

Matter of Norwood v New York City Tr. Auth.
2007 NY Slip Op 32140(U)
July 3, 2007
Supreme Court, Queens County
Docket Number: 0011591/2007
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 22

In the Matter of the Application of
CALVIN NORWOOD to file a late notice
of claim
Petitioner,
-against-
NEW YORK CITY TRANSIT AUTHORITY,
Respondent.

Index No. 11591/07
Motion
Date June 19, 2007
Motion
Cal. No. 7
Motion
Sequence No. S001

The following papers numbered 1 to 9 read on this order to show cause by petitioner, Calvin Norwood for leave to serve a late Notice of Claim.

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affidavits-Exhibits.....	1-5
Affirmation in Opposition.....	6-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that petitioner's application for leave to serve a late Notice of Claim is denied (see, General Municipal Law § 50-e[1][a]). It is within the Court's discretion to extend the time to serve a Notice of Claim (*In the Matter of Nahema Canty v. City of New York*, 273 AD2d 467 [2d Dept 2000]). "The key factors to be considered in determining whether to grant an application to serve a late Notice of Claim are whether the [governmental unit or its attorneys or its insurance carrier] acquired actual knowledge of the essential facts of the claim within the statutory 90-day period, whether the petitioners had a reasonable excuse for the delay, and whether the delay would substantially prejudice the [governmental unit or its attorneys or its insurance carrier] in its defense on the merits." (*Matter of "Jane Doe" v. Hicksville Union Free School District*, 24 AD3d 666 [2d Dept 2005]; General Municipal Law § 50-e[5]; *Fox v. City of New York*, 91 AD2d 624 [2d Dept 1982]).

In the underlying action, petitioner, Calvin Norwood seeks to recover from respondent, New York City Transit Authority ("NYCTA") for personal injuries suffered as a result of an accident occurring on February 14, 2006 when he allegedly "was on the platform of the Jamaica Center Parson/Archer station of the 'J' train when he was caused to fall on loose cracked bricks on the platform." Pursuant to General Municipal Law § 50-e, petitioner's time to file a Notice of Claim expired 90 days after February 14, 2006. Petitioner brought the instant Order to Show Cause on May 21, 2007.

Actual Knowledge of Essential Facts Underlying Claim Within 90-Day Statutory Period

Petitioner maintains that NYCTA had actual knowledge of the essential facts underlying the claim on the day of the accident. The NYCTA Police allegedly filed an aided report on the date of the accident, which report indicated the time and location of the accident, indicated that plaintiff slipped, fell, and broke his right knee, and was taken via EMS to Mary Immaculate Hospital, and indicated the police officer who responded to the scene (Richard Coleman). Additionally, petitioner asserts that photographs of the scene of the accident reveal that work was done on the platform on the spot where petitioner fell. Also, petitioner identified an employee of the NYCTA who was at the scene of the accident. Finally, petitioner contends that actual knowledge was imparted since the NYCTA was in receipt of an aided report prepared by its own police officer, and it will have records regarding the repair work done on the platform.

NYCTA asserts that it did not acquire any knowledge about the potential claims until the instant Order to Show Cause which was filed fifteen months after the alleged accident occurred. It maintains that it has no accident or incident reports on file prepared by any of its employees relating to this alleged occurrence imputing any negligence on its behalf, or any knowledge of petitioner's medical or other claims. NYCTA states: "It is well settled law that an accident report which fails to connect an accident with any negligence on the part of a public corporation does not furnish any actual knowledge of the essential facts constituting the claim within the meaning of the statutory Notice of Claim requirements." NYCTA further asserts that the NYC Police Aided Report was prepared by an employee of *the New York City Police Department*, which has been an entirely separate and distinct entity from the *New York City Transit Authority* since April 1995. Additionally, NYCTA contends that Police Officer Richard Coleman is not an employee of the NYCTA

and so any police reports filed in connection with the incident would be exclusively in the police department's possession and jurisdiction. Finally, NYCTA concludes that photographs depicting repair work and or repair records kept by the NYCTA could not apprise the NYCTA that an accident took place or of the nature of petitioner's potential claims.

