

Traynor v John Civetta & Sons, Inc.

2007 NY Slip Op 30097(U)

February 15, 2007

Supreme Court, Queens County

Docket Number: 0018068

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
EUGENE TRAYNOR,

Index

Number: 18068/06

Plaintiff,

- against -

Motion

Date: 02/13/07

JOHN CIVETTA & SONS, INC., THE CITY OF
NEW YORK and THE CITY OF NEW YORK
DEPARTMENT OF DESIGN AND CONSTRUCTION,

Motion

Cal. Number: 20

Defendants.

Motion Seq. No. 1

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The following papers numbered 1 to 10 read on this motion by defendants City of New York and City of New York Department of Design and Construction for summary judgment dismissing the complaint.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 7
Reply Affirmation-Exhibits.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants City of New York and City of New York Department of Design and Construction (hereinafter referred to collectively as the City)for summary judgment dismissing the complaint against them for failure of plaintiff to file a timely notice of claim, pursuant to General Municipal Law §50-e, is granted and the complaint is hereby dismissed as against the City.

Plaintiff alleges that the bulkhead on his property was caused to be shifted and that extensive undermining, washout and erosion occurred in his rear yard as a result of bulkhead and

excavation work done by defendants adjacent to his property on May 26, 2005. The notice of claim was filed on March 14, 2006.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law § 50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). The notice of claim herein was served upon the City on March 14, 2006, nine months, nineteen days after the work was done and over six and one-half months past the ninety-day deadline for filing a notice of claim.

Plaintiff argues that the notice of claim was not untimely, since the work that was done by the City is causing continuing damage to his property and, therefore, constitutes a continuing tort that accrues each day. This Court finds plaintiff's argument unpersuasive. The cases cited by plaintiff (Carhart v. Village of Hamilton, 190 AD 2d 973 [3rd Dept 1993], and Zoller v. Niagra Mohawk Power Corp., 137 AD 2d 947 [3rd Dept 1988]) are inapposite. Those cases involved a municipality's defective electrical transformer that produced stray voltage. In that scenario, a new tort and, hence, a new cause of action, arose every time the municipality's transformer produced stray electricity that caused damage to plaintiff. In contrast, plaintiff herein claims to have sustained damage to his property as a result of the singular act of the City in making allegedly defective repairs and renovations on a specific date. That plaintiff may still be experiencing periodic flooding and erosion to his yard as a result of that work does not amount to the commission by the City of a new wrongful act each time there is new flooding or erosion. "[A] distinction must be drawn 'between the originating wrongful act and the continuing, perhaps perpetual, adverse consequences of the wrongful act'" (Greco v. Incorporated Village of Freeport, 223 AD 2d 674, 675 [2nd Dept 1996], quoting Jensen v. General Elec. Co., 82 NY 2d 77, 89 [1993]).

Plaintiff's contention that the City should be precluded from raising the defense of late notice of claim because it was aware of the condition is without merit.

Plaintiff furnishes no proof that the City had actual knowledge of damage to plaintiff's property within the 90-day period after May 26, 2005 or a reasonable time thereafter.

Even had plaintiff demonstrated that the City had such knowledge, the issue of actual or constructive knowledge is relevant only to a determination by the Court whether, in the exercise of its sound discretion, it should grant leave to serve a late notice of claim (see, e.g., Nairne v. N.Y. City Health &

Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; General Municipal Law § 50-e[5]).

However, a late notice of claim may not be filed more than one year and 90 days after the cause of action accrued, which is the period of limitation for commencing tort actions against a municipality (see General Municipal Law § 50-e[5]; Pierson v. City of New York, 56 NY 2d 950 [1982]). The date plaintiff's cause of action accrued is the date the event occurred upon which plaintiff's claim is based, to wit, the work performed by the City on May 26, 2005 (see General Municipal Law § 50-i). Therefore, the period of limitation within which plaintiff had to commence a timely action expired on August 24, 2006.

The untimely service of the notice of claim on March 14, 2006 without leave of court was a nullity (see Chicara v. City of New York, 10 AD 2d 862 [2nd Dept 1960, appeal denied 8 NY 2d 1014 [1960]; Wollins v. NYC Board of Education, 8 AD 3d 30 [1st Dept 2004]). Therefore, the instant action, though served and filed within the one year and 90 day limitation period, was never properly commenced and is now time-barred (see Davis v. City of New York, 250 AD 2d 368 [1st Dept 1998]). The Court has no authority to allow a late notice of claim after the expiration of the one year and 90-day statute of limitations (see Hochberg v. City of New York, 63 NY 2d 665 [1984]).

Therefore, since plaintiff failed to serve a timely notice of claim and failed to seek leave to file a late notice of claim within the one year and 90-day limitation period, this action must be dismissed.

Dated: February 15, 2007

KEVIN J. KERRIGAN, J.S.C.