

Basse v New York City Police Dept.

2008 NY Slip Op 32099(U)

July 25, 2008

Supreme Court, New York County

Docket Number: 0114870/2004

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER Justice

PART IA Part 16

Index Number : 114870/2004

INDEX NO. _____

BASSE, MOHAMED

MOTION DATE _____

vs

NYC POLICE DEPT.

MOTION SEQ. NO. _____

Sequence Number : 002

MOTION CAL. NO. _____

DISMISS COMPLAINT

s motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.

FILED
JUL 28 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: JUL 25 2008



ALICE SCHLESINGER 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

-----X
MOHAMED BASSE as the Administrator of the
Estate of OUSMANE BASSE, and as an
Individual,

Plaintiff,

-against-

Index No. 114870/04
Motion Seq. No. 002

THE NEW YORK CITY POLICE DEPARTMENT,
et al.,

Defendants.

-----X
SCHLESINGER, J.:

This case involves a tragedy, a tragedy which could have been avoided had the New York City Police Department properly performed its duties.

Plaintiff Mohamed Basse is the older brother of the decedent Ousmane Basse. Born in Senegal, the brothers were living in Arizona with Mohamed's wife and infant child. The brothers came to New York on March 3, 2003 to board a connecting flight to Senegal.

While in New York, Ousmane abruptly left the car his brother was driving near 110th Street and Eighth Avenue and disappeared. He was then 21 years old and apparently suffering from some cognitive deficiencies and had no experience navigating the streets of New York City. Unable to locate his brother, Mohamed promptly went to the 28th Precinct of the Police Department and reported his brother missing. He provided a complete description and also advised the police that Ousmane was carrying a Senegalese passport. According to the NYPD Missing Person Report (Exh. 1 to plaintiff's papers), an officer called some hospitals, canvassed the area, and spoke with a gas station attendant, all with negative results. NYPD then advised Mohamed to return to Arizona and file a

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missing person report there. When he did so, he was advised by Arizona that the investigation was in the jurisdiction of New York. Mohamed continued to call NYPD periodically and spoke with Detective Benoit, who assured him that an investigation was continuing but never provided any information.

It was not until some three months later that Mohamed learned that his brother had been found on March 4, 2003, about 12 hours after he had been reported missing and about 50 blocks away from the point where he had exited the car. According to the Police Report (Exh. 2 to plaintiff's papers), Ousmane was found lying face down near the exit ramp for 158th Street and Henry Hudson Parkway in Manhattan with minor abrasions not consistent with a car accident. Significantly, Ousmane was found with his identification on his person, and the Police recorded his full name and date of birth on their Report. Ousmane was taken to St. Luke's-Roosevelt Hospital, where he died, reportedly due to "hypothermia secondary to cold winter temperatures." (See June 18, 2003 Certificate of Death by Medical Examiner, Exh 7 to plaintiff's papers.)

Tragically, NYPD did not contact Mohamed and apparently made no effort to locate any family members when Ousmane was found, despite the Missing Person Report on file and NYPD's ability to readily confirm Ousmane's identity based on the papers he possessed. Nor did NYPD or St. Luke's notify anyone when Ousmane was declared dead. Mohamed learned of his brother's death three months after the fact, on June 11, 2003, only because Dr. Abraham Phillip, a fellow at the NYC Medical Examiner's Office troubled by the circumstances, contacted the Senegalese Consulate which reached out to a Senegalese association that located Mohamed.

Mohamed came to New York immediately and met with the Medical Examiner. With his assistance, Ousmane's body was located buried in Potter's Field. When the body was exhumed, it was badly deteriorated and barely recognizable as it had been buried without embalming. Mohamed arranged for the body to be prepared as best as possible and flown to Senegal where the Basse parents resided.

