Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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EDWARD WNETRZAK and MALGORZATA WNETRZAK,
Plaintiffs,

- against -

V.C. VITANZA SONS INC., THE NEW YORK CITY HOUSING AUTHORITY, and THE CITY OF NEW YORK,
Defendants.

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Index Number: 21845/06

Motion Date: June 26, 2007

Motion Cal. Number: 31

Motion Seq. No. 1

The following papers numbered 1 to 15 read on this motion by plaintiffs for an order granting an extension of time to serve the summons and complaint upon defendant New York City Housing Authority (hereinafter the NYCHA) and for an order deeming the late notice of claim served upon the NYCHA timely served nunc pro tunc and cross-motion by defendants Housing Authority and the City of New York for summary judgment, pursuant to CPLR 3212 or, in the alternative, to dismiss the complaint as against them pursuant to CPLR 3211(a)(5).

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition to Motion-Exhibits.....	5-6
Notice of Cross-Motion-Affirmation-Exhibits.....	7-10
Affirmation in Opposition to Cross-Motion-Exhibits.	11-13
Reply Affirmation.....	14-15

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiffs for an order granting an extension of time to serve the summons and complaint upon the NYCHA and for an order deeming the late notice of claim served upon the NYCHA timely served nunc pro tunc is denied.

Cross-motion by the NYCHA and the City for summary judgment

dismissing the complaint against them for failure of plaintiffs to file a timely notice of claim, pursuant to General Municipal Law §50-e and New York Public Housing Law §157, and for failure to state a cause of action is granted and the complaint is hereby dismissed as against the NYCHA and the City.

Plaintiff, Edward Wnetrzak, allegedly sustained injuries while performing interior renovation work at the Marlboro Houses, owned by the NYCHA, in Kings County on August 8, 2005. In his deposition, plaintiff alleges that in the course of framing a bathroom, he was removing debris from the ceiling. He stated that renovation work always commences with the ceiling. The ceiling had not been completely demolished, so he removed some loose concrete. However, there was a piece of metal left in the ceiling, which he attempted to remove by hooking his hammer on it and trying to pull it loose. He yanked on the metal hard and felt a crack in his shoulder muscle. The injuries he alleges are to his right shoulder and arm muscles. Plaintiff claims that defendants are liable for his injuries pursuant to Labor Law §§200, 240, 241, 241-a and 241(6).

Plaintiffs filed a notice of claim with the NYCHA either on August 11, 2006 (as plaintiffs' counsel asserts) or on August 14, 2006 (as counsel for the NYCHA asserts). The certified mail receipt that plaintiffs annex to their motion papers does not have a visible date. The notice of claim annexed to the cross-moving papers bears a stamp indicating that it was received by the NYCHA on August 15, 2006. Nevertheless, it is immaterial whether the notice of claim was filed with the NYCHA on August 11 or 14, 2006.

It is undisputed that plaintiffs did not file a notice of claim with the City.

Plaintiffs filed the summons and complaint with the Queens County Clerk on October 6, 2006 but did not serve the NYCHA until March 6, 2007.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). All the provisions of General Municipal Law §50-e are also applicable to the NYCHA by virtue of Public Housing Law §157(2). The notice of claim herein was served upon the NYCHA on either August 11 or 14, 2006, over one year after plaintiffs' claim arose on August 8, 2006 and over 9 months past the ninety-day deadline for filing a notice of claim. No notice of claim was filed with the City.

Plaintiffs' counsel, in his affirmation in support of the motion, offers as an excuse for plaintiff's failure to file a timely notice of claim upon the NYCHA that plaintiff did not speak English, did not understand his rights and as a result of psychological ailments that he suffered as a result of the accident was unable to seek the advice of counsel within the 90-day period. In addition, counsel argues that even though the NYCHA was served with the notice of claim beyond the statutory deadline, it nevertheless, by virtue of having received the notice of claim, albeit late, acquired actual knowledge of the claim and thus would not be prejudiced by allowing the late notice. Finally, counsel alleges law office failure for the neglect to serve the NYCHA with the summons and complaint. Counsel's arguments are without merit.

An action against a municipality or municipal corporation or against the NYCHA must be commenced within one year and 90 days after the date plaintiff's cause of action accrued, which is the date the event occurred upon which plaintiff's claim is based (see General Municipal Law § 50-i; Public Housing Law §157[2]). Since plaintiff's cause of action accrued on August 8, 2005, plaintiff would have had to commence a proper action against the City no later than November 6, 2006.

Plaintiff's counsel contends that since an action is commenced by filing and the summons and complaint was filed on October 6, 2006, the action was timely commenced within the one year and 90-day limitation period. Counsel's argument is without merit.

The untimely service of the notice of claim upon the NYCHA on August 11 or 14, 2006 without leave of court was a nullity (see Chicara v, City of New York, 10 AD 2d 862 [2nd Dept 1960, appeal denied 8 NY 2d 1014 [1960]; Wollins v. NYC Board of Education, 8 AD 3d 30 [1st Dept 2004]). Therefore, the instant action, though filed within the one year and 90 day limitation period, was never properly commenced and is now time-barred (see Davis v. City of New York, 250 AD 2d 368 [1st Dept 1998]). The Court has no authority to allow a late notice of claim after the expiration of the one year and 90-day statute of limitations (see Hochberg v. City of New York, 63 NY 2d 665 [1984]).

Consequently, there is also no basis for the granting of an extension of time to serve the summons and complaint. Pursuant to CPLR 306-b, service of the summons and complaint must be made (except in cases where the statute of limitations is four months or less) within 120 days after the filing. Although the Court, in its discretion, for good cause shown, may allow late service of the summons and complaint beyond 120 days after the filing thereof (see CPLR 306-b), since the summons and complaint that was filed herein

was a nullity, no action was commenced and, thus, there was no service period to extend (see Gonzalez v. New York City Health and Hospitals Corporation, 29 AD 3d 369 [1st Dept 2006]).

Therefore, since plaintiff failed to serve a timely notice of claim and failed to seek leave to file a late notice of claim within the one year and 90-day limitation period, this action must be dismissed as against the NYCHA.

The Court only has the discretionary authority to allow the filing of a late notice of claim within the period of limitation for commencing tort actions against a municipality (see General Municipal Law § 50-e[5]; Pierson v. City of New York, 56 NY 2d 950 [1982]). Inasmuch as the statute of limitations for commencement of an action has expired, this Court is without authority to allow the filing of a late notice of claim, which is merely a predicate to commencement of an action against the NYCHA.

Therefore, counsel's argument that the NYCHA acquired actual knowledge of the claim by virtue of the late notice of claim is irrelevant (see Pierson v. City of New York, supra; see, e.g., Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]).

As to the City, plaintiffs neither served a notice of claim upon the City nor do they seek leave to file a late notice of claim upon the City nor do they oppose that branch of the cross-motion seeking dismissal of the complaint against the City. Plaintiffs entirely fail to address the City, either in their motion or their opposition papers to the cross-motion.

The NYCHA is a separate and distinct entity not united in interest with the City and, therefore, notice to the NYCHA cannot be imputed to the City (see Torres v. New York City Housing Authority, 261 AD 2d 273 [1st Dept 1999]). Therefore, for the reasons heretofore stated with respect to the NYCHA, since plaintiffs have failed to comply with the notice of claim requirement of General Municipal Law §50-e, which is a condition precedent to commencement of an action against the City, the summons and complaint against the City is a nullity and must be dismissed. Even had plaintiffs timely served a notice of claim and timely commenced the underlying action against the City, the complaint fails to state a cause of action against the City. Plaintiffs neither allege that the City was the owner of or in any way connected with Marlboro Houses nor that it was plaintiff's employer.

Accordingly, the motion is denied and the cross-motion is granted, and the complaint is dismissed as against the NYCHA and the City.

Dated: July 18, 2007

KEVIN J. KERRIGAN, J.S.C.