

Matter of Shipman v New York City Tr. Auth.
2007 NY Slip Op 32699(U)
August 16, 2007
Supreme Court, Queens County
Docket Number: 0016632/2007
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
EVELYN SHIPMAN,
Petitioner,

Index No. 16632/07
Motion
Date August 14, 2007

-against-

NEW YORK CITY TRANSIT AUTHORITY,
Respondent.

Motion
Cal. No. 3
Motion
Sequence No. S001

The following papers numbered 1 to 6 read on this application by petitioner for leave to serve a late Notice of Claim.

PAPERS
NUMBERED

Order to Show Cause-Affidavits-Exhibits..... 1-4
Affirmation in Opposition..... 5-6

Upon the foregoing papers it is ordered that petitioner's application for leave to serve a late Notice of Claim is granted (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, Evelyn Shipman seeks to recover from respondent, New York City Transit Authority ("NYCTA") for personal injuries suffered as a result of

a motor vehicle accident occurring at the intersection of Linden Boulevard and Merrick Boulevard in the County of Queens, City and State of New York on May 23, 2006, when while a passenger in a car, she was struck by a bus owned by the NYCTA. Petitioner alleges negligence on the part of the NYCTA. Pursuant to General Municipal Law § 50-e, petitioner's time to file a Notice of Claim expired 90 days after May 23, 2006. It is undisputed that petitioner brought the instant Order to Show Cause on July 19, 2007.

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

Petitioner maintains that the police appeared at the scene and a police report was prepared which indicated that petitioner was a passenger in a car driven by Sean Cherry and which indicated the parties and the vehicles involved in the accident. Petitioner's counsel argues that "upon information and belief, from other past cases involving the New York City Transit Authority, when a NYCTA bus is involved in an accident, an investigation is conducted by the Transit Authority and internal reports and memorandums are created regarding the same."

Respondent asserts that a police report is not an accident report prepared by the NYCTA and even if an employee of the NYCTA had filed an accident report, it would definitely not make the NYCTA aware of any future claims against it. It is argued that an accident report would not state the nature of the claim or apprise the defendant of plaintiff's injuries.

This Court finds that the respondent did 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). In its moving papers, at Paragraph 13 of the petition, petitioner asserts that "upon information and belief from other past cases involving the New York City Transit Authority, when a New York City Transit Authority Bus is involved in an accident, an investigation is conducted by the Transit Authority and internal reports and memorandums are created regarding same." While respondent asserted at oral argument that it had no legal notice as to the accident until the instant motion, respondent has not refuted or denied petitioner's assertion that an investigation with internal reports and memorandums was actually conducted. As such assertion was neither contradicted by one with personal knowledge or even by an attorney, for the purposes of this motion,

petitioner's contention regarding an investigation is deemed admitted (*see, Thompson v. 9 West 117th Street Corp.*, 44 Misc.2d 920 [Sup. Ct., NY Cty 1964]). The Court notes that respondent failed to submit an affidavit from a person from the NYCTA with personal knowledge of the facts that would rebut petitioner's allegation that the NYCTA conducted an investigation of the accident and created internal reports and memorandum concerning the accident. Rather, NYCTA chose to oppose the petition by submitting solely an affirmation of an attorney who has no personal knowledge of the facts. Accordingly, petitioner has demonstrated 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's counsel maintains that there is a reasonable excuse for the delay in that petitioner recently moved from Georgia to New York and she was unaware of the legal requirement that a Notice of Claim had to be filed until she retained the law firm of Mallilo & Grossman in April, 2007.

Respondent argues that ignorance of the Notice of Claim requirement is not a legally acceptable excuse for failure to comply, *citing (Weber v. County of Suffolk*, 208 AD2d 527 [2d Dept 1994]; *Matter of Light v. County of Nassau*, 187 AD2d 720 [2d Dept 1992]).

This Court finds that petitioner has failed to sufficiently explain the delay in filing the application for leave to serve a late notice of claim approximately 14 months after the accident date. The petitioner proffers the excuse that respondent had moved from Georgia to New York and was ignorant of the law regarding filing a Notice of Claim. The Appellate Division, Second Department has held that ignorance of the timely filing fails to constitute a reasonable excuse for the delay (*see, Matter of Ealy v. City of New York*, 204 AD2d 720 [2d Dept 1994]); *see also, Matter of Mallory v. City of New York*, 135 AD2d 636 [2d Dept 1987]). Accordingly, the petitioner has failed to provide a legally sufficient reasonable excuse for the delay.

Substantial Prejudice as a Result of the Delay

Petitioner asserts that respondent cannot show any prejudice in the late filing of the Notice of Claim, because the police appeared at the scene and a police report was prepared which indicated that petitioner was a passenger in Sean Cherry's car and which reflected the parties and vehicles involved in the

accident. Petitioner's counsel also argues that "upon information and belief, from other past cases involving the New York City Transit Authority, when a NYCTA bus is involved in an accident, an investigation is conducted by the Transit Authority and internal reports and memorandums are created regarding the same." Petitioner references the case of *Johnson v. New York City Transit Authority*, 278 AD2d 83 (1st Dept 2000), claiming that it held that petitioner's application was properly granted where the NYCTA was in receipt of the incident report and an aided report worksheet provided by the police officer who responded to the scene of the accident.

Respondent maintains that it has been prejudiced in its defense of this claim by its inability to immediately locate and interview witnesses, conduct a statutory hearing, and interview its own employees while memories were still fresh, all with an eye towards future litigation. Respondent maintains that it would have tried to verify lost earnings and obtain medical records and reports before such records are possibly lost, discarded, or destroyed. Respondent also asserts that a police report is not an accident report prepared by the NYCTA, and that even if an employee of the NYCTA had filed an accident report, it would not apprise the NYCTA of any possible future claims against it. Finally, respondent contends that an accident report would not satisfy the conditions of General Municipal Law § 50(e)(2), because it would not state the nature of the claim or apprise the respondent of petitioner's injuries.

This Court finds that the delay would not substantially prejudice the respondent in maintaining its defense on the merits. Under the circumstances, the delay of approximately 11 months from the expiration of the statutory period did not substantially prejudice the respondent's ability to investigate the accident scene as well as other circumstances surrounding the accident. Under the circumstances, wherein it has been deemed admitted that the New York City Transit Authority conducted an investigation whereby internal reports and memorandums were prepared, it cannot be said that substantial prejudice inured to the respondent (*see, Underwood v. New York City Housing Authority*, 177 AD2d 698 [2d Dept 1991][holding that an 11-month delay after the expiration of the statutory 90-day period, is "comparatively short"]).

Conclusion

In conclusion, the petitioner has established 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 that respondent would not be substantially prejudiced in defending the claim on the merits. While the petitioner has failed to establish a reasonable excuse for the delay, the absence of this factor is not fatal to the application (see, *Soto v. New York City Housing Authority*, 180 AD2d 570 [1st Dept 1992]). Accordingly, petitioner's application is granted. Petitioner is given leave to serve her Notice of Claim within thirty (30) days from the date of this order with notice of entry.

Accordingly, it is hereby

ORDERED, that pursuant to General Municipal Law § 50-e(5), petitioner is granted leave to serve a late Notice of Claim upon the respondent, New York City Transit Authority in a form as required under General Municipal Law § 50-e(2); and it is further

ORDERED, that the proposed Notice of Claim annexed to petition as Exhibit C, is hereby deemed served upon the respondent, New York City Transit Authority as required under General Municipal Law § 50-e, effective of the date of this order.

This constitutes the decision and order of this Court.

A courtesy copy of this decision/order is being mailed to counsel for the respective parties.

Dated: August 16, 2007

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Howard G. Lane, J.S.C.