

Gorman v City of New York

2005 NY Slip Op 30570(U)

October 28, 2005

Supreme Court, New York County

Docket Number: 111181/05

Judge: Rolando T. Acosta

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This opinion is uncorrected and not selected for official publication.

are alleged to be caused by breathing in air that was polluted with toxins and contaminants from the fires and dust, as a result of the City failing to provide proper respiratory masks and protective equipment. Petitioner contends that the injuries, including, but not limited to, fatigue, GERD, and RADS did not become apparent to him or his physicians until on or about October 20, 2004.

Section 50-e of the General Municipal Law (“GML”) states that “In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding...” the notice of claim shall be served “within ninety days after the claim arises.” The purpose of serving a notice of claim “is to allow the municipal defendant to make a prompt investigation of the facts and preserve the relevant evidence.” Lomax v. New York City Health and Hospitals Corp., 262 A.D.2d 2, 4 (1st Dept. 1999).

However, the Court, in its discretion, may grant an application for leave to serve a late notice of claim. GML §50-e(5). *See also* Isereau v. Brushton-Moira School District, 6 A.D.3d 1004 (3rd Dept. 2004) (“...absent a clear abuse of discretion, Supreme Court’s determination of an application for leave to serve a late notice of claim will not be disturbed.”).

In determining whether to grant a late notice of claim, the Court must balance the municipal corporation’s need for prompt notice of claims against it

with the injured party's right to just compensation. Camarella v. East Irondequoit Central School Board, 34 N.Y.2d 139, 142-143 (1974). The Court's discretion in granting leave to file a late notice of claim is a remedial measure, and thus should be liberally construed. Santana v. City of New York, 183 A.D.2d 665 (1st Dept. 1992).

It is well settled that in deciding whether or not to grant leave to file a late notice of claim, the Court should consider a number of relevant factors, including whether the excuse offered by the petitioner for the delay in filing the notice of claim is reasonable, whether the municipal had actual knowledge of the material facts constituting the claim within the 90-day as of right statutory time period, or shortly thereafter, and whether the municipality would be prejudiced if the petition to file the late notice of claim is granted. GML §50-e(5); *See also* Ali ex rel. Ali v. Bunny Realty Corp., 253 A.D.2d 356 (1st Dept. 1998).

Petitioner has provided this Court with a reasonable excuse for his delay in filing a timely notice of claim, as well as showing that the City of New York had actual knowledge of the facts constituting his claim, and thus would not be prejudiced if petitioner is allowed to file a late notice of claim.

Petitioner reasonably relied on statements and assurances made to him on behalf of the City of New York that the atmosphere in and around Ground Zero

was safe for human exposure, or that any health related symptoms he may experience would not pose any chronic health hazards and would shortly resolve. It was not unreasonable for petitioner, after experiencing symptoms of respiratory problems, to adhere to the suggestions of the City of New York that they would soon dissipate. It was only after his symptoms persisted that petitioner's injuries became apparent both to his doctors and himself. Thus, "petitioner should not be penalized for waiting to see if his symptoms... would resolve." McGillick v. City of New York, 13 A.D.3d 195 (1st Dept. 2004) *quoting* Matter of Edwards v. City of New York, 2 A.D.3d 110 (Sup. Ct. N.Y. Co., 2003). Indeed, as Justice Stallman of this Court has noted, "to hold otherwise would encourage preemptive filing of notices of claim by claimants who have no good faith basis for believing that they were actually injured." O'Halloran v. City of New York, 1 Misc.3d 568, 570 (Sup. Ct. N.Y. Co., 2003). Significantly, even were petitioner not to have a reasonable excuse for his delay, that alone would not be fatal to his application for leave to file a late notice of claim. GML §50-e(5). *See also* Weiss v. City of New York, 237 A.D.2d 212 (1st Dept. 1997).

