the complaint as against him, for failure to state a cause of action, unanimously affirmed, without costs.

Plaintiff's State law claim against District Attorney Morgenthau for negligent hiring, supervision and training was properly dismissed, since plaintiff's General Municipal Law § 50–e notice failed to assert such a claim or allege any facts from which defendant could have gleaned plaintiff's intention to raise such a claim (*see, Urena v. City of New York,* 221 A.D.2d 429, 633 N.Y.S.2d 391; *Brown v. New York City Tr. Auth.,* 172 A.D.2d 178, 180, 568 N.Y.S.2d 54; *St. John v. Town of Marlborough,* 163 A.D.2d 761, 763, 558 N.Y.S.2d 332).

Plaintiff's remaining State law claims against District Attorney Morgenthau, seeking to hold him vicariously accountable for the acts or omissions of his subordinates, were also properly dismissed, ***872** since claims premised on vicarious liability do not lie against the head of a county agency (*see,* County Law §§ 54, 941; *Barr v. County of Albany,* 50 N.Y.2d 247, 257, 428 N.Y.S.2d 665, 406 N.E.2d 481).

Plaintiff's claim against District Attorney Morgenthau predicated on 42 USC § 1983 was also properly dismissed, since plaintiff has failed to allege direct participation by him in the alleged wrongful acts, a failure by him to remedy a wrong after discovering it, a policy or custom in the District Attorney's Office which encouraged or permitted the alleged wrongful acts, or gross negligence in District Attorney Morgenthau's supervision of his subordinates (*see, McKeon v. Daley,* 101 F.Supp.2d 79, 91, *affd.* 2001 WL 533662, 2001 U.S. App LEXIS 10503 [2d Cir.]).

WILLIAMS, P.J., NARDELLI, SAXE, SULLIVAN and FRIEDMAN, JJ., concur.

All Citations

295 A.D.2d 271, 743 N.Y.S.2d 871 (Mem), 2002 N.Y. Slip Op. 05378

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McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 30. Remedies and Pleading (Refs & Annos)
McKinney's CPLR Rule 3043

Rule 3043. Bill of particulars in personal injury actions

Currentness

(a) Specified particulars. In actions to recover for personal injuries the following particulars may be required:

(1) The date and approximate time of day of the occurrence;

(2) Its approximate location;

(3) General statement of the acts or omissions constituting the negligence claimed;

(4) Where notice of a condition is a prerequisite, whether actual or constructive notice is claimed;

(5) If actual notice is claimed, a statement of when and to whom it was given;

(6) Statement of the injuries and description of those claimed to be permanent, and in an action designated in subsection (a) of section five thousand one hundred four of the insurance law, for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, in what respect plaintiff has sustained a serious injury, as defined in subsection (d) of section five thousand one hundred two of the insurance law, or economic loss greater than basic economic loss, as defined in subsection (a) of section five thousand one hundred two of the insurance law;

(7) Length of time confined to bed and to house;

(8) Length of time incapacitated from employment; and

(9) Total amounts claimed as special damages for physicians' services and medical supplies; loss of earnings, with name and address of the employer; hospital expenses; nurses' services.

(b) Supplemental bill of particulars without leave. A party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities.

(c) Discretion of court. Nothing contained in the foregoing shall be deemed to limit the court in denying in a proper case, any one or more of the foregoing particulars, or in a proper case, in granting other, further or different particulars.

Credits

(L.1962, c. 308. Amended L.1974, c. 575, § 2; L.1979, c. 590, § 1; L.1984, c. 805, § 10.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Professor Patrick M. Connors

2020

C3043:2 Supplementing Special Damages.

Supplemental Bill of Particulars May Not Include a New Injury

As we have stressed several times in these Practice Commentaries, a supplemental bill of particulars cannot be used to assert a new injury. A party seeking to allege a new injury must amend the bill of particulars, which can be amended once as of right before the filing of the note of issue. CPLR 3042(b). If a note of issue has already been filed or the party has already amended the bill once as of right, she should promptly seek court leave to amend the bill to add the additional injury. *See* Practice Commentary, CPLR 3042, C3042:4 ("Amendment to Bill of Particulars").

