

Pena v City of New York
2007 NY Slip Op 31395(U)
May 21, 2007
Supreme Court, New York County
Docket Number: 0114493/2006
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Judge

PART 17

Index Number : 114493/2006

PEÑA, GRIPLIANO

INDEX NO. _____

vs
CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

LEAVE SERVE LATE NOT. OF CLAIM

MOTION CAL. NO. _____

_____ read on this motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied*
as attached

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 4024).

Dated: 5/21/07

[Signature]
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

-----X
GRIPLIANO PEÑA,

Petitioner,

Index No.
114493/06

-against-

THE CITY OF NEW YORK,

Respondent

-----X
EMILY JANE GOODMAN, J.S.C.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 112).

Petitioner Gripliano Peña (Peña) petitions this court, pursuant to General Municipal Law (GML) § 50-e (5), for leave to file a late notice of claim against respondent The City of New York (the City). Peña served the City with a notice of claim, photographs and a cover letter on September 7, 2006. The notice of claim, which was stamped "received" by the City Comptroller's office on September 11, 2006, was rejected by the City for being late.

Peña alleges that he was injured on February 14, 2006, due to a defective sidewalk/curb that was hidden by snow. Peña did not serve his notice of claim upon the City within 90 days after the accident, as is required under GML § 50-e (1) (a). Thus, he now applies for leave to serve a late notice of claim, pursuant to GML § 50-e (5). The court, in its discretion, may grant or deny the application. The main factors the court must consider in determining whether to grant leave are: whether there is a reasonable excuse for failure to serve a timely notice of claim; whether the City acquired actual knowledge of the essential facts constituting the claim within 90 days after it arose or a reasonable time thereafter; and whether the delay in serving the notice of claim would substantially prejudice the City in maintaining its defense on the merits. Matter of Dubowy v City

of New York, 305 AD2d 320, 321 (1st Dept 2003). “[T]he presence or absence of any one factor is not determinative, and the absence of a reasonable excuse is not fatal.” *Id.* (citations omitted).

Peña states that the 90-day period expired on May 14, 2006, and that he served his notice of claim less than four months later. He argues that, under the circumstances, the City received notice “within a reasonable time” after the 90-day period. Peña further maintains that the delay did not substantially prejudice the City in its defense.

Peña contends that the snow on the ground at the time of the accident covered and hid the defect, but that, because snow is transitory, even if he had filed a timely claim within 90 days, the City would not have seen the conditions as they existed on February 14, 2006. He asserts that the records as to weather and snow removal, however, are available. Peña argues that there is no prejudice to the City, because timely notice of a snow claim would not have made any difference, and that the delay of almost four months beyond the 90-day period is relatively short. Thus, he asserts that it would be a proper exercise of discretion for this court to grant the instant petition.

Peña states that a Big Apple Prior Notification Map with the sidewalk/curb defect noted was filed in October 2003, nearly three years before the incident. Thus, Peña states that the City had prior notice of the defect, although it was covered by snow on the date of the accident. Furthermore, Peña asserts that, because the defect has not been repaired and remains unchanged, it can still be inspected. Peña is aware of one eyewitness to his accident, who he names in the papers submitted in support of his instant petition, and he states that she may be interviewed if the City so desires.

It is undisputed that Peña failed to offer a reasonable excuse, or any excuse, for the delay. The City further asserts that it did not acquire actual knowledge of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter. The City disputes Peña's assertion that a Big Apple Map was enough to satisfy the statute's requirements, because the issue before the court is not whether the City had notice of a sidewalk defect, but rather whether the City had knowledge of the essential facts forming the basis of the negligence claim.

Finally, the City argues that it has been substantially prejudiced by Peña's delay. The City points out that Peña has the burden of showing that the City will not be prejudiced. The City asserts that a delay such as the one herein creates "a very real danger that changed conditions would prevent an accurate reconstruction of the circumstances existing at the time the accident occurred." Matter of Perry v City of New York, 133 AD2d 692, 693 (2d Dept 1987). Furthermore, the City maintains that, due to the delay, it "has been denied the opportunity ... to locate and examine witnesses while their memories of the facts were still fresh." Matter of Gilliam v City of New York, 250 AD2d 680, 681 (2d Dept 1998).

The City argues that Peña is not an expert qualified to state, as he does in his affidavit, that the sidewalk defect appeared to be the same on the date he filed his petition as it did several months earlier. The City contends that the alleged defect could have continued to deteriorate over time beyond its alleged condition in February of 2006. Thus, the City asserts that to grant Peña leave to serve a late notice of claim would frustrate the purpose of the law.

Peña disputes the City's contention that he has failed to establish any of the factors favoring a grant of his application. Peña states that the City had actual knowledge of the "essential facts constituting the claim" less than four months after the 90-day cutoff when petitioner served his

notice of claim. He points out that the City sent an acknowledgment that it received the claim on September 20, 2006.

According to Peña, the City's knowledge of the defect nearly three years before the accident, plus actual knowledge of the essential facts of the case within a reasonable time period after the 90-day cutoff weigh in favor of granting his application.

Peña further contends that the City has failed to demonstrate that its defense has been prejudiced. Pena again points out that the snow covering the large hole in the sidewalk was a transitory condition that "would not have remained for defendants' investigation even if plaintiffs' notices had been timely filed." Gamoneda v New York City Bd. of Educ., 259 AD2d 348, 348-49 (1st Dept 1999); Williams v City of New York, 229 AD2d 114, 116 (1st Dept 1997) (where alleged negligence is based on a transitory condition such as snow and ice, condition will have changed or disappeared by time notice of claim filed, even within the statutory period). In the instant case, the alleged negligence is not due to snow alone, but rather to snow covering a defect in the sidewalk/curb. The City had notice of the defect more than three years prior to Peña's alleged accident.

The purpose of the notice of claim requirement in GML § 50-e is "to protect the municipality from unfounded claims and to ensure that it has an adequate opportunity 'to explore the merits of the claim while information is still readily available'." Matter of Porcaro v City of New York, 20 AD3d 357, 357 (1st Dept 2005), quoting Teresta v City of New York, 304 NY 440, 443 (1952). "The statute, however, is not intended to operate as a device to frustrate the rights of individuals with legitimate claims." Matter of Porcaro, *supra* at 358. "The statute is remedial in nature and, therefore, *should be liberally construed*." Id. (emphasis added).

While Peña has not offered an excuse for his delay, his serving of a notice of claim less than four months after the expiration of the 90-day period, followed by the serving of the instant petition approximately two months later, is a reasonable time after the 90-day period. Furthermore, there is no substantial prejudice to the City's defense, given that the Big Apple Map provided notice of the defect more than three years prior to the alleged accident (see Febles v City of New York, 15 AD3d 248 [1st Dept 2005]), and given that the transitory snow conditions would not have remained in existence even if Peña had filed his notice of claim within the 90-day statutory period. Further, although the City maintains that the condition could have deteriorated over time, Peña's affidavit, and attached photos, which according to Peña were taken two days after the accident, depict the condition at that time. Thus, the application is granted and Peña is permitted to file a late notice of claim.

Accordingly, it is

ORDERED and ADJUDGED that the petition to file a late notice of claim is granted and the notice of claim in the proposed form annexed to the moving papers is deemed timely served, nunc pro tunc, upon service of a copy of this Decision, Order and Judgment, with notice of entry, on respondent.

This constitutes the Decision, Order and Judgment of the Court.

Dated: May 21 , 2007

ENTER:

UNFILED JUDGMENT
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).
 E.J.G.
 EMILY JANE GOODMAN