

Angeles-Ricart v City of New York

2007 NY Slip Op 30103(U)

February 27, 2007

Supreme Court, Queens County

Docket Number: 0027589

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
REYNALDO ANGELES-RICART and LUIS VERA,

Index
Number: 27589/06

Petitioners,

- against -

Motion
Date: 02/20/07

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF TRANSPORTATION
and PAUL L. SIMPSON,

Motion
Cal. Number: 1

Respondents.

Motion Seq. No. 1

-----X

The following papers numbered 1 to 7 read on this application by petitioner for an Order pursuant to General Municipal Law § 50(e)(5) granting leave to serve a late Notice of Claim.

	<u>Papers</u> <u>Numbered</u>
Order to show Cause-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition.....	6 - 7

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

Since there was no action pending at the time petitioners sought leave to serve a late notice of claim, they were 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]). Petitioners' order to show cause was not accompanied by a petition but only by an affidavit of petitioner Vera and an affirmation of petitioners' 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.

Petitioners' application for an order granting leave to file a late notice of claim, pursuant to General Municipal Law §50 (e) (5), is denied and the petition is hereby dismissed.

Petitioner Vera allegedly sustained injuries when the motor vehicle in which he was a passenger and which was owned and operated by co-petitioner Ricart was struck by a vehicle owned by the Department of Transportation (DOT) and operated by Simpson, an employee of DOT on December 7, 2005.

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 order to show cause on the instant petition was served on January 10, 2007, one year and 35 days after the accident and over 10 months past the 90- day deadline for filing a notice of claim.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see 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; see General Municipal Law § 50-e[5]).

Petitioner has failed to articulate any excuse for his failure to serve respondents within the statutory period. Indeed, petitioner's attorney admits in his affirmation that "petitioner cannot proffer a reasonable excuse for the delay." Petitioner offers no excuse whatsoever in his affidavit in support of the petition.

Although the lack of a reasonable excuse for the delay is not, in and of itself, fatal to an application for leave to file

a late notice of claim when weighed against other relevant factors (see Johnson v. City of New York, 302 AD 2d 463 [2nd Dept 2003]), there are no other facts or circumstances presented herein that would weigh in favor of allowing the filing of a late notice of claim.

Petitioner failed to demonstrate that respondents had actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter. All that petitioner's counsel offers, in support of petitioner's burden in this regard, is the conclusory statement in his affirmation in support of the petition that respondents had actual notice because "petitioner was involved in a motor vehicle accident with a motor vehicle owned by the respondent and operated by the respondents' employee." Petitioner fails to allege, for example, that respondents had notice by way of their employees having prepared an incident report, (see, e.g., Hasmath v. Cameb, 5 A.D.3d 438[2d Dept. 2004]; see also, Matter of Continental Ins. Co. v. City of Rye, 257 A.D.2d 573 [2d Dept. 1999]).

Although it has been held that the municipal entity had actual notice where its employees were present and actually involved in the accident (see, Whitehead v. Centerville Fire Dist., 90 AD 2d 655 [3rd Dept 1982]), there were other factors involved that imparted the requisite knowledge. In Whitehead v. Centerville Fire Dist., the accident involved a vehicle driven by the captain of the fire company. The accident was immediately reported to the Ulster County Fire Control, the fire district's insurance company was notified of the incident within the 90-day time frame, plaintiff's no-fault carrier with whom plaintiff filed a no-fault claim with supporting medical reports was the same carrier as the fire district's and the fire district's attorney had personal knowledge of the accident and resigned because his law partner undertook representation of plaintiff in anticipation of the litigation.

General Municipal Law §50-e would be entirely truncated if a late notice of claim were allowed merely, and solely, because an accident involved a City vehicle. This Court is unaware of any controlling case that holds that the mere involvement of a municipal vehicle and driver in an accident automatically constitutes actual knowledge by the municipality of the facts underlying the subsequent claim so as to merit allowing a late notice even in the absence of any excuse for the delay.

The police accident report annexed to the petition does not establish that defendants had actual knowledge of the facts underlying the claim. A police report does not of itself constitute notice of the accident to a municipality (see,

Continental Ins. Co. v. City of Rye, 257 A.D.2d 573 [2d Dept. 1999]); Matter of Dube v. City of New York, 158 A.D.2d 457 [2d Dept. 1990]).

Thus, this Court finds that it would be an improvident exercise of its discretion to grant petitioner's application for leave to serve a late notice of claim without any excuse whatsoever by counsel for the delay, and without any indication that respondents received timely actual knowledge of the facts constituting petitioner's claim (Jasinski v. HB Ward Tech. Sch., 306 A.D.2d 347 [2d Dept. 2003]; Cordero v. County of Nassau, 2 A.D.3d 567 [2d Dept. 2003]; Gomez v. City of New York, 250 Ad 2d 443 [1st Dept 1998]).

Accordingly, the application must be denied, and the petition is hereby dismissed. Respondents may enter judgment accordingly.

Dated: February 22, 2007

KEVIN J. KERRIGAN, J.S.C.