In *Jeannette S. v. Williot*, 179 A.D.3d 1479, 118 N.Y.S.3d 329 (4th Dep't 2020), the Fourth Department affirmed supreme court's order striking plaintiff's supplemental bills of particulars and denying plaintiff's cross-motion seeking leave to amend the bills of particulars. The court noted, once again, that a "supplemental bill of particulars is appropriate '[w]here the plaintiff seek[s] to allege continuing consequences of the injuries suffered and described in previous bills of particulars, rather than new and unrelated injuries.'" *Id.* at 1479, 118 N.Y.S.3d at 332.

In *Jeannette S.*, plaintiff served documents labeled "supplemental" bills of particulars, but the Fourth Department ruled that they were in fact amended bills of particulars because they included a new injury, hypovolemic shock. Therefore, it determined that supreme court properly granted the motions to strike plaintiff's supplemental bills of particulars. The court also ruled that the supplemental bills of particulars were "a nullity" because the note of issue had been filed before they were served and plaintiff failed to seek leave to amend the bills of particulars before serving them.

Addressing that portion of the order that denied plaintiff's cross-motion to amend the bills of particulars, the court noted that " '[l]eave to serve an amended bill of particulars should not be granted where a [note of issue] has been filed, except upon a showing of special and extraordinary circumstances.'" *Id.* at 1480, 118 N.Y.S.3d at 332. In that plaintiff failed to make such a showing, the Fourth Department ruled that supreme court properly denied the motion to amend the bill of particulars.

2019

C3043:1 Bill in Personal Injury Actions.

Third Department, in Expansive Treatment of Bill of Particulars Practice, Holds that Plaintiff Cannot Serve Identical Responses to Each Defendant

The Third Department's decision in *Stoddard v. New York Oncology Hematology, P.C.*, 172 A.D.3d 1504, 99 N.Y.S.3d 468 (3d Dep't 2019) contains an extensive treatment of bill of particulars practice that will be of interest to the personal injury bar. In *Stoddard*, plaintiff, as administrator of decedent's estate, commenced an action for medical malpractice and wrongful death against a hospital, two medical practices, and 12 physicians. After receiving demands, plaintiff served each defendant with a verified bill of particulars. Various defendants asserted objections to the bills of particulars and then moved for conditional orders striking certain portions of the bills of particulars and precluding plaintiff from introducing evidence related to those matters unless plaintiff served sufficiently detailed amended bills of particulars. *See* CPLR 3042(d). The supreme court ruled that several of plaintiff's responses to the demand were insufficient and that evidence of matters related to those responses would be precluded unless plaintiff served amended bills of particulars within 30 days.

The Third Department affirmed the conditional order, noting that "a bill of particulars must clearly detail the specific acts of negligence attributed to each defendant, and the use of phrases such as 'including but not limited to' or 'among other things' ... plainly are improper as they destroy its most essential functions." *Stoddard*, 172 A.D.3d at 1505-06, 99 N.Y.S.3d at 470. The defendants' demands required plaintiff to detail "[e]ach and every act of omission and commission constituting the alleged negligence and medical malpractice with which the plaintiff charges [the answering defendant]." Plaintiff served identical responses to each defendant, which stated they were negligent by

[f]ailing to properly diagnose [decedent's] DPD deficiency and the effects thereof in a timely manner; B. Failing to properly diagnose [decedent's] 5-FU toxicity condition and the effects thereof in a timely manner; C. Failing to properly treat [decedent's] 5-FU toxicity condition and the effects thereof in a timely and appropriate manner.

Id. at 1506, 99 N.Y.S.3d at 471.

The Third Department ruled that supreme court did not abuse its discretion in concluding that plaintiff's inclusion of the words " 'and the effects thereof,' without more specificity, rendered the responses vague and insufficiently informative." *Id.* The court acknowledged that "in a medical malpractice action, as in any action

for personal injuries, the bill of particulars requires only a general statement of the acts or omissions constituting the negligence claimed." *Id.*; *see* CPLR 3043(a)(3) (requiring "[g]eneral statement of the acts or omissions constituting the negligence claimed"). Nonetheless, the court also emphasized that "responses will be deemed insufficient where there are several defendants and the plaintiff serves bills of particulars with 'essentially identical' responses 'even though it seems obvious that the role[s] of the [several] defendants differed'." *Id.* at 1506-07, 99 N.Y.S.3d at 471. That was especially so in *Stoddard*, where the defendants "practice in discrete medical specialties and played varied roles by providing treatment for certain of decedent's complaints at different times during her hospitalization." *Id.* at 1507, 99 N.Y.S.3d at 471. Therefore, plaintiff was required to particularize the acts or omissions each defendant is alleged to have committed.

