

Ramos v New York City Tr. Auth.

2007 NY Slip Op 34048(U)

November 27, 2007

Supreme Court, New York County

Docket Number: 0115629/2005

Judge: Donna Marie Mills

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT.

PART 21

Index Number : 115629/2005

RAMOS, VINCENT

vs

TRANSIT AUTHORITY

Sequence Number : 001

DISMISS ACTION

INDEX NO. 115629/05

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 + 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Decided in accordance with attached memorandum decision.

FILED
DEC 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/27/07

[Signature] J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
VINCENT RAMOS, as administrator of the
estate of DORIS RAMOS, deceased and
VINCENT RAMOS, individually,

Plaintiffs,

-against-

NEW YORK CITY TRANSIT
AUTHORITY

Defendant.

Index No. 115629/05

FILED
DEC 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
MILLS, J.:

Defendant moves for dismissal as to the wrongful death claim and all cross-claims¹ pursuant to CPLR 3211 on the grounds of failure to state a cause of action and plaintiffs' failure to comply with the Notice of Claim requirements under General Municipal Law § 50 (e) and Public Authorities Law § 1212. Defendant also seeks an award of its motion costs and disbursements.

Plaintiffs cross-move for: (1) an order permitting them to amend the Notice of Claim pursuant to General Municipal Law § 50 (e) (6) to include a cause of action for wrongful death, and (2) denying defendant's motion to dismiss the complaint as to the wrongful death action.

The following allegations are taken from the complaint. On July 28, 2004, plaintiff Doris Ramos was traveling south on an M11 bus along 9th Avenue in Manhattan. She allegedly sustained injuries when the bus driver negligently placed Ramos, who was confined to a wheelchair, in the wheelchair lift at 60th Street and 9th Avenue. Ramos' wheelchair rolled off of

¹ Defendant's notice of motion seeking dismissal of all cross-claims appears to be in error because there are no cross-claims in this action.

the lift and she was thrown to the ground, face first, thereby sustaining serious injuries.

On September 10, 2004, within 90 days of the date of Ramos's accident, plaintiffs Doris Ramos and her husband Vincent Ramos filed a Notice of Claim against defendant seeking damages for the personal injuries she sustained following her fall from the wheelchair lift on July 28, 2004 (Exhibit A to Affirmation of Jane Shufer, Esq.) (Shufer Affirmation). Those injuries included a broken arm, facial cuts, lacerations, bruises, and body trauma (Affirmation of Peter A. Frankel, Esq., dated June 27, 2007) (Frankel I Affirmation).

After undergoing a regimen of occupational therapy, Mrs. Ramos was admitted to St. Luke's Roosevelt Hospital on October 11, 2004 for an undisclosed ailment (Frankel I Affirmation). She was placed on a ventilator four days later on October 15, 2004 (*id.*). Mrs. Ramos died on January 5, 2005. On September 26, 2005, letters of administration limited to the prosecution of this action were issued to Mr. Ramos by the Surrogate of New York County (Exhibit B to Shufer Affirmation).

On November 7, 2005, plaintiffs commenced this action against defendant, the New York City Transit Authority, asserting claims for personal injury, wrongful death, and loss of services.

Defendant argues that it is entitled to dismissal of this action because plaintiff failed: (1) to serve defendant with a Notice of Claim for wrongful death as required under Public Authorities Law § 1212, and compliance with the Notice of Claim requirement is a condition precedent to maintenance of an action; (2) to serve the Notice of Claim within 90 days of the appointment of an administrator as required under General Municipal Law § 50 (e) (1) (a); and (3) to file a late Notice of Claim within two years of the decedent's death as required under Public Authorities Law § 2981.

Plaintiffs argue that defendant is not entitled to dismissal of the wrongful death action because: (1) under General Municipal Law § 50 (e) (6), it is permissible to amend an existing and timely filed notice of claim to add a claim for wrongful death arising out of the circumstances enumerated in the original notice of claim, and (2) permission to serve late notice of claim was not required, as no new theory of liability is being asserted, but merely an amplification of damages arising out of the same occurrence.

Title 9 of the Public Authorities Law involves actions against the New York City Transit Authority. Section 1212 (2) of this chapter provides in part:

“An action against the authority for wrongful death shall be commenced in accordance with the notice of claim and time limitation provisions of title eleven of article nine of this chapter.”

In accordance with section 1212 of the Public Authorities Law, Article 9 provides:

“ No wrongful death action against a public authority or public benefit corporation shall be commenced unless a notice of claim has been served on the authority or corporation in accordance with the provisions of section fifty-e of the general municipal law ”

(Public Authorities Law § 2980).

Section 50-e (1) (a) of the General Municipal Law provides:

“In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall

comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.”

Timely service of a notice of claim is a condition precedent to the commencement of an action sounding in tort against the New York City Transit Authority, the Metropolitan Transportation Authority, and the Manhattan and Bronx Surface Transit Operating Authority (*Matter of Groves v New York City Tr. Auth.*, _ NY2d_, 2007 NY Slip Op 7843 [October 16, 2007]; *see also Matter of James v City of New York*, 37 AD3d 832 [2d Dept 2007]; *Brown v City of New York*, 95 NY2d 389, 392 [2000], *lv denied* 96 NY2d 936 [2001]). General Municipal Law § 50 (e) (1) requires the service of a notice of claim prior to the commencement of a tort action against a public corporation within 90 days after the claim arises, “except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate” (*see Campbell v City of New York*, 4 NY3d 200 [2005]; *Matter of Ruiz v New York City Health & Hosps. Corp.*, 165 AD2d 75, 78-9 [1st Dept 1991]). Although the 90 days to serve a notice of claim commences upon the appointment of a representative of decedent's estate (General Municipal Law § 50-e [1] [a]), there is an outside time limitation of two years after the happening of the death (*see Baez v New York City Health & Hosps. Corp.*, 80 NY2d 571, 576 [1992]; Public Authorities Law § 2981).

General Municipal Law § 50-e (2) requires, among other things, that a notice of claim be in writing, sworn to by or on behalf of the claimant, and that it set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the

time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable (*Brown v City of New York*, 95 NY2d 389, *supra*). General Municipal Law § 50 (i) (1) mandates that a notice of claim for wrongful death must be served with the requisite 30 day window prior to the commencement of an action, and that in that time defendant neglected to or refused to satisfy plaintiffs claims (*McKune v City of New York*, 19 AD3d 308, 310 [1st Dept 2005]; *Alex-Mitchell: El v State of New York*, 2 AD3d 549, 551 [2003]). The plain purpose of the statutes requiring pre-litigation notice to municipalities “is to guard them against imposition by requiring notice of the circumstances upon which a claim for damages is made, so that its authorities may be in a position to investigate the facts as to time and place, and decide whether the case is one for settlement or litigation (*Rosenbaum v City of New York*, 8 NY3d 1, 11 [2006]). Here, plaintiffs failed to adhere to language of the above referenced statutes. They neglected to file a notice of claim for the portion of the cause of action alleging wrongful death, and therefore did not provide defendant with pre-litigation notice to investigate the facts as to time and place, and to decide whether the case was one for settlement or litigation (*id.*).

While General Municipal Law § 50-e (5) permits a court to extend the time for serving a notice of claim, generally, a court will consider the following three factors: (1) whether the petitioner has a reasonable excuse for failure to serve a timely notice of claim, (2) whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) whether the delay would substantially prejudice the municipality in its defense (*Matter of James v City of New York Dept. of Env'tl. Protection*, 37 AD3d at 833). Here, plaintiff never sought to file a late notice of claim and

offered no excuse for failing to do so, and thus is now time-barred from bringing any new claims. As stated above, Doris Ramos died on January 5, 2005. Plaintiff was appointed as the representative of his decedent's estate on September 23, 2005, and under the statutory provision for wrongful death, the 90 days started running at that time of his appointment. Plaintiff also failed to file an application for leave to serve a late notice within two years of the decedent's death. He petitioned this court to add the wrongful death cause of action on June 27, 2007, a date that was six months beyond the two-year limitation period.

It should also be noted that defendant did not have actual notice of the wrongful death claim. The complaint did not possess sufficient information to establish the statutorily required notice (*Matter of Scott v Huntington Union Free School Dist.*, 29 AD3d 1010, 1011 [2d Dept 2006]). That portion of the complaint was impermissibly vague (Exhibit C to Shufer Affirmation dated May 22, 2007).

Plaintiffs' argument that permission to serve a late notice of claim was not required because no new theory of liability was asserted is unpersuasive. Although a notice of claim may be amended pursuant to General Municipal Law § 50-e (6), this provision merely authorizes the correction of good faith, non-prejudicial technical defects or omissions, not substantive changes in the theory of liability and any amendment that creates a new theory of liability is not within the statute's purview (*Shavulskaya v New York City Tr. Auth.*, 41 AD3d 462 [2d Dept 2007]; *Scott v City of New York*, 40 AD3d 408, 410 [1st Dept 2007]).

Actions to recover damages for conscious pain and suffering are materially distinct from a cause of action to recover damages for wrongful death (*Mack v City of New York* 265 AD2d 308 [2d Dept 1999], *lv denied* 94 NY2d 763 [2000]; *Johnson v County of Suffolk*, 238 AD2d 480

[2d Dept 1997]; *Matter of Ruiz v New York City Health and Hosp. Corp.*, 165 AD2d at 80). A personal injury action is for conscious pain and suffering of the decedent prior to his death (*Lancaster v 46 NYL Partners*, 228 AD2d 133 [1st Dept 1996]). This contrasts with a wrongful death action for pecuniary injuries resulting from decedent's death and certain expenses. The recovery for conscious pain and suffering accrues to the decedent's estate, whereas the damages for wrongful death are for the benefit of the decedent's distributees who have suffered pecuniary injury, and thus the claims are predicated on different theories of loss which accrue to different parties (*id.*).

Finally, defendant has not demonstrated, at this stage of the litigation, its entitlement to costs and disbursements.

Accordingly, it is

ORDERED that the motion to dismiss the wrongful death claim is granted and that claim is dismissed; and it is further

ORDERED that plaintiff's cross-motion is denied.

Dated:

ENTER:

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

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