Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

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

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ALLSTATE INSURANCE COMPANY a/s/o ASAD BACCHUS,
Petitioners,

– against –

MIMIE JAGASSAR, KENRICK JAGASSAR, CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS,
Respondents.

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Index Number: 11571/07

Motion Date: 10/09/07

Motion Cal. Number: 1
Motion Seq. No. 1

The following papers numbered 1 to 14 read on this application by petitioner for leave to file a late notice of claim and cross-motion by respondent City of New York (s/h/a City of New York and New York City Department of Buildings) for summary judgment dismissing the complaint and all cross-claims against it.

	Papers Numbered
Order to Show Cause–Affirmation–Affidavit–Exhibits.	1–6
Notice of Cross–Motion–Affirmation–Exhibits.....	7–10
Affirmation in Opposition to Cross–Motion.....	11–12
Reply Affirmation.....	13–14

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

Since there was no action pending at the time petitioner sought leave to serve a late notice of claim, it was required to proceed by way of a special proceeding (see Billone v. Town of Huntington, 188 AD 2d 526 [2nd Dept 1992]). A special proceeding is commenced by service of a notice of petition and petition or an order to show cause and petition (see CPLR 304, 403[b]). Petitioner's order to show cause was not accompanied by a petition but only by an affidavit of Elissa Palmer, employee of Allstate, and an affirmation of petitioner's attorney. Nevertheless, this Court finds that the affidavit and the affirmation in support of the order to show cause contain all the essential elements of a petition. Therefore, since this defect is an irregularity which may

be overlooked (see CPLR 2001; Billone v. Town of Huntington, supra), this Court deems the affidavit and affirmation in support of the order to show cause a petition.

Petitioner's application for an order granting leave to file a late notice of claim nunc pro tunc, pursuant to General Municipal Law §50 (e) (5), is denied.

Allstate alleges that on November 3, 2004 an abandoned construction and building project located at 91-26 175th Street in Queens County collapsed upon the adjoining residential building owned by its subrogor located at 91-28 175th Street, causing $421,316.32 in property damage. Allstate seeks to recover from defendants the sum of $421,316.32 paid by it to its subrogor pursuant to the subrogor's homeowner's insurance policy with Allstate. Allstate alleges that the City was negligent in that it had actual and constructive knowledge that the abandoned structure was unsafe and in danger of collapse and failed to comply with its statutory obligation to remove the structure.

The City cross-moves for summary judgment upon the ground that Allstate's cause of action against it is time-barred. An action against the City ordinarily must be commenced within one year and 90 days after the cause of action accrued, which is the date the event occurred upon which plaintiff's claim is based, in this case, the date of the building collapse on November 3, 2004(see General Municipal Law § 50-i).

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]). It is undisputed that the claim arose on November 3, 2004, the date of the building collapse. Petitioner seeks to file a notice of claim approximately two years and four months past the ninety-day deadline for filing a notice of claim.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). However, a late notice of claim may not be filed beyond 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]). Therefore, this Court must, initially, determine whether the statute of limitations has expired before considering

any other factors in deciding whether to allow a late notice of claim.

The City, in its cross-motion, contends that Allstate's claim is time-barred because it was commenced beyond the one year and 90-day period of limitation for actions against the City, pursuant to General Municipal Law §50-i.

Allstate argues in its opposition, correctly, that its claim against the City is premised upon liability created by statute and, therefore, the statute of limitations governing this action is not the one year and 90-day period contained in §50-i, but the three-year statute of limitations of CPLR 214(2).

The basis of liability against the City which Allstate is claiming is that the City was statutorily required to remove the dangerous structure and that its failure to do so was a substantial factor that resulted in the property damage to the premises of Allstate's subrogor.

It is the general rule that where a duty, and liability for breach of that duty, would not exist but for a statute, an action for damages thereupon is governed by the three-year statute of limitations for actions to recover upon liability created or imposed by statute, pursuant to CPLR 214(2) (see European American Bank v. Cain, 79 AD 2d 158 [2nd Dept 1981]).

Pursuant to the Administrative Code of the City of New York §26-235, et seq, the City is obligated to abate an unsafe building condition by repairing, securing or taking down a building found to be unsafe or dangerous.

The failure of the City to comply with said provision of the Administrative Code pertaining to unsafe and dangerous buildings constitutes a violation of a statutory duty, rendering the City liable for damages resulting from the collapse of the unsafe building or structure(see Mazelis v. Wallerstein, 51 AD 2d 579 [2nd Dept 1976] [case decided under former Administrative Code §C26-80.0 et seq, which is virtually identical to §26-235, et seq; Runkel v. City of New York, 282 App. Div. 173 [2nd Dept 1953]).

Allstate does not cite any authority, and this Court is unaware of any, establishing that any duty exists at common law for the City to take it upon itself to secure or remove unsafe buildings owned by persons or entities other than the City itself. Since the duty of the City to abate the unsafe condition of the adjoining premises exists solely by virtue of the Administrative Code, Allstate's cause of action against it is one founded upon

liability created or imposed by statute and, thus, is governed by the three-year statute of limitations of CPLR 214 rather than the one year and 90-day statute of limitations of General Municipal Law §50-i. Therefore, Allstate's claim is not time-barred.

Nevertheless, Allstate has failed to demonstrate that it would be a provident exercise of this Court's discretion to allow a late notice of claim.

In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see 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]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Allstate has failed to articulate an adequate excuse for its failure to serve the City within the statutory period. Allstate's explanation that it did not seek to proceed against the City until it discovered that it could not recover against the owners of the adjoining premises is not a reasonable excuse. Moreover, Allstate has failed to allege or show when it discovered that its claim could not be resolved with the adjoining property owners so as to justify a delay in seeking to file a notice of claim since November 3, 2004.

Allstate has also failed to proffer any proof to support its only other argument, namely, that the City acquired actual or constructive notice of the facts underlying the claim within 90 days after the claim arose or a reasonable time thereafter. Allstate has failed to submit any proof that the City had notice one year prior to November 3, 2004 that the subject structure was unsafe or dangerous. The record on this petition also fails to demonstrate that the City had ordered the owners of the collapsed structure to abate the condition one year prior to the collapse, as Allstate contends.

The City's obligation under the Administrative Code to abate an unsafe building condition does not arise unless and until it acquires notice of the condition (see §26-236). The City must then serve a notice upon the owner of the structure to abate the unsafe condition within 24 hours (id.). If the owner fails to comply, the City must commence a proceeding in the Supreme Court seeking an

order to secure or take down the structure (see §§26-236, 26-238). Upon obtaining such order, the City must then perform the demolition work in accordance with the order (see §26-240[a]).

Allstate fails to submit any proof that the City had notice of the unsafe condition of the building before its collapse. Even though it alleges that the City had ordered the owners of the structure to abate the hazardous condition, it annexes no proof of same to the petition. Moreover, although Allstate alleges that the City investigated the building collapse and learned all the facts and circumstances surrounding the occurrence, it fails to annex any reports or other admissible evidence of such investigation showing what knowledge, if any, the City acquired.

Even if the City had knowledge of the building collapse on November 3, 2004, there is no showing, on this record, that it had knowledge of the unsafe condition of the building prior to said date which would give rise to its duty under the Administrative Code to remove the structure. In order to have actual knowledge of the claim, the City must be shown to have been aware of a causal connection between the happening of the accident and any negligence on its part (see Acosta v. City of New York, 39 AD 3d 629 [2nd Dept 2007]; Doyle v. Elwood Union Free School District, 39 AD 3d 544 [2nd Dept 2007]; Henriques v. City of New York, 22 AD 3d 847 [2nd Dept 2005]).

Therefore, Allstate has failed to establish, on this record, that the City had notice of its potential liability with respect to the building collapse and, thus, the facts underlying the claim, on or within a reasonable time after the occurrence.

Accordingly, this Court finds that it would be an improvident exercise of its discretion to grant Allstate's application for leave to serve a late notice of claim in the absence of a reasonable excuse for the delay, and without any indication that the City received timely actual knowledge of the facts constituting the claim (Jasinski v. HB Ward Tech. Sch., 306 A.D.2d 347 [2d Dept. 2003]; Cordero v. County of Nassau, 2 A.D.3d 567 [2d Dept. 2003]; Gomez v. City of New York, 250 Ad 2d 443 [1st Dept 1998]).

Accordingly, the application is denied and the petition is dismissed. The cross-motion is also denied as moot, as well as for the reasons heretofore stated.

Dated: October 25, 2007

KEVIN J. KERRIGAN, J.S.C.