2016

C3043:1 Bill in Personal Injury Actions.

Bill of Particulars Is Appropriate Vehicle for Obtaining Collateral Source Information

CPLR 4545 partially abolishes the common law "collateral source rule" and permits the defendant to seek a reduction of the verdict by certain amounts plaintiff has received from other sources, such as insurance. *See* Siegel, New York Practice § 180 (Thomson 5th ed., 2011). "Pretrial discovery is available so defendants can acquire information and documents that may later be used to support a motion for a collateral source hearing." *Firmes v. Chase Manhattan Auto. Fin. Corp.*, 50 A.D.3d 18, 35, 852 N.Y.S.2d 148, 161 (2d Dep't 2008), *lv. denied* 11 N.Y.3d 705, 866 N.Y.S.2d 608, 896 N.E.2d 94; *see Stolowski v. 234 E. 178th St. LLC*, 89 A.D.3d 549, 933 N.Y.S.2d 232 (1st Dep't 2011); *see also* Practice Commentaries, CPLR 3101, C3101:5 ("The Criterion: 'Material and Necessary' "). In *Firmes*, the court observed that in this area "the most common discovery mechanism, of course, is the demand for collateral source information ... served by many defense practitioners with their clients' answers." *Firmes*, 50 A.D.3d at 35, 852 N.Y.S.2d at 162. A demand for a bill of particulars would also be an appropriate vehicle for obtaining information on collateral sources. *McKenzie v. St. Elizabeth Hosp.*, 81 A.D.2d 1003, 1004, 440 N.Y.S.2d 109, 110 (4th Dep't 1981); *Lewis v. MTA Bus Co.*, 2016 WL 1228569 (Sup. Ct., New York County 2016).

2015

C3043:2 Supplementing Special Damages.

First Department Orders Further Deposition of Plaintiff After Service of Supplemental Bill of Particulars

In *Brown v. Brink Elevator Corp.*, 125 A.D.3d 421, 998 N.Y.S.2d 884 (1st Dep't 2015), the plaintiff served a second supplemental bill of particulars concerning continuing disabilities in her cervical spine pursuant to the authority in CPLR 3043(b). That subdivision permits a party in a personal injury action to serve a supplemental bill of particulars as of right with respect to claims of continuing special damages, as long as it is accomplished thirty days prior to trial. The defendant's right to use of the pretrial disclosure devices, which ordinarily expire after the filing of the note of issue and certificate of readiness, is then renewed with respect to the supplemental matter.

In *Brown*, however, the supreme court denied defendant's motion to compel plaintiff to submit to a further deposition and to compel plaintiff to undergo a physical examination pursuant to CPLR 3121(a). The First Department reversed, noting that "[d]efendant's discovery rights [under CPLR 3043(b)] include the right to take a further deposition (CPLR 3106), and to notice a physical examination by a 'designated physician' (CPLR 3121[a])."

2013

C3043:2 Supplementing Special Damages.

Bill of Particulars May Not Supply a New Cause of Action Not Included in Pleading

CPLR 3043(b) allows a party to serve a supplemental bill of particulars without leave of court "[p]rovided however that no new cause of action may be alleged or new injury claimed." In the 2011 Supplementary Practice Commentary in this space, we noted that a party planning to add a new theory in a supplemental bill of particulars must be careful. While CPLR 3043(b) seems to allow a supplemental bill of particulars to contain a new theory in support of a cause of action that has been pleaded, the courts are not affording the statute a liberal, or even literal, interpretation.

One toiling in this field must also be aware that several courts have concluded that the bill of particulars generally may not supply a new cause of action that is not already included in a pleading. A recent application of the rule is demonstrated by the Second Department's decision in *Alami v. 215 East 68th Street, L.P.*, 88 A.D.3d 924, 931 N.Y.S.2d 647 (2d Dep't 2011), which prohibited plaintiff from asserting, "for the first time in her bill of particulars, a cause of action alleging negligent supervision of the [defendants'] son." The ruling is discussed in further detail in the 2013 Supplementary Practice Commentary to CPLR 3041, C3041:9 ("Use of Bill of Particulars to Fill Pleading Gaps").

