Matter of State Farm Ins. Co. v Suffolk Transp. Co.
2007 NY Slip Op 31241(U)
May 16, 2007
Supreme Court, Suffolk County
Docket Number: 0035064/2006
Judge: Sandra L. Sgroi

INDEX NO. 35064-2006

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 002 MG

CASEDISPOSED

Present:
Hon. SANDRA L. SGROI

Adj'd Date: 3-14-07
Return Date: 5-3-07

In the Matter of STATE FARM INSURANCE COMPANY, a/s/o, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Petitioner,

-against-

SUFFOLK TRANSPORTATION COMPANY and COUNTY OF SUFFOLK,

Respondents.

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Upon the following papers numbered 1 to 21 read on this Proceeding: Order to Show Cause and supporting papers 1-14; Affirmation in opposition and supporting papers 15-19; Affirmation in Reply and supporting papers 20-21; it is,

ORDERED that the motion of the Petitioner, State Farm Insurance Company, a/s/o International Brotherhood of Electrical Workers, for leave to file the proposed Notice of Claim attached as Petitioner's Exhibit "A" is granted; and it is further

ORDERED that the proposed Notice of Claim attached as Petitioner's Exhibit "A" is deemed timely filed nunc pro tunc; and it is further

ORDERED that this proceeding has been marked "disposed" and any further civil action commenced by the

Petitioner against the Respondents must be commenced under a new index number, the filing and service of a summons and complaint and the purchase and filing of a new RJI.

According to the Petitioner herein, on March 6, 2006, an individual operating a Suffolk Transportation Company bus drove over an object which punctured the bus' gas tank, causing transmission fluid to leak from the bus. The bus driver pulled the vehicle off the road onto premises owned by the International Brotherhood of Electric Workers (hereinafter "IBEW") and the bus apparently continued to leak fluid while on the IBEW property (see, Petitioner's Exhibit "B").

On or about March 10, 2006, a company identified as EarthCare, at the direction of the Suffolk Transportation Company, began to perform a "clean up" at the IBEW property. The transmission fluid that had leaked from the bus caused a discoloration of the ground and that fluid also had seeped into a storm drain on the property. According to the Petitioner, the soil in the storm drain was contaminated by the transmission fluid. As a result, the New York State Department of Environmental Conservation (hereinafter "DEC") was required to approve the completed clean up. The petitioner herein, State Farm Insurance Company, insured the IBEW property at the time of the spill and apparently was responsible under the IBEW insurance policy to remediate the spill.

On May 18, 2006, representatives of the Petitioner discussed the effects of the transmission fluid spill with EarthCare and EarthCare informed the Petitioner that Suffolk Transportation Company considered the remediation work at the site to be completed. However, at that time, the DEC had not approved the remediation procedures performed by EarthCare. At that point, the Petitioner paid contractors to continue to restore the premises and clean the storm drain. The additional expense of cleaning the premises incurred by the Petitioner allegedly amounted to Twenty Thousand, Two Hundred Seventeen Dollars and Ninety Cents ($20,217.90) (see Petitioner's Exhibit "D"). The work performed at the behest of the Petitioner was completed on or about September 15, 2006 and the final bill was paid by the Petitioner. Four days later, on September 19, 2006, the Petitioner sent correspondence to Suffolk Transportation Company advising that it had paid to restore the IBEW property, clean the contaminated soil and obtain the DEC approval of the clean up process(see, Petitioner's Exhibit "E").

After this invoice for payment was sent to Suffolk Transportation Company, Suffolk County sent a letter dated October 4, 2006, to the Petitioner stating:

> We are in receipt of your purported claim. Inasmuch as it does not comply with Section 50(e) of the General Municipal Law of the State of New York,***we are constrained by law to hereby reject it and advise you that we will treat it as a nullity.
>
> So, because we were not notified within the 90-day period we must, unfortunately, deny your claim. (Petitioner's Exhibit "F").

Although it is unclear when exactly the Petitioner became aware that Suffolk County controlled or contracted with the Respondent Suffolk Transportation Company, it appears that the Petitioner obtained that knowledge sometime in the period between April and October of 2006.

After receipt of the letter of October 4, 2006, the Petitioner wrote to the County of Suffolk on October 10, 2006,

and stated:

> However, the Suffolk County Department of Transportation located at 10 Moffit Blvd., in Bay Shore, New York 01706 was fully apprised of what happened and had instructed companies by the name of Earthcare and 95 Inc., to commence the remediation of the site. We had only commenced our efforts after they had indicated they were completed what they had intended to do at the site.

It is unclear whether the County of Suffolk ever responded to this letter.

While the Petitioner and the County were corresponding, the DEC, by letter dated October 5, 2006, informed the owner of the IBEW property that the spill was, to the best of the DEC's then current knowledge, fully and completely remediated and the transmission fluid spill on the IBEW property was removed from the active spill list maintained by the DEC (Petitioner's Exhibit "H").

The co-Respondent herein, Suffolk Transportation Corp., the corporate entity involved in the fuel spill, is apparently a private corporation that has contracted with Suffolk County to provide bus service within this County. A computer generated statement from the New York State Department of State of the corporate status Suffolk Transportation Corp. does not reflect that it is a municipal corporation or that it has any relationship with the County of Suffolk (see, Petitioner's Exhibit "I").

According to the attorney for the Respondents, there is a contract between the County of Suffolk and Suffolk Bus Corporation wherein Suffolk Bus Corporation agrees to operate bus routes within Suffolk County, using County owned buses. The Court notes that the entity sued herein is not Suffolk Bus Corporation and is, instead, Suffolk Transportation Company. The attorney for the County has not informed the Court whether the Suffolk Bus Corporation and Suffolk Transportation Company are related entities, the same corporation using different names or separate corporations with contractual agreements with each other and/or the County, but the confusion engendered to an aggrieved claimant by these business relationships between the County and private corporations is obvious to even the casual observer. It does appear that the bus involved in the incident was owned by the County of Suffolk, but the police field report lists the complainant as "Suffolk Co. Transit". The record does not reflect that the Petitioner was aware the registered owner of the bus was actually Suffolk County.

Where a municipal entity owns the bus operated by a private corporation, the municipality "has a statutory obligation to indemnify" the non-municipal entity operating the bus (see, ***General Municipal Law***, § 50-e (1)(b); see generally, ***Montalto v. Westchester Street Transp. Co.***, 102 A.D.2d 816, 476 N.Y.S.2d 586). Under these circumstances, where the municipality must indemnify the non-municipal entity, a timely Notice of Claim must be filed by the injured party with the municipality (see, ***Coleman v. Westchester Street Transp. Co.***, 57 N.Y.2d 734, 454 N.Y.S.2d 978, 440 N.E.2d 1324).

Although the Court agrees with the Respondents, Suffolk Transportation Company and the County of Suffolk, that the Petitioner must file a Notice of Claim as a condition of commencing a civil action, that finding does not determine whether this application for leave to file a late Notice of Claim should be granted or denied.

General Municipal Law § 50-e requires that a Notice of Claim be served within ninety days after a tort claim arises against certain public and municipal corporations including the County of Suffolk. This requirement is intended to protect those public and municipal corporations against stale tort claims, and to provide them with an opportunity to timely and efficiently investigate claims (see ***Matter of Tumm v. Town of Eastchester,*** 8 A.D.3d 581, 582, 779 N.Y.S.2d 217).

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

> 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 in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

Pursuant to ***General Municipal Law*** § 50-e(5), this Court may permit the service of a late notice of claim under certain circumstances. The relevant factors for the Court to consider include, but are not limited to, whether the application (1) provides (1) a reasonable excuse for failing to serve a timely notice of claim, (2) proof that the municipality acquired actual knowledge of the facts constituting the claim within ninety days from its accrual or a reasonable time thereafter, and (3) a showing that the delay would substantially prejudice the municipality in maintaining its defense on the merits (see, ***General Municipal Law*** 50-e(5)). The presence or absence of any one of the foregoing factors is not determinative as to the application (see, ***Matter of Dubowy v. City of New York,*** 305 A.D.2d at 321, 759 N.Y.S.2d 325; ***Chattergoon v. New York City Hous. Auth.***, 197 A.D.2d 397, 398, 602 N.Y.S.2d 381), and the absence of a reasonable excuse for a delay in filing is not, standing alone, fatal to the application (***Matter of Ansong v. City of New York,*** 308 A.D.2d 333, 334, 764 N.Y.S.2d 182; ***Weiss v. City of New York,*** 237 A.D.2d 212, 213, 655 N.Y.S.2d 34).

As stated above, the Court generally will focus on the following three factors on a application for leave to file a late Notice of Claim: (1) whether the Petitioner has a reasonable excuse for the failure to serve a timely Notice of Claim, (2) whether the municipality acquired actual knowledge of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) whether the delay would substantially prejudice the municipality's defense (see, ***Matter of Padovano v. Massapequa Union Free School Dist.,*** 31 A.D.3d 563, 818 N.Y.S.2d 274, citing ***Williams v. Nassau County Med. Ctr.,*** 6 N.Y.3d 531, 814 N.Y.S.2d 580, 847 N.E.2d 1154).

While all three of these factors will be considered by this Court in determining this application, the Appellate

Division, Second Department in ***Casias v. City of New York***, --- N.Y.S.2d ----, 2007 WL 1150000, 2007 N.Y. Slip Op. 03250 (N.Y.A.D. 2 Dept. Apr 17, 2007) recently stated:

> The statute enumerates various factors relevant to an application for an extension, but it sets one apart from all the others: "the court shall consider, in particular, whether the [public corporation] acquired actual knowledge of the essential facts constituting the claim within the [90-day period] or within a reasonable time thereafter." Other factors, listed under the category "all other relevant facts and circumstances" (***General Municipal Law*** § 50-e[5]) essentially require a reasonable excuse for the delay and a showing of lack of prejudice to the public corporation in its defense on the merits (see ***Matter of Dell'Italia v. Long Is. R.R. Corp.***, 31 A.D.3d 758, 759, 820 N.Y.S.2d 81; ***Matter of Sica v. Board of Educ. of City of N.Y.***, 226 A.D.2d 542, 640 N.Y.S.2d 610; ***Matter of Shapiro v. County of Nassau***, 208 A.D.2d 545, 616 N.Y.S.2d 786). None of these factors is "necessarily determinative" (***Matter of Dell'Italia v. Long Is. R.R. Corp***, supra).

In a further enunciation of the guidelines that the Courts must apply in these applications, the Appellate Division, First Department in ***Goodwin v. New York City Housing Authority***, --- N.Y.S.2d ----, 2007 WL 1247589, 2007 N.Y. Slip Op. 03790 (N.Y.A.D. 1 Dept. May 01, 2007) recently stated;

> the notice of claim statute, General Municipal Law § 50-e, is to be applied flexibly. The Court has reiterated that flexibility is key " 'so as to balance two countervailing interests: on the one hand protecting municipal defendants from stale or frivolous claims, and on the other hand, ensuring that a meritorious case is not dismissed for a ministerial error.' (***Rosenbaum v. City of New York***, 24 A.D.3d 349, 806 N.Y.S.2d 543, *rev'd on other grounds*, 8 N.Y.3d 1, 828 N.Y.S.2d 228, 861 N.E.2d 43). This Court has further held that the statute was not meant to be used as "a sword to cut down honest claims but merely as a shield to protect municipalities against spurious ones." (***Lomax v. New York City Health and Hosps. Corp.***, 262 A.D.2d 2, 4, 690 N.Y.S.2d 548; see also, ***Matter of Quiroz v. City of New York***, 154 A.D.2d 315, 316, 546 N.Y.S.2d 604).

Therefore, while a balancing test of all relevant factors will be employed in deciding whether to grant an application to permit the filing of a late Notice of Claim, the most important factor remains the Respondents' actual knowledge of the essential facts constituting the Petitioner's meritorious claim, acquired within the ninety day time period to file a Notice of Claim or within a reasonable time after the running of the time to file a Notice of Claim.

The Respondents in this proceeding not only had immediate notice of the fuel spill when it occurred, they also voluntarily undertook to remediate the environmental damage caused by the spill by hiring EarthCare, a third party contractor, to begin the clean up process. Therefore, the Petitioner has satisfied the most critical element for the Court to address in determining whether to grant the motion for leave to file a late Notice of Claim.

While the Appellate Courts have, under some circumstances, failed to permit the filing of a late Notice of Claim where the delay was as short as two months (see, ***Lorseille v. N.Y. City Hous. Auth.***, 295 A.D.2d 612, 744 N.Y.S.2d 880), here there is no showing that the Respondents have been prejudiced by any delay resulting from

the failure to file a Notice of Claim. The conclusory assertions, made solely by the Respondents' attorney, that the Respondents have been prejudiced by reason of the delay are insufficient to meet the burden of overcoming a showing of lack of prejudice (see, ***Gibbs v. City of New York***, --- N.Y.S.2d ----, 2005 WL 2786997, 2005 N.Y. Slip Op. 07927 (N.Y.A.D. 2 Dept. Oct 24, 2005)). The Respondents herein were immediately aware of the spill and since Suffolk Transportation Company made the initial attempts to remediate the spill, they were aware of not only the accident but the damage caused by the leak within the period of time required to file a Notice of Claim. Since the agents of the Respondents acted in the first instance to correct the ground contamination resulting from transmission fluid leak from the County owned bus a mere four days after the incident occurred, the Respondents should not be impeded by any lack of knowledge in their attempt to show that no additional efforts were necessary to remediate the site after their contractor stopped clean up efforts at the IBEW property before obtaining DEC approval in or around May of 2006.

Where, as here, the Respondents have actual knowledge of the incident and cannot show that the short delay in filing the Notice of Claim prejudiced their defense of the action, the motion of a Petitioner for leave to file a late Notice of Claim will be granted. The Court further notes that under the unusual fact pattern of this case, there is no showing that the Petitioner improperly delayed in commencing this proceeding against the Respondents.

The Respondents have not raised any other procedural objections to the order to show cause served by the Petitioner and any possible objections are waived because this Court has jurisdiction of both the subject matter and the parties.

Dated: 5/10/07

SANDRA L. SGROI, J. S. C.