This Court finds that the NYCTA did not have actual knowledge of the essential facts underlying the claim within the 90-day statutory period or within a reasonable time thereafter. The Appellate Division, Second Department has held that this factor "should be accorded great weight." (see, *In the Matter of Nahema Canty v. City of New York*, *supra*). NYCTA asserts that it had no notice as to the accident until more than fifteen months after its alleged occurrence. It is undisputed that petitioner failed to file any incident or accident reports with the New York City Transit Authority, as opposed to with the New York City Police Department, an entirely separate entity. Also, *assuming arguendo* that the NYCTA had workers at the scene of the accident, such presence does not provide adequate notice to the NYCTA of the essential facts constituting the claim. "[What satisfies the statute is not knowledge of the alleged wrong, but rather, knowledge of the nature of the claim." (*Matter of Shapiro v. Nassau*, 208 AD2d 545 [2d Dept 1994]). An accident report which fails to connect an accident with any negligence on the part of the public corporation does not serve to provide actual knowledge of the essential facts constituting the claim pursuant to the meaning of the statutory Notice of Claim requirements (see, *Matter of Morris v. County of Suffolk*, 88 AD2d 956 [2d Dept 1982], *Fox v. City of New York*, 91 AD2d 624 [2d Dept 1982]; *Caselli v. City of New York*, 105 AD2d 251 [2d Dept 1984]). As such, no actual or constructive notice can be said to be imputed to the NYCTA. Finally, photographs depicting repair work done to the platform area and repair records could not have served to provide actual or constructive notice that an accident took place at the scene. Accordingly, petitioner has failed to demonstrate that NYCTA had actual knowledge of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter.

Reasonable Excuse for the Delay

Petitioner and petitioner's counsel maintains that petitioner was unaware of the 90-day requirement and also unaware during the 90-day period of the seriousness and permanency of his injury, and that when he was discharged from the emergency room of Mary Immaculate Hospital he was not informed that his knee

injury was serious. Petitioner maintains that it was only after his consultation with Dr. Allen on April 17, 2006, when Dr. Allen told him he would need future surgery including a knee replacement that he realized the seriousness of his injury.

NYCTA argues that petitioner has failed to offer any reasonable excuse for the delay. First, NYCTA asserts that petitioner failed to present any objective proof, such as medical affidavits, to substantiate the injury; and has failed to allege in what manner petitioner's unawareness of the extent of his injuries prevented him from filing a timely Notice of Claim. Next, NYCTA argues that ignorance of the 90-day requirement is no excuse, citing, (*Weber v. County of Suffolk*, 208 AD2d 527 [2d Dept 1994]; *Matter of Light v. County of Nassau*, 187 AD2d 770 [2d Dept 1992]).

This Court finds that petitioner has sufficiently explained the delay in filing the application for leave to serve a late notice of claim. First, the petitioner proffers the excuse of ignorance of the law and failure to promptly contact an attorney. The Appellate Division, Second Department has held that such explanations fail to constitute a reasonable excuse for the delay, and do not exonerate petitioner from compliance with the statute (*see, Matter of Easy v. City of New York*, 204 AD2d 720 [2d Dept 1994]; *see also, Weber v. County of Suffolk, supra; Light v. County of Nassau, supra; Matter of Gorman v. City of New York*, 268 AD2d 588 [2d Dept 2000]; *Matter of Rabin v. City of New York*, 222 AD2d 678 [2d Dept 1995]). However, petitioner also argues that he did not know the seriousness and permanency of his injury until approximately December 2006. He states that the doctors at Mary Immaculate Hospital and subsequent doctors minimized the injury, that he received mixed signals in his medical treatment regarding the injury, and that it wasn't until he met with another doctor in December 2006 regarding future knee replacement that the seriousness of his injury became apparent. Courts have held such to be a reasonable excuse (*see Matter of Gabriel Lopez v. New York City Housing Authority*, 235 AD2d 492 [1st Dept 1996]; *Swanson v. City of New York*, 126 AD2d 499 [1st Dept 1987]; *Matter of Greene v. Rochester Housing Authority*, 273 AD2d 895 [4th Dept 2000]; *More v. General Brown Central School District*, 262 AD2d 1030 [4th Dept 1999]). Accordingly, petitioner has provided a reasonable excuse for the delay.