As we noted in the 2011 Supplementary Practice Commentary, if there are any doubts as to whether the matter sought to be added in a supplemental bill of particulars constitutes a new cause of action, or even a new theory of recovery, a party should make a motion to amend the pleading under CPLR 3025(b).

2011

C3043:2 Supplementing Special Damages.

Courts Consistently Reject Supplemental Bills of Particulars That Allege New Theories, Despite Statutory Language That Only Prohibits New Causes of Action

CPLR 3043(b) allows a party to serve a supplemental bill of particulars without leave of court "[p]rovided however that no new cause of action may be alleged or new injury claimed." In *Jurkowski ex rel. Cosgrove v. Sheehan Mem'l Hosp.*, 85 A.D.3d 1672, 926 N.Y.S.2d 781 (4th Dep't 2011), a medical malpractice action, plaintiff served supplemental bills of particulars, which added allegations that two defendants, a hospital and a doctor, failed to physically restrain plaintiff from leaving the emergency room. The Fourth Department affirmed the supreme court's determination that these additional allegations were "new and distinct theories of liability not previously raised." While these new allegations were contained in documents labeled as supplemental bills of particulars, the court concluded that they were in essence amended bills of particulars, which required leave of court. *See* CPLR 3042(b). Inasmuch as the amended bills of particulars were served without court leave after the note of issue was filed, they were deemed a nullity with respect to those newly alleged theories. *See, e.g., Elkrichi v. Flushing Hosp. Med. Ctr., Inc.*, 293 A.D.2d 706, 741 N.Y.S.2d 420 (2d Dep't 2002).

The central "cause of action" in *Jurkowski* was apparently for medical injuries. There can be several "theories" that support this "cause of action." *See* Siegel, NY Practice, section 212 (5th ed. 2011) (explaining that a single "cause of action" arising from a medical injury can support both a malpractice and a breach of contract claim). One theory is that the defendants failed to physically restrain plaintiff from leaving the emergency room. In adding this "theory" in the supplemental bill of particulars, it does not appear that plaintiff added a "new cause of action" or claimed a "new injury," which would be prohibited by CPLR 3043(b).

While the statutory language in CPLR 3043(b) does not prohibit a party from adding a new "theory" in support

of an existing cause of action, the courts have consistently prohibited a party from serving a supplemental bill of particulars that includes one. In *Barrera v City of New York*, 265 A.D.2d 516, 697 N.Y.S.2d 132 (2d Dep't 1999), for example, the court acknowledged that "[a] supplemental bill of particulars may be served without leave of court provided that no new cause of action is alleged or new injury claimed." The Second Department then went on to note that the plaintiff was not entitled to serve the second bill of particulars under CPLR 3043(b) because it "present[ed] a new theory not raised either in the complaint or in the original bill of particulars." (emphasis added). *See also Orros v. Yick Ming Yip Realty, Inc.*, 258 A.D.2d 387, 685 N.Y.S.2d 676 (1st Dep't 1999) (holding that a supplemental bill of particulars was appropriate since it merely amplified and elaborated upon facts and theories already set forth in the original bill of particulars and did not raise a "new theory of liability").

Until the Court of Appeals weighs in on this issue, or CPLR 3043(b) is amended to address the problem, a party planning to add a new theory in a supplemental bill of particulars must be careful. While CPLR 3043(b) seems to allow a supplemental bill of particulars to contain a new theory in support of a cause of action that has been pleaded, the courts are not affording the statute a liberal, or even literal, interpretation. This construction of the statute appears to be unduly restrictive, especially where the adverse party is on notice of the theory from any prior pleadings and bills of particulars.

If a party seeks to add a new theory in a bill of particulars prior to the filing of the note of issue, she may do so as of right in an amended bill of particulars, assuming it is the first amendment. CPLR 3042(b). If the note of issue has already been filed, or the party has already amended the bill once as of right, she should promptly seek court leave to amend the bill to add the additional theory. *See* Practice Commentary, CPLR 3042, C3042:4 ("Amendment to Bill of Particulars"). To be on the safe side, the party might simultaneously seek leave to amend their pleading to add the new theory. *See* CPLR 3025(b)(allowing for a motion to amend a pleading). Proceeding in this fashion will prevent a party from having to ultimately rely on a court's interpretation of the supplemental bill of particulars provision in CPLR 3043(b), when it may be too late to seek an amendment of the bill. *See Barrera*, 265 A.D.2d at 518, 697 N.Y.S.2d at 134 (concluding that supreme court "improvidently exercised its discretion in granting leave to amend" because the plaintiff "failed to offer a reasonable excuse for his delay in seeking to amend the bill of particulars until over three years after the accident and after the note of issue was filed").

