

Williams v City of New York

2007 NY Slip Op 30086(U)

March 13, 2007

Supreme Court, Queens County

Docket Number: 0002876

Judge: Kevin J. Kerrigan

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J. Kerrigan Part 10
Justice

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SANDRA WILLIAMS,

Index No. 2876/07

Petitioner,

- against -

Motion
Date 03/06/07

THE CITY OF NEW YORK,

Motion
Cal. Number 30

Motion Seq. No. 2

Respondent.

-----X

The following papers numbered 1 to 5 read on this order to show cause by petitioner for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e(5).

PAPERS
NUMBERED

Order to Show Cause-Exhibits..... 1-5

Upon the foregoing papers, it is ordered that this application is decided as follows:

Since there was no action pending at the time petitioner sought leave to serve a late notice of claim, she was required to proceed by way of a special proceeding (see Billone v. Town of Huntington, 188 AD 2d 526 [2nd Dept 1992]). A special proceeding is commenced by service of a notice of petition and petition or an order to show cause and petition (see CPLR 304, 403[b]). Petitioner's order to show cause was not accompanied by a petition but only by her affidavit and an affirmation of her attorney. Nevertheless, this Court finds that the affidavit and the affirmation in support of the order to show cause contain all the essential elements of a petition. Therefore, since this defect is an irregularity which may be overlooked (see CPLR 2001; Billone v. Town of Huntington, supra), this Court deems the affidavit and affirmation in support of the order to show cause a petition.

Application by petitioner seeking leave to serve a late notice of claim nunc pro tunc, pursuant to General Municipal Law

§50-e(5), is granted, there appearing no opposition (see GML § 50-e[1][a]). her failure to timely serve the notice of claim.

Plaintiff allegedly sustained injuries as a result of tripping and falling on a broken sidewalk and metal gate that was lying on the sidewalk due to construction work on August 18, 2006. Plaintiff promptly retained her attorney on August 25, 2006. However, her attorney did not file a notice of claim until November 17, 2006, one day past the 90-day deadline for filing such notice. Counsel's totally unacceptable explanation for his failure is that he "miscalculated the last day to file as November 17, 2006." In other words, when plaintiff promptly and diligently retained his office to represent her only nine days after the accident, counsel intended to wait the entire 81 remaining days and file a notice of claim on her behalf at the last possible moment, but made an error in counting that date. Compounding his error, counsel thereupon waited three months and nine days to submit the instant order to show cause.

Nevertheless, based upon the totality of circumstances presented on this record, including the fact that plaintiff pursued her legal remedies in a diligent fashion and has articulated a reasonable excuse for her untimeliness and a meritorious claim, this Court, in its discretion, will not penalize plaintiff for her attorney's behavior.

Moreover, as respondent did not submit any opposition, there is no evidence that they will be prejudiced by this application. The record on this petition does not show that there has been either an inordinate passage of time or any changed conditions that would prevent an accurate reconstruction of the circumstances existing at the time of the accident (see Rabanar v. City of Yonkers, 290 AD 2d 428 [2nd Dept 2002]).

In addition, petitioner's application was made within the applicable period to commence an action (see Haynes v. City of New York, 100 AD2d 572 [2nd Dept. 1984]).

Petitioner is given leave to serve a notice of claim nunc pro tunc within thirty (30) days from the date of entry of this order.

Serve a copy of this order with notice of entry upon the attorney for respondents without undue delay.

Dated: March 13, 2007

KEVIN J. KERRIGAN, J.S.C.