Matter of Wendt v City of New York
2005 NY Slip Op 30630(U)
June 15, 2005
Supreme Court, New York County
Docket Number: 113786/04
Judge: Michael D. Stallman

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

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In the Matter of the Application of

George Wendt,

Petitioner,

For Leave to File a Late Notice of Claim Against

-against-

The City of New York,

Respondent.

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Index No. 113786/04

Decision, Order and Judgment

HON. MICHAEL D. STALLMAN, J.:

In this special proceeding, petitioner seeks leave to serve a late notice of claim, pursuant to General Municipal Law 50-e(5).

Petitioner, a Consolidated Edison worker, asserts in his affidavit, that he was injured because of exposure to toxic substances in the course of his work from September 12, 2001 through November 15, 2001 in the vicinity of the World Trade Center site. Petitioner claims, inter alia, that the City did not provide a mask or proper respiration equipment.[1]

It is well-settled that when considering an application for leave to file a late notice of claim, the Court should consider a number of factors, including: (1) the reasonableness of the excuse offered by the claimant for the delay in filing the notice of claim; (2) whether the municipality obtained actual knowledge of the essential facts constituting the claim within the 90-day as-of-right

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[1] The City opposed the instant relief on the grounds that the order to show cause did not contain an affidavit from petitioner, or a doctor, or any medical records. Petitioner submitted his affidavit on the reply. GML § 50-e(5) and its interpretive case law does not require a petitioner to proffer evidence of the merits of the underlying claim when seeking leave to file a late notice of claim. It is well-settled that no such proof is necessary on the motion for leave to serve a late notice of claim. See, e.g., Weiss v City of New York, 237 AD2d 212, 213 (1st Dep't 1997): The City could have sought permission to serve a sur-reply, but did not do so.

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filing period or within a reasonable time thereafter; and (3) whether the municipality was prejudiced because the claimant did not file during the as-of-right period. See, gen., GML 50-c(5).

Petitioner states that he did not become aware of his respiratory problems until July 1, 2003. He had a pulmonary function test performed on April 16, 2004 at which time he learned that he was suffering from restriction in his lungs. This proceeding was commenced approximately on September 28, 2004.

Thus, the papers on this application appear to indicate that it was made within the one-year and 90 days limitation period. However, as it is premature to raise a statute of limitations defense before an answer, the Court does not pass on this issue preclusively as law of the case, particularly because this issue will undoubtedly be the subject of extensive disclosure proceedings.

CPLR 214-c provides that in personal injury and property damage cases based on exposure to a foreign substance, the statute of limitation period begins to run not from the exposure itself but from the later time when the plaintiff discovers or with reasonable diligence should have discovered the injury.

The delayed-accrual rules of CPLR 214-c apply to service of a notice of claim because the as-of-right filing period only begins on accrual of the claim. In order to measure the 90-day as-of-right period and the one year and 90-day period which delimits the time in which it can exercise its discretionary power under GML 50-e(5), the Court must analyze when the claim accrued.

The purpose of CPLR 214-c is to recognize that where there is such latency, the law should provide a remedy. See Rothstein v Tennessee Gas Pipeline Co., 87 NY2d 90, quoting, Governor's

Mem Approving L. 1986, ch. 682, 1986 N.Y. Legis Ann. at 288. When CPLR 214-c is applicable, which is not being decided here, the actual notice provision of GML § 50-e(5) must be interpreted in harmony with the legislative purpose of CPLR 214-c so as to produce a consistent and just result. To adopt the City's position, viz., that the City did not have actual notice of plaintiff's condition within the as-of-right period or within one year and 90 days after the event, would mean that GML § 50-e would in all cases trump CPLR 214-c, and that effectively CPLR 214-c would not be applicable to municipalities. Because CPLR 214-c was adopted after the most recent amendments to GML § 50-e and because the Legislature did not exclude municipalities from the coverage of CPLR 214-c, the Court would be engaging in impermissible judicial legislation to adopt the City's position.

The slow manifestation of various symptoms and the diagnosis of various conditions among workers at and around the World Trade Center site has been widely reported in the media. The term "World Trade Center cough" quickly entered the language as referring to a recurrent cough, characteristic among site workers, that sometimes did not resolve, and was followed later in many cases by a diagnosis of a respiratory condition.

The evidence before the Court sufficiently indicates, for this application, that petitioner may well have been exposed to toxic substances in the course of his work in the vicinity of the World Trade Center site. It cannot be determined on these papers when petitioner discovered or reasonably should have discovered his injury. These issues should be explored in disclosure and could well present factual issues for trial. Recognition that a statute of limitations issue may exist (and may

present factual issues for trial) does not bar grant of this application. Rather, only if this application is granted can the statute of limitation defense be properly raised and litigated. Only where the evidence on a GML § 50-e(5) motion incontestably indicates that the statute of limitations has already run, thereby terminating this Court's discretionary authority to permit service of a late notice of claim, is it a ground for denial of a late notice of claim application.

Accordingly, petitioner has set forth a reasonable excuse for the delay in filing the notice of claim.

As for the City's knowledge of the facts constituting petitioner's claim, it is not reasonable to assert, under the unprecedented circumstances of the destruction of the World Trade Center and the clearing of the site thereafter, the allegations of toxic substances in the smoke and debris, and the remarkably similar health claims of many workers involved in the rescue, clearance and transportation work related to the site and its debris, that the City did not have notice of the nature and substance of this claim. The investigation of environmental concerns by various levels of government, and the intense media attention and public discussion of these subjects of common concern bely the City's contention that it was surprised by petitioner's notice of claim and that it did not obtain actual knowledge of the nature of petitioner's claims respecting the City's alleged acts and omissions. See, Matter of Annis v New York City Transit Authority, 108 AD2d 643 (1st Dept 1985)(coverage of a train wreck by the media, and subsequent investigation by the Transit Authority, grounds to permit service of late notice of claim relating to injuries received in the disaster).

Petitioner's claim involves something other than an ephemeral or transitory condition that the City could not have investigated until it received this application. Since the fall of 2001, it has been reported that government agencies at all levels have investigated working conditions, air quality and the composition of the World Trade Center debris and the smoke and fumes emanating from the site.

The Court is not determining here that there was a hazardous condition in the vicinity of the site, or that the City knew that a hazardous condition existed there. However, it is undisputed that the City monitored the site. 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 claimant's allegations and prepare a defense. Unlike many alleged conditions that are not objectively verifiable or that have disappeared over time because of a claim's delay, the City will be able to verify, inter alia, what substances were present and what equipment it issued to whom at the site (see, e.g., Chechelnitskaya v City of New York, 293 AD2d 700 [2d Dept 2002]).

It appears that one of petitioner's likely claims will be that the City controlled the entire World Trade Center site, and its surrounding streets and the equipment issued to any workers in the vicinity. All these matters require substantial factual exploration. Nevertheless, based on the showing made by petitioner here, petitioner has set forth a sufficient showing of actual notice as envisioned under GML 50-e(5).

Petitioner's delay in bringing this application did not prejudice the City. It neither prevented nor hampered any attempt that the City could have made to investigate the substance of petitioner's claim. Unlike many late notice of claim applications, the delay here had no effect on the City's capacity to investigate, defend or correct an allegedly hazardous condition, or to objectively verify or refute a claimed ephemeral or transitory condition.

The City contends that petitioner does not demonstrate that the City knew of petitioner's presence at the worksite, or that the City had actual knowledge that petitioner was exposed to toxic levels of particular substances, or the specific substance to which petitioner was exposed, or the length of petitioner's exposure or that petitioner's alleged injuries were more probably than not caused by his exposure to alleged toxins.

Notice of claim provisions were never intended to require substantive proof of every element of a claim, including statute of limitations issues not yet formally raised.

Suffice to say, the papers before the Court provide ample basis for concluding that the City had, within its control, within a reasonable period of time after the occurrence, information that placed it on notice, or should have placed it on notice, of the nature and substance of petitioner's claims, both of the City's alleged acts and omissions, and of the health complaints of petitioner, which are characteristic of those of many other site workers, including uniformed services members, whose recurrent cough and other symptoms were well-documented and apparently within the City's knowledge. Under the unusual circumstances of these cases, this Court cannot say that the City did not obtain sufficient knowledge to have been placed on notice of petitioner's claims within the

reasonable time envisioned by the statute. Moreover, the City's right to conduct comptroller's examinations under GML 50-h, an essential part of the statutory scheme, assures that the City will be given an opportunity to explore all of those issues thoroughly even prior to commencement of an action.

It is premature here to determine (1) whether the City owes a duty sounding in common law negligence to employees of private contractors, including a duty to provide specific protective equipment; (2) whether the activity in which petitioner was engaged is covered by Labor Law 200 or 241(6) and (3) issues of causation, specifically whether petitioner caused or contributed to his condition by his conduct, either at the site (e.g., by not wearing available protective equipment) or otherwise, by his lifestyle or habits (e.g., by smoking).

All these issues require disclosure that, as a practical matter, can take place only in the inchoate action for which this proceeding is a pre-condition. The Court cannot finally determine here whether petitioner has a viable cause of action against the City; neither can it hold that petitioner is incapable of stating a cause of action. Short of holding a trial at this point, prefaced by full disclosure, there is no practical way to thoroughly and fairly resolve those issues in this special proceeding.

A court must use common sense and logic in applying its discretion as part of the statutory analysis. The standard used to decide a motion for summary judgment under CPLR 3212 is not the standard for deciding whether to grant leave to file a late notice of claim under GML 50-e(5). The standard applicable here does not require the claimant to demonstrate ultimate entitlement to

judgment; neither does the existence of factual questions respecting exposure, negligence, causation, contributory conduct or injury prevent the relief sought here: ability to serve a document that would permit claimant to sue the City.

Accordingly, it is

ORDERED and ADJUDGED that the motion is granted and the verified notice of claim is deemed timely filed and served in the form annexed to the reply papers.

This decision constitutes the order and judgment of the Court.

Dated: June 15, 2005
New York, New York

ENTER

J.S.C.

HON. MICHAEL D. STALLMAN

CLERK

FILED

JUL 14 2005

COUNTY CLERK'S OFFICE
NEW YORK