Given the devastation and the subsequent clean up efforts of the World Trade Center site after the terrorist attacks on September 11, 2001, it cannot fairly be said that the City of New York did not have actual knowledge of the facts

constituting petitioner's claim. Galasso v. City of New York, 8 Misc.3d 1025(A) (Sup. Ct. N.Y. Co., 2005). The widespread allegations of toxic substances, the similar health complaints by those involved in the cleanup and rescue efforts, the investigation of environmental effects by various levels of government, and the enormous media coverage all overwhelmingly point to the conclusion that respondent did in fact have actual knowledge of petitioner's claim. Ibid; *see also* Edwards v. City of New York, 2 A.D.3d 110 (1st Dept. 2003). For example, there has been wide media coverage of the onslaught of various health conditions, such as the "World Trade Center cough", affecting those involved in the rescue, recovery, and construction efforts in and around the sites of the September 11, 2001 terrorist attacks in New York City. Blake v. City of New York, 2003 WL 21665696 (Sup. Ct., N.Y. Co., 2003). Thus it is undisputed that the City monitored Ground Zero after the terrorist attacks, and therefore was aware of the facts underlying petitioner's claim. Galasso v. City of New York, 8 Misc.3d 1025(A) (Sup. Ct. N.Y. Co., 2005).

Having been aware of the facts underlying petitioner's claim, respondent will not be prejudiced by this Court granting petitioner's application to file a late notice of claim. "The continued ability to investigate and analyze the environmental data and the particular circumstances surrounding the World Trade

Center cleanup means that the City will have an opportunity to objectively test claimants's allegations and prepare a defense." Galasso v. City of New York, 8 Misc.3d 1025(A) (Sup. Ct. N.Y. Co., 2005). The City of New York was aware of the issues that are raised in petitioner's claim, and thus "will be able to verify, *inter alia*, what substances were present and what equipment it issued to whom at the site." Blake v. City of New York, 2003 WL 21665696 (Sup. Ct., N.Y. Co., 2003).

There is undoubtedly a question of when petitioner's cause of action arose for Statute of Limitations purposes. However, recognition by the Court that a Statute of Limitations issue may exist does not bar granting petitioner leave to file a late notice of claim, for it is only if the application is granted can the Statute of Limitations issue be properly raised and litigated. Galasso v. City of New York, 8 Misc.3d 1025(A) (Sup. Ct. N.Y. Co., 2005). An action or special proceeding against a city for personal injury "shall be commenced within one year and ninety days after the happening of the event upon which the claim is based." GML § 50-i. Petitioner's participation in the cleanup and recovery efforts at the World Trade Center was from September 11, 2001 until September 26, 2001, well beyond the time allotted to bring a personal injury action against a municipality. However, petitioner claims that his injuries did not become apparent to either him or his

treating physician until on or about October 20, 2004. Section 214-c of the CPLR states that for purposes of Section 50-e and 50-i of the General Municipal Law, a personal injury claim based on exposure to any substance or combination of substance “shall be deemed to have accrued on the date of discovery of the injury by the plaintiff or on the date when through the exercise of reasonable diligence the injury should have been discovered, whichever is earlier.”

Therefore, if petitioner’s injuries could not have been discovered prior to on or about October 20, 2004, his claim is not barred by the applicable Statute of Limitations. However, the applicability of CPLR§ 214-c is not being decided here. A determination by the Court of when the present claim arose would be premature, for “it cannot be said, as a matter of law, particularly, in the absence of disclosure, when the claim accrued, whether under CPLR 214-c or otherwise.” Blake v. City of New York, 2003 WL 21665696 (Sup. Ct., N.Y. Co., 2003).

Accordingly, it is hereby ORDERED that the petitioner’s application for leave to file a late notice of claim is granted, unopposed; and its is further

ORDERED that the notice of claim in the form proposed as “Exhibit A” shall be deemed timely served upon service of a copy of this order with notice of entry and a copy of the proposed notice of claim upon respondent, City of New York; and it is further

ORDERED that petitioner shall comply with the preceding paragraph within 30 days of entry of this order; and it is further

ORDERED that the petitioner be produced for a 50h hearing within 30 days of this order.

This constitutes the decision and order of the Court.

Dated: October 28, 2005

ENTER

Rolando T. Acosta
SO ORDERED

Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

FILED
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