

State Farm Mut. Auto. Ins. Co. v New York City Tr. Auth.
2007 NY Slip Op 32276(U)
July 19, 2007
Supreme Court, Queens County
Docket Number: 0010245/2007
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

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY a/s/o HYUK JUNG,
Petitioner,

Index No. 10245/07
Motion
Date July 17, 2007

-against-

NEW YORK CITY TRANSIT AUTHORITY,
Respondent.

Motion
Cal. No. 15
Motion
Sequence No. E001

The following papers numbered 1 to 7 read on this application by petitioner for leave to serve a late Notice of Claim.

	<u>PAPERS NUMBERED</u>
Notice of Petition-Affidavits-Exhibits.....	1-4
Affirmation in Opposition.....	5-7

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, State Farm Mutual Automobile Insurance Company ("State Farm") a/s/o Hyuk Jung seeks to recover from respondent, New York City Transit Authority ("NYCTA") for personal injuries suffered as a result of an

accident occurring on September 16, 2006, when the subrogor's vehicle was allegedly struck by respondent's vehicle. Pursuant to General Municipal Law § 50-e, petitioner's time to file a Notice of Claim expired 90 days after September 16, 2006. Petitioner states that State Farm wrongly served a Notice of Claim by certified mail, return receipt requested, on or about October 11, 2006 at the New York City Comptroller's Office.

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

Petitioner maintains that the NYCTA had actual knowledge of the automobile accident through the involvement of its employed driver in the operation of the subject vehicle. Respondent also attaches a Police Accident Report to its moving papers.

NYCTA asserts that it did not acquire any knowledge about the potential claims until the instant Order to Show Cause which was served eight months after the alleged accident occurred. It maintains that although petitioner argues that his purported Notice of Claim was served upon the New York City Comptroller's Office by certified mail on October 11, 2006, respondent was not in receipt of such until May 2, 2007. Respondent also asserts that the New York City Comptroller's Office is a separate and distinct entity from the NYCTA and therefore has its principal place of business which is designated to receive such service, in an entirely different location from the latter. Additionally, respondent maintains that with regards to any reports that may have been filed about the incident, "it is well settled law that knowledge of an employee of the public corporation cannot be considered actual knowledge to the public corporation itself regarding the essential facts of a claim and that a police report or accident report which fails to connect an accident with any negligence on the part of a public corporation does not furnish actual knowledge of the essential facts constituting the claim within the meaning of the statutory Notice of Claim requirements." Respondent concludes that since the NYCTA is a separate and distinct entity from the City of New York and the New York City Police Department, and as such, the NYCTA could not possibly be alerted to the petitioner's 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 eight months after its alleged occurrence. Petitioner does not state that he filed 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, the fact that the driver of the NYCTA vehicle was involved in the accident, does not provide adequate notice to the NYCTA of the essential facts constituting the claim. "[W]hat 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]). Furthermore, 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. 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 maintain that in serving the Notice of Claim an excusable error was made concerning the identity of the public corporation against which the Claim should be asserted, in that the New York City Comptroller's Office was the wrong party served, and the NYCTA is the party that should have been served.

Respondent asserts that the petitioner has failed to provide a satisfactory explanation for the delay in filing his Notice of Claim timely. Respondent contends that petitioner has failed to set forth any legally valid excuse or compelling circumstance to permit a late Notice of Claim to be served.

This Court finds that petitioner has sufficiently explained the delay in filing the application for leave to serve a late Notice of Claim. The petitioner proffers the excuse of incorrectly serving the New York City Comptroller's Office instead of the NYCTA. Pursuant to General Municipal Law § 50-e(5), in determining whether permission to file a late Notice of Claim should be granted, one of the factors a Court shall consider is "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." (See also, *Medley v. Cichon*, 305 AD2d 543 [2d Dept 2003]). This Court finds that petitioner has provided a reasonable excuse for the delay, in that an excusable error was made concerning the identity of the NYCTA.

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. Petitioner states that respondent will have a meaningful opportunity to perform an investigation of the facts and circumstances and will not be hampered in its discovery of the conditions of the accident which is not of a transitory nature. Petitioner concludes that respondent can use the discovery process to investigate, acquire, and assess the facts of the case.

Respondent contends that petitioner has failed to show how the respondent would not be prejudiced when it had no means to promptly investigate the claims, and in light of the discovery process being dwarfed due to the petitioner's faulty actions in effectuating service upon an improper entity. Respondent also cites to case law which states that where a petitioner fails to show countervailing circumstances, lack of prejudice cannot be asserted on a motion to file a late Notice of Claim, *citing Phillips v. New York*, 415 NYS2d 249 (Sup. Ct. Kings Co. 1979). The NYCTA asserts that it was not given an opportunity to investigate promptly and adequately with an eye towards future litigation. The NYCTA asserts that it was deprived of an opportunity "to locate and interview witnesses, conduct statutory hearings and interview its own employees for knowledge while memories [were] still fresh." The respondent concludes that it would have tried to verify lost earnings and obtain medical reports and hospital records before such records are possibly lost, discarded, or destroyed.

This Court finds that the delay would substantially prejudice the NYCTA in maintaining its defense on the merits. The delay of eight 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]; *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]).

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 19, 2007

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Howard G. Lane, J.S.C.