PRACTICE COMMENTARIES

by Professor Patrick M. Connors

Professor Connors acknowledges the earlier commentaries Professor David D. Siegel authored for this section. See the Preface for an explanation of the relationship between those commentaries and the present ones.

Subdivision (a)

C3043:1 Bill in Personal Injury Actions.

Subdivision (b) %tc

C3043:2 Supplementing Special Damages.

Subdivision (c)

C3043:3 Discretion of Court.

Subdivision (a)

C3043:1 Bill in Personal Injury Actions.

The "personal injury" action is the only one in which the contents of the demand for the bill of particulars, and hence the bill itself, is codified in detail. The list in CPLR 3043(a) is largely self-explanatory. Its presence is attributable to the predominance of personal injury cases on the state courts' calendars and the hope of avoiding as many disputes as possible about the bill of particulars in these cases by having the basic content set forth in detail.

A few comments are appropriate for paragraph (9) of CPLR 3043(a). It requires special damages to be particularized. General damages need not be particularized in an action. *See* Practice Commentary CPLR 3041, C3041:3 ("Contents, Generally"). There was originally to be no bill of particulars under the CPLR. *See* Practice Commentary CPLR 3041, C3041:1 ("History of Bill of Particulars"). On that assumption, the pleading itself was required to itemize special damages whenever claimed, and the original subdivision (d) contained in CPLR 3015 so required. It took almost a decade, but it was finally recognized that such a provision was superfluous in view of the fact that the bill of particulars had been restored. The original CPLR 3015(d), in deference to the bill of particulars and especially to CPLR 3043(a)(9), was finally repealed in 1972.

The references in paragraph (6) to provisions of the insurance law are part of the no-fault legislation. In order for an injured plaintiff to sue in court instead of submitting to the procedures of the no-fault law, the plaintiff must plead the presence of certain facts. The pleading requirement is in CPLR 3016(g). *See* Practice Commentary CPLR 3016, C3016:10 ("Passing the No-Fault Barrier"). It says only that the complaint shall "state" that serious injury, or greater-than-"basic economic" loss has been sustained, as those terms are defined in the cited Insurance Law provisions. CPLR 3016(g). It should suffice for the pleader to allege those things in just such conclusory terms. CPLR 3043(a)(6), the counterpart to CPLR 3016(g), makes specificity in these situations the burden of the bill of particulars and requires the plaintiff to particularize the facts relied on to take the case out from under the no-fault law.

A comprehensive discussion of the categories of serious injury under the no-fault law and the pattern charges for each category are contained in New York Pattern Jury Instructions--Civil, Introductory Statement preceding 2:75 and in sections 2:88A through 2:88G. This authoritative treatise, published annually by a select group of justices sitting on the Appellate Division and supreme court, also includes extensive commentary on the requirements under each category and the substantive law in this area.

CPLR 3043(a)(9) has been held to include the number of visits made by the plaintiff to the doctor's office and by the doctor to see the plaintiff (assuming there is still a doctor practicing in the state who makes house calls!), construing that provision so as to resolve conflict that previously existed on that point. *See Baldwin v. Tinker,* 48 Misc.2d 362, 364-65, 264 N.Y.S.2d 855, 858 (Sup.Ct., Onondaga County 1965).

The court has discretion to add or subtract from the list contained in CPLR 3043(a), which power it can exercise on an ad hoc basis pursuant to subdivision (c).

Subdivision (b)

C3043:2 Supplementing Special Damages.

Before the enactment of CPLR 3043(b), the supplementing of special damages in the bill of particulars required either a stipulation of the parties or leave of the court. Subdivision (b), added in 1979, permits the supplementing as a matter of right, but:

(1) only in personal injury cases,

(2) only "with respect to claims of continuing special damages and disabilities," and

(3) only if the supplemental bill is served no later than 30 days before the scheduled start of the trial.

If any of those requirements is not met, and the note of issue has already been filed, court leave would be needed for the supplement. Elaborating on the three stated requirements:

Since the provision allowing a party to supplement as a matter of right was made in CPLR 3043, which applies only in personal injury actions, it is assumed that the matter-of-right supplementation is to be available only in that category of actions. This presumably means that supplementation in other categories is to require an "amendment," which covers an even broader range of changes, but which must be made before the filing of the note of issue under the terms of CPLR 3042(b). *See* Practice Commentary CPLR 3042, C3042:4 ("Amendment to Bill of Particulars").