Mohamed then commenced this action claiming, among other things, that his brother had been denied the right to a proper religious burial and had been subjected to an autopsy without consent because efforts had not been made to locate the next of kin when Ousmane was found by NYPD or when he was declared dead at St. Luke's. The various City defendants, including the New York City Health and Hospitals Corporation ("HHC", sued herein as Bellevue Hospital) have moved to dismiss the action alleging that the Notice of Claim was not timely filed. HHC has also moved to dismiss pursuant to CPLR §3215(c) on the ground that plaintiff failed to timely enter a judgment after HHC defaulted in answering. Plaintiff has opposed the motion and requested leave to enter a default judgment against HHC at this time.¹

A Timely Notice of Claim is Required

Pursuant to General Municipal Law § 50-e, a party seeking to commence an action against the City of New York or one of its agencies must file a Notice of Claim within ninety days of the alleged injury summarizing the alleged claim. Subdivision 5 of that statute

¹ Defendant St. Luke's-Roosevelt Hospital Center separately moved to dismiss based on plaintiff's alleged failure to provide discovery. That motion was granted by order dated November 14, 2007 to the extent of directing a preliminary conference. However, the conference was then held in abeyance pending the determination of this motion. Defendant Dr. "John" Orozco, who allegedly treated Ousmane at St. Luke's, has never appeared in this action.

allows the court discretion to grant an application for an extension of time to serve a Notice of Claim, but only if the application is filed within one year and ninety days of the date when the claim arose. See, e.g., *Soreca v New York City Housing Authority*, 177 A.D.2d 254 (1st Dep't 1991).

Defendants here assert that not only did plaintiff fail to timely file the Notice of Claim, but he also failed to ask this Court to accept the notice as timely filed *nunc pro tunc*. Since more than a year and 90 days has passed since the alleged injury, plaintiff is barred from seeking such relief now, plaintiff asserts, citing a myriad of cases such as *Pierson v City of New York*, 56 NY2d 950 (1982). Since a timely Notice of Claim is a condition precedent to an action against the City of New York or the Health and Hospitals Corporation, the plaintiff's failure to timely file the Notice here mandates the dismissal of the action as against the moving defendants, they assert, citing cases such as *Daniel J. v New York City Health and Hosp. Corp.*, 77 NY2d 630, 633 (1991) and *Scantlebury v New York City Health and Hosp. Corp.*, 4 NY3d 606, 609 (2005).

A review of the facts in this case compels the Court to grant the City's motion to dismiss based on the plaintiff's failure to timely file the Notice of Claim. NYPD found Ousmane on March 4, 2003. The City had him buried on April 10, 2003. Mohamed learned of the tragedy on or about June 11, 2003. However, he did not file a Notice of Claim against the City until more than 90 days later, on October 8, 2003, and he delayed yet another two days before filing a Notice of Claim against HHC on October 10, 2003. This action was commenced by the filing of a summons and complaint on October 19, 2004. The City defendants made this motion in December of 2007. A no point did plaintiff seek

to have his Notice of Claim deemed timely filed. The one year and 90 day time to move having long ago expired in the fall of 2004, this action must be dismissed pursuant to the rules and cases cited above.

Plaintiff in his opposition papers has asserted a number of arguments in an effort to avoid dismissal, but they are all unavailing. First, plaintiff argues that his time to file the Notice of Claim should be equitably tolled, or the City should be equitably estopped from objecting to the Notice based on untimeliness, because the City misled Mohamed Basse. Specifically, plaintiff asserts that NYPD misled him by assuring him that they would contact him if Ousmane was found – which they undeniably failed to do – sent him to Arizona to file a Missing Person Report, despite NYPD's jurisdiction over the case, and failed to provide him with information in NYPD's possession as to Ousmane's location and death, despite the City's ability to identify Ousmane and despite the Missing Person Report which Mohamed had filed with NYPD.

These facts are compelling, and our Appellate Division has recognized the principle of equitable estoppel in *Drysdale v City of New York*, 182 AD2d 566 (1st Dep't 1992), *lv denied* 81 NY2d 759. In that case, a wrongful death action, the time to file a Notice of Claim was tolled based on the City's "active concealment" of the plaintiff's mother's death until a time after the statute of limitations had expired. However, this case is readily distinguishable from *Drysdale* because here Mohamed learned of his brother's death well before the statute of limitations had expired. Mohamed was advised of his brother's death in mid-June of 2003, requiring that the Notice of Claim be filed by mid-September, at the latest. It was not filed until October 8, 2003. Upon receiving the Notice of Claim, the City

held a 50-h hearing to explore plaintiff's claims on December 2003, and plaintiff appeared represented by counsel. Plaintiff's counsel could have and should have acted at that time, before the statute of limitations expired in September of 2004. Yet counsel continued to delay until October of 2004 before commencing this action and never moved for leave to have the Notice of Claim deemed timely filed, despite knowledge of the facts. As plaintiff's extended delay beyond the statute of limitations was not attributable to "active concealment" or misinformation from the City, the principle of equitable estoppel does not apply.

Next plaintiff argues that the accrual of the cause of action should be set on or about July 23, 2003, when Mohamed allegedly began to suffer physical ailments which he attributes to the wrongful treatment of his brother's body. In support of this argument, plaintiff cites *Searle v City of New Rochelle*, 293 AD2d 735 (2nd Dep't 2002). *Searle* has no application here, as it involves the specific rule applicable in toxic tort cases; i.e., that the cause of action resulting from exposure to toxic substances accrues when the plaintiff begins to suffer the manifestations and symptoms of his physical condition and the injury is apparent, not when the specific cause of the injury is identified. *Id.* at 736. Here, however, the injury based on the mishandling of Ousmane's body was apparent as of June 2003 when Mohamed learned of his brother's death and had the body exhumed. No basis in law or fact exists to set the accrual of the cause of action at a later date, when Mohamed's physician first documented his reaction to his brother's tragic death.

Lastly, plaintiff argues that the statute of limitations should be tolled pursuant to CPLR §208. That statute provides for a tolling when "the person entitled to commence an

action is under a disability because of infancy or insanity at the time the cause of action accrues ..." Plaintiff seeks to equate "insanity" with his troubled mental state after his brother's death. The argument is unavailing. The tolling provision is strictly construed [*McCarthy v Volkswagen of America*, 55 NY2d 543, 548 (1982)], and plaintiff has offered no legal support justifying the application of the tolling provision in a case such as this.

Even assuming *arguendo* that the term "insanity" could be broadly construed to include some sort of mental distress, plaintiff has failed to offer factual support to justify the application of the tolling provision. An affidavit from Mohammed Basse is conspicuously absent, and allegations from counsel as to Mr. Basse's mental state have no probative value. Plaintiff has provided a letter from his physician, Kim Lucas, M.D., but that, too, is inadequate, not only because it is not in admissible form but also because it does not confirm any significant mental disability. Rather, it states in relevant part as follows: "Mr. Basse was seen in my office on May 29, 2003 for allergy symptoms and on June 19, 2003 for insomnia, back pain and generalized body rash." Dr. Lucas then indicates that the circumstances surrounding Ousmane's death were "particularly painful" for Mohamed, and he details some of those circumstances, such as the late notification and improper burial. He concludes by stating: "In light of the aforementioned it is my opinion that his (Mohamed Basse's) physical symptoms are stress induced." The letter simply does not establish a condition which would qualify for the application of the insanity tolling provision.

For these reasons, the motion by the City defendants, including HHC, to dismiss based on the untimely Notice of Claim must be granted. No reason exists to address the argument by HHC that the action should be dismissed based on plaintiff's failure to seek

a default judgment. Pursuant to this Court's November 19, 2007 order, the action shall proceed against the remaining defendant, St. Luke's Roosevelt Hospital, with the completion of a preliminary conference order scheduling discovery.

Accordingly, it is hereby

ORDERED that the motion to dismiss by The City of New York, s/h/a The New York City Police Department and The Office of the Chief Medical Examiner, and by