

Carleton v City of New York

2007 NY Slip Op 31012(U)

April 25, 2007

Supreme Court, New York County

Docket Number: 0100454/2007

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Rakower **EILEEN A. RAKOWER**
Justice **J.S.C.**

Part 5

PART 5

Carleton
- v -
CITY OF NY

INDEX NO.

100454/07

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3 4 5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

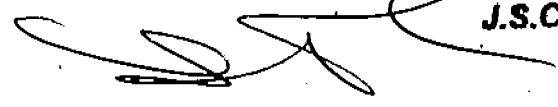
FILED

MAY 02 2007

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

EILEEN A. RAKOWER
J.S.C.



Dated: 4/26/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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

-----X
JOHN P. CARLETON,

Petitioner,

Index No.
100454/07

- against -

Decision and
Order

THE CITY OF NEW YORK,

Respondent.

FILED

MAY 02 2007

NEW YORK
COUNTY CLERKS OFFICE

-----X
HON. EILEEN A. RAKOWER

Petitioner brings this action for personal injuries allegedly sustained while he was working as a "sandhog" at the New York City Water Tunnel No. 3 construction project ("No. 3") in lower manhattan. Petitioner now moves for leave to file a late notice of claim. Defendant the City of New York ("City") opposes the motion.

During April through May of 2006 petitioner was assigned to construction duties at "Shaft 30B" of No. 3. In order to carry out the construction, scaffolding had been erected and placed around the perimeter of the shaft. According to petitioner's affidavit, the method of excavation and construction used in the shaft was called "ground-freezing" or "freeze-wall." Because the work had to be done through soft ground this method was employed in order to stabilize the shaft walls above the scaffolding to prevent the walls from collapsing. The "ground-freezing" was accomplished through electrically powered machinery which was used to lower the temperature of the ground so that it was more stable. Petitioner affirms that engineers who were employed by the City decided to shut down this electrical power on the weekends during the time that he was working in the shaft. Petitioner contends that this shut down caused the walls surrounding the work site to repeatedly thaw and be re-frozen, weakening the walls and causing a major collapse. According to petitioner, some debris from the collapse fell and damaged the scaffolding that he was working on and that respondents never replaced the damaged scaffolding. On May 31, 2006

petitioner stepped onto the allegedly damaged scaffolding and fell, severely injuring his knee.

Petitioner, in support of his motion, first argues that he was unable to file his notice of claim within the 90 day period following the accident because he was undergoing medical treatment for his injury. Further, petitioner claims that the City was in possession of work logs and other reports which would have provided actual knowledge of the facts surrounding the claim and thus it would not be prejudiced by a delay in filing.

City, in its opposition, argues that petitioner's claim is meritless and thus, his motion should be denied. Additionally, City argues that petitioner does not submit the alleged work logs or reports and thus there is no proof that it had actual notice of the claim.

Oral argument was held on February 27, 2007, at which time this court granted petitioner additional time to submit proof that the City had actual notice of the accident. Petitioner, by way of a "second supplemental reply," submits an "employer's report of work-related accident/occupational disease"; an "employee's report of injury"; and a "Construction Daily Work Log" dated May 31, 2006 which was obtained from the New York City Department of Environmental Protection. The log which was in the City's possession, contains a description of petitioner's accident as well as other notes including a phone call made to "Linda Shmidt" in which the author of the report told her "walk way on forms need work, men are falling." There are also references made to "ground-freezing" and to the "concrete form decking which was damaged in the collapse." City does not submit any further opposition.

General Municipal Law §50(e)(5) states, in relevant part:

Upon application, the court, in its discretion, may extend the time to serve a notice of claim... The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified...or within a reasonable time thereafter...

The court in *Caminero v. New York City Health and Hospitals Corp.*, 21 A.D.3d 330, found that when the City is in possession of records which gave rise to the claim, it had actual knowledge of the facts constituting the claim.

. . . by virtue of the hospital records made contemporaneously with the events giving rise to the claim, defendant had actual knowledge of the facts constituting the claim virtually from its inception, and was not prejudiced by plaintiff's delay in seeking the court's leave...*Id.* at 332. (In a medical malpractice action, held that failure to deem timely late notice of claim was abuse of discretion due to hospital's actual notice of events within notice of claim period.)

Here, petitioner submits copies of a "construction daily work log" which details the accident which lead to petitioner's injury. The report also references the collapse which petitioner claims caused damaged to the scaffolding he was working on. Significantly, this report was in the possession of the New York City Department of Environmental Protection, a City agency. Thus, the City had actual knowledge of the essential facts constituting the claim on or near the date of the incident and had the opportunity to investigate.

Wherefore it is hereby

ORDERED that this motion for leave to serve and file a late notice of claim is granted and the notice of claim is deemed timely filed and served in the form annexed to the petition upon entry of this decision and judgment.

DATED: April 25, 2007

FILED

MAY 02 2007

NEW YORK
COUNTY CLERK'S OFFICE



EILEEN A. RAKOWER, J.S.C.