Substantial Prejudice as a Result of the Delay

Petitioner asserts that there is a lack of prejudice to the defendant as a result of the delay. The NYCTA Police filed an

aided report on the date of the accident, which report indicated the time and location of the accident, that plaintiff slipped, fell, and broke his right knee, that petitioner was transported by EMS to Mary Immaculate Hospital, and that a police officer responded to the scene (Richard Coleman). Additionally, petitioner asserts that photographs of the scene of the accident reveal that work was done on the station platform at the location where petitioner fell. Petitioner contends that all of the information is more than sufficient for the NYCTA to conduct an investigation without any prejudice. Also, petitioner identified an employee of the NYCTA who was at the scene of the accident and supplied a physical description. Finally, petitioner concludes that since the NYCTA was in receipt of an aided report prepared by its own police officer, and will have records regarding the repair work done on the platform, there will be no prejudice to defendant, *citing, Johnson v. New York City Transit Authority*, 278 AD2d 83 (1st Dept 2000); *Rao v. Triborough Bridge and Tunnel Authority*, 223 AD2d 374 (1st Dept 1996).

NYCTA argues that it was not afforded an opportunity to investigate promptly the incident with an eye towards future litigation. NYCTA maintains that had petitioner filed a timely Notice of Claim, NYCTA would have immediately been able to "locate and interview witnesses, conduct a statutory hearing and interview its own employees for knowledge while memories are still fresh." NYCTA contends that it could have conducted statutory hearings of petitioner and pursued witnesses more aggressively, and that it would have attempted to obtain medical records and reports before they were lost or destroyed. Finally, plaintiff contends that the mere passage of time which has prevented a prompt investigation has been held sufficient to constitute prejudice, *citing, Phillips v. New York*, 415 NYS2d 349, Sup Ct. Kings Co., (1979).

This Court finds that the delay would substantially prejudice the NYCTA in maintaining its defense on the merits. The delay of over fifteen months from the time the claim arose until the instant motion was brought substantially prejudiced the NYCTA's ability to investigate the accident scene as well as other circumstances surrounding the accident (*Matter of Konstantinides v. City of New York*, 278 AD2d 235 [2d Dept 2000][an over six-month delay was held to be substantially prejudicial]). Under the circumstances, "the New York City Transit Authority was clearly prejudiced by not being able to conduct a proper investigation while the facts surrounding the incident were still fresh." (*Illera v. New York City Transit Authority*, 181 AD2d 658 [2d Dept 1992]). The NYCTA was not given a sufficient opportunity to "timely and efficiently" investigate

the merits of the claim (*Matter of Light v. County of Nassau*, 187 AD2d 720 [2d Dept 1992]); see also, *Pelican v. New York City Transit Authority*, 225 AD2d 750 [2d Dept 1996]) stating, "[prompt and accurate information is especially important in cases involving a defective condition which is transitory in nature . . .]" (see also, *Phillips v. City of New York*, 415 NYS2d 349 [Sup. Ct., Kings Co. 1979] [holding the mere passage of time preventing a prompt investigation has been held to constitute prejudice to municipalities]; *Matter of Perry v. City of New York*, 133 AD2d 692 [2d Dept 1987] [holding a 14-month delay was substantially prejudicial]; *Pappalardo v. City of New York*, 2 AD3d 699 [2d Dept 2003] [holding a 15-month delay was substantially prejudicial]).

Conclusion

In conclusion, the petitioner has failed to establish that the respondent had actual knowledge of the essential facts underlying the claim within the statutory 90-day period or a reasonable time thereafter, and has failed to establish that respondent would not be substantially prejudiced in defending the claim on the merits. Accordingly, under the circumstances, petitioner's application is denied.

The foregoing constitutes the decision and order of this Court.

Dated: July 3, 2007

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Howard G. Lane, J.S.C.