As noted above, the supplementation without court leave is available only "with respect to claims of continuing special damages and disabilities." CPLR 3043(b). The provision does not authorize the use of this supplement to add new claims or theories or to allege new injuries not set forth in the original bill. *Id.* To accomplish that, the plaintiff would have to amend the bill, a procedure governed, again, by CPLR 3042(b). *See Leon v. First Nat. City Bank*, 224 A.D.2d 497, 637 N.Y.S.2d 482 (2d Dep't 1996). Under that provision, a party is entitled to one amendment without leave of court if the amendment is made before the note of issue is filed. *See* Practice Commentary CPLR 3042, C3042:4 ("Amendment to Bill of Particulars"). The plaintiff desiring to supplement the bill before the filing of the note of issue can do so by invoking the amendment provision of CPLR 3042(b) instead of using the supplement now authorized by CPLR 3043(b). The latter's main advantage, therefore, is that it permits the supplementation of the bill of particulars after the filing of the note of issue.

The only stated time limit in CPLR 3043(b) is that the supplement be made "not less than 30 days prior to trial." It will often be difficult for the plaintiff to learn precisely when the trial is to begin, so as to measure 30 days back from it and be sure to get in under that wire, but as long as the procedure is used before that time, which will not be too difficult to arrange in most cases, it should satisfy this time requirement.

Upon receipt of the supplemental bill, the defendant's right to use of the pretrial disclosure devices, which ordinarily expire after the filing of the note of issue and certificate of readiness, is renewed, but only with respect of the supplemental matter. The defendant is required to give at least 7 days notice of any disclosure device used, and it would be just as apt here, as it is for disclosure in general, to expect that the parties will work out the time requirements amicably without technical reliance on time minimums.

Before the adoption of CPLR 3043(b), the courts were all over the place with the dilemma of supplementing

special damages, the final aspects of which are often not known during the early stages of personal injury litigation. It was this disorder that produced CPLR 3043(b), which should dispense with motion practice altogether by allowing a late supplement as a matter of right.

The supplement-of-right may not be used for a "new injury," or for wholly new items of damages. *See Pearce v. Booth Mem'l Hosp.,* 152 A.D.2d 553, 543 N.Y.S.2d 157 (2d Dep't 1989). The original bill in *Pearce* alleged nothing in the way of damages for "custodial, supervisory and housekeeping care" and the court precluded the plaintiff from adding those items--and seeking $3 million for them--as a purported supplement of right under CPLR 3043(b). *Id.* at 553, 543 N.Y.S.2d at 158. The note of issue had already been filed and "[s]ince the plaintiff was not merely updating allegations of special damages previously asserted, but was rather adding a wholly new category of special damages, leave to serve the disputed bill was necessary." *Id*. at 554, 543 N.Y.S.2d at 158. The *Pearce* court also denied the motion, noting that the delay was prolonged and the excuse for the delay inadequate.

If a party serves what is actually an amended bill of particulars after the filing of the note of issue, but labels it a "supplemental" bill, the courts will place substance over form and also treat the bill as a nullity. *See, e.g., Bartkus v. New York Methodist Hosp*., 294 A.D.2d 455, 742 N.Y.S.2d 554 (2d Dep't 2002). A party who wants to assert this defect should do so promptly. If the party who served the bill will not consent to withdraw it, it is best to move under CPLR 3042(c) to resolve the matter. Some courts have concluded that returning a defective bill, instead of making a motion under CPLR 3042(c), can constitute a waiver of defects. *See* Practice Commentary CPLR 3042, C3042:8 ("Penalties for Willful Failure to Comply With Demand").

Subdivision (c)

C3043:3 Discretion of Court.

CPLR 3043(c) had originally been subdivision (b), but was relettered (c) in 1979 when the present subdivision (b) was enacted. It is merely a reminder that the list of demandable items contained in subdivision (a) is not absolute; that the court retains discretion to deny given items listed or grant additional items not listed.

Notes of Decisions (342)

McKinney's CPLR Rule 3043, NY CPLR Rule 3043
Current through L.2022, chapters 1 to 501. Some statute sections may be more current, see credits for details.