

Harte v Greenville Fire Dist. #1

2007 NY Slip Op 33448(U)

October 22, 2007

Supreme Court, Greene County

Docket Number: 0020071/2981

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

ROBERT HARTE and LEONOR HARTE

Claimant(s),

-against-

DECISION and ORDER
INDEX NO. 07-1298

GREENVILLE FIRE DISTRICT #1

Defendant.

Supreme Court Greene County All Purpose Term, September 28, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Claimant, ("Mr. Harte" or "Mrs. Harte") brings an order to show cause, seeking leave to file a late notice of claim against Greenville Fire District #1. Respondent ("Greenville Fire District #1") opposes this motion.

This order to show cause arises from an alleged accident that occurred on September 1, 2006 on property owned by Greenville Fire District #1. At the time of the alleged accident, Mr. Harte was an employee of Gary A. Hood ("GAH General Contracting"). GAH General Contracting and Greenville Fire District #1 entered into a contract on August 16, 2006

for the construction of a three fire truck garage at the Norton Hill site, owned by Greenville Fire District #1. Mr. Harte was working at the site when the ladder he was standing on fell, allegedly causing him to sustain injuries.

Claimants bring this order to show cause seeking leave to file late notice of claim. Claimants argue that they were unaware of the 90-day filing requirement due to being unaware of the fact that Greenville Fire District #1 owned the property where the incident occurred. Claimants argue that they were told by GAH that Greenville Volunteer Fire Company was the party who contracted with GAH, and therefore were under the assumption that Greenville Volunteer Fire Company owned the property. In addition, Claimants argue that Greenville Fire District #1 was given notice of the essential facts of the claim within a reasonable time after the expiration of the 90-day requirement. Claimants also assert that the Worker's Compensation and liability carrier for the contractor were notified of the accident immediately. Finally, Claimants argue that Respondents have not been prejudiced in any way by failure of Claimants to file a notice of claim within 90 days of the alleged accident.

Respondent argues that a complaint and summons was not filed until March 2007, six months after the alleged accident. Second, Respondent argues that almost one year has passed between the date of the alleged accident and filing of the pending petition. Third, respondent argues that Claimant's unawareness of liability on the part of Greenville Fire District #1 is insufficient because Claimant could have conducted further inquiry into who owned the property. Finally, Respondent argues that Greenville Fire District #1 had no actual knowledge of the essential facts and are therefore prejudiced since the alleged accident occurred almost one year ago, making it almost impossible to investigate the conditions and circumstances

surrounding the event.

NY General Municipal Law §50-e(1)(a) requires, as a condition precedent to the commencement of an action, a notice of claim to be filed within 90 days after the claim arises. NY General Municipal Law 50-e(5) allows a court, within its discretion, to extend the 90-day requirement by looking at all the surrounding circumstances. “[T]he decision to permit the late filing of a notice of claim is discretionary and involves an inquiry as to whether respondents acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter, whether a reasonable excuse was proffered for the delay in filing a claim and whether granting a late filing would prejudice respondents.” Crocco v. Town of New Scotland, 307 AD.2d 516, 517 (3d Dept. 2003). However, the presence or absence of any one factor is not dispositive. Jensen v. City of Saratoga Springs, 203 AD. 2d 863 (3d Dept. 1994).

With regards to late filing of the claim, claimants offer the excuse of unawareness of the 90-day statutory requirement because of the mistaken belief that Greenville Volunteer Fire Company was the owner of the property where the alleged incident occurred. In determining the reasonableness of an excuse for failure to timely file notice, the Court may look to “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.” NY Gen. Mun. Law §50-e(5); See Stenowich v. Colonie Indus. Development Agency, 151 AD. 2d 894 (3rd Dept. 1989)(citing Baldeo v. City of New York, 127 AD. 2d 809 (2d Dept. 1987)). However, where the identity of the public corporation could have been made through a reasonable investigation, the Courts have denied leave to file late notice of claim. See Coppersmith v. County of Greene, 173 AD.2d 1080 (3d Dept. 1991); see also Baird v. Dormitory Auth. of State of NY, 139 AD.2d 577 (2d Dept.

1988).

Claimants argue that they did not discover the true owners of the property until May 2007, when they received the Respondent's answer and a copy of the contract between Greenville Fire District #1 and GAH General Contracting. The Claimants relied on a statement made by GAH General Contracting that Greenville Volunteer Fire Company was the owner of the property, without any further inquiry into the actual owner. In addition, even after discovering that Greenville Fire District #1 was the property owner, Claimants waited three more months to file a petition seeking leave to file a late notice of claim. "Error concerning the identity of the public entity to be served can be excused provided that a prompt application for relief is made after discovery of the error . . ." Lemma v. Off Track Betting Corp., 272 AD.2d 669 (3d Dept. 2000)(quoting Farrell v. City of New York, 191 AD.2d 698 (2d Dept. 1993)). The Third Department has found that a three-month delay between becoming aware of filing requirements and filing a petition for late notice was not reasonable where it was not sufficiently justified. See Smith v. Ostelic Valley Central School District, 302 AD.2d 665 (3d Dept. 2003). Here, Claimants have failed to justify their three month delay between realizing the statutory requirement and filing their petition.

Claimants' argument that Respondent had actual notice of the essential facts underlying the claim is unsupported. NY General Municipal Law §50-e(5) requires that respondent receive "actual knowledge of the essential facts constituting the claim." This includes notice of petitioner's claimed injuries or damages. Mangona v. Village of Greenwich, 252 AD.2d 732 (3d Dept. 1998); see also Lemma v. Off Track Betting Corp., 272 AD.2d 669 (3d Dept. 2000). Claimant has failed to show actual knowledge on the part of respondent with

anything other than a conclusory statement. There is no indication that Respondent had any knowledge of the essential facts of the claim until the filing of the notice of claim, which the Third Department has held to be insufficient to comply with the statutory requirements. Id. Additionally, while Claimants state that the Worker's Compensation and liability carriers were notified immediately, this too is insufficient to support an argument for actual knowledge. "[T]he filing of a Workers Compensation claim does not constitute notice to the respondents of the petitioners' impending claim and does not satisfy the requirements of General Municipal Law 50-e to serve a timely notice of claim." Mark v. Board of Ed. of City of New York, 255 AD.2d 586 (3d Dept. 1998).

Although there is no indication of the condition of the premises today as compared to September 1, 2006, the fact that Respondents had no actual knowledge of the alleged incident and therefore have not investigated the incident thus far is enough by itself to indicate that Respondents may be hindered in further investigation. In addition, although Claimants did not retain counsel until after the 90-day period for filing notice of claim had expired, they offer no reason to justify this delay. See Raczy v. Westchester County, 95 AD.2d 859 (2d Dept. 1983); compare to Gorinshek v. City of Johnstown, 186 AD.2d 335 (3d Dept. 1992). The Third Department has also held that the inability to secure an attorney is not a basis for a delay in filing. Simpson v. State, 95 AD.2d 646 (3d Dept. 1983).

After full review of the record, this Court will deny the Claimant's petition to file a late notice of claim. Looking at the entirety of the circumstances, Claimant has failed to proffer a reasonable excuse for failure to file notice in a timely fashion.

All papers, including this Decision and Order, are being returned to the attorney for the Respondent. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED

Dated: Albany, New York
October 22, 2007



PAPERS CONSIDERED:

1. Claimant's Order to Show Cause, dated August 30, 2007, with Attached Exhibits A-E.
2. Respondent's Affirmation in Opposition to Application to File Late Notice of Claim, dated September 19, 2007, with Attached Exhibit A.