

Stephens v Consolidated Edison of N.Y., Inc.

2007 NY Slip Op 31388(U)

May 15, 2007

Supreme Court, New York County

Docket Number: 0117113/2006

Judge: Joan A. Madden

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

PRESENT: MADDEN
Justice

PART 11

STEPHENS, DENISE
- v -
CONSOLIDATED EDISON OF
NEW YORK, INC.

INDEX NO. 117113/06
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is determined in accordance with the annexed decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

FILED
MAY 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 15, 2007

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
DENISE STEPHENS,

Plaintiff,

INDEX NO. 117113/06

-against-

CONSOLIDATED EDISON OF NEW YORK, INC.,

Defendant.

-----X
JOAN A. MADDEN, J.:

FILED
MAY 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves for an order pursuant to General Municipal Law § 209-5), granting leave to serve a late notice of claim upon proposed defendant, The City of New York (the City), and for an order pursuant to CPLR 3025 granting leave to amend the complaint to add the City as a defendant. The City opposes the motion, and defendant Consolidated Edison of New York, Inc. (Con Ed), submits no papers in response to the motion.

The accident underlying this action occurred on February 18, 2006, when plaintiff alleges she tripped and fell the street in front of 275 West 115th Street in Manhattan, due to a trench in the street. Plaintiff alleges that as a result of the accident, she injured her left knee, underwent surgery on April 6, 2006, and received physical therapy from April 19, 2006 to July 13, 2006. She also alleges that her treating physician advised her not to return to work until August 27, 2006.

Meanwhile, on July 10, 2006, plaintiff retained an attorney. In August 2006, plaintiff's attorney submitted a FOIL request to the New York City Department of Transportation ("DOT") for "[a]ll permits, applications for permits, cut forms, contracts issued to contractors or

Consolidated Edison regarding any work conducted in the street at or near the address of 275 West 115th Street, New York, New York for a period of two years prior to February 18, 2006.” By letter dated August 29, 2006, DOT acknowledged the FOIL request, and on or about September 5, 2005, DOT provided various computer print-outs which, according to plaintiff’s counsel, show that Con Ed, Division of Design and Construction of the City of New York and the Department of Transportation performed work at or near the location of plaintiff’s accident.

On November 15, 2006, plaintiff commenced this action for damages for personal injuries, naming Con Ed as the only defendant, and a preliminary conference was held on March 1, 2007. On March 15, 2007, plaintiff submitted the instant order to show cause seeking leave to serve a late notice of claim against the City and to amend the complaint to add the City as a defendant. In support of the motion, plaintiff’s counsel asserts that since the City did not provide the cut forms sought in the FOIL request, based on the documents the City has provided, “it is entirely possible that the Department of Transportation or a contractor hired by the New York City Division of Design and Construction was responsible for the trench” which caused plaintiff’s accident.

General Municipal Law §50-e(1)(a) requires a complainant to serve a notice of claim on a public corporation within 90 days after the claim arises. See Williams v. Nassau County Medical Center, 6 NY3d 531, 535 (2006); Rivera v. New York City Housing Authority, 25 AD3d 450, 451 (1st Dept 2006). Pursuant to GML §50-e(5), the court in its discretion may extend the time to serve a notice of claim. See Williams v. Nassau County Medical Center, *supra*; Rivera v. New York City Housing Authority, *supra*. An application to serve a late notice of claim must be made before or after the commencement of an action, but not more than one year and 90 days

after the cause of action accrued, unless the statute of limitations has been tolled. GML §50-e(5); GML §50-I; Campbell v. City of New York, 4 NY3d 200 (2005). In determining whether to grant leave to serve a late notice of claim, various factors are considered, including whether plaintiff has demonstrated a reasonable excuse for failing to serve a timely notice of claim, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the public corporation in maintaining its defense. See Alexander v. City of New York, 2 AD3d 332 (2003); Rivera v. New York City Housing Authority, *supra*; The presence or absence, however, of any one factor is not necessarily dispositive. See Matter of Nayyar v. Board of Education of the City of New York, 169 AD2d 628, 629 (1st Dept 1991).

Here, plaintiff fails to make a sufficient showing to warrant late filing of a notice of claim. Plaintiff fell on February 18, 2006, but did not make the instant application until thirteen months later on March 15, 2007. She attributes the delay to the “disabling injury” she sustained in the fall, and submits an affidavit that she did not hire an attorney until July 10, 2007, because prior to that time, she was “more concerned with being able to retain the ability to ambulate than with bringing an action against any of the parties for a leaving the trench unguarded and unpaved” and that not until she finished physical therapy in July, was she “able to walk around without assistance and I sought the advice of an attorney.” Plaintiff also submits medical records indicating she suffered from a torn meniscus of the left knee, and that surgery was performed on April 6, 2006, followed by physical therapy. Even assuming without deciding that plaintiff had a “disabling injury” which might reasonably explain a short delay in filing, see Silva v. City of New York, 246 AD2d 465 (1st Dept 1998), she nevertheless fails to account for the

additional eight-month delay from the time she retained counsel in July 2006 and made the instant application in March 2007. When the attorney was hired on July 10, 2006, nearly two months had passed since the May 19, 2006 deadline for filing a notice of claim, yet no steps were taken then or shortly thereafter to preserve plaintiff's potential rights against the City, as the owner of the public street where plaintiff fell.

Plaintiff also makes no showing that the City had actual knowledge of the essential facts constituting the claim within 90 days of the accident, or a reasonable time thereafter. See Chattergoon v. New York City Housing Authority, 161 AD2d 141 (1st Dept 1990), aff'd 78 NY2d 958 (1991). Plaintiff merely asserts that the City is in possession of all documents relating to work performed on the street by itself or any other entity. However, that fact alone is insufficient to establish that the City had actual knowledge of plaintiff's accident, injury or intent to file a lawsuit.

As to the third factor, prejudice to defendant City, thirteen months have passed between the date of the accident and the instant application. As a result, the City has been deprived of an opportunity to examine and investigate the allegedly dangerous condition at or around the time of the incident. The purpose of a notice of claim is to allow the public corporation an opportunity to conduct a prompt investigation of the facts and preserve relevant evidence. See Beary v. City of Rye, 44 NY2d 398, 412 (1978). Moreover, it is unlikely that witnesses' memory would remain fresh due to the substantial length of time that has elapsed, and it is also unlikely that the trench exists or even if it does exist, it is in substantially the same condition as on the date of the accident. See Alexander v. City of New York, supra; Rivera v. New York City Housing Authority, supra; Seif v. City of New York, 218 AD2d 595, 597 (1st Dept 1995). Although

plaintiff's counsel asserts that the "defect is non-transitory in nature," plaintiff submits no affidavit stating or photograph showing that the condition of the street with the trench remains unchanged since the day of the accident.

Thus, under the circumstances presented, plaintiff has not made a sufficient showing to permit late filing of a notice of claim. As a notice of claim is a condition precedent to maintaining an action against the City, plaintiff's motion to add the City as a party-defendant is denied. See Davidson v. Bronx Municipal Hospital, 64 NY2d 59 (1984); Kovachevich v. New York City Housing Authority, 295 AD2d 255 (1st Dept 2002).

Accordingly, it is hereby

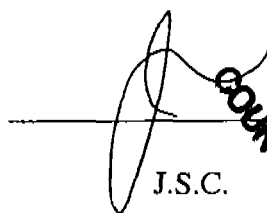
ORDERED that plaintiff's motion for leave to serve a late notice of claim against The City of New York and for leave to amend the complaint to add The City of New York as a defendant, is denied; and it is further

ORDERED that the parties are directed to appear for the compliance conference previously scheduled for June 28, 2007, at 9:30 am, Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: May 15, 2007

ENTER:


J.S.C.

FILED
MAY 30 2007
NEW YORK
COUNTY CLERK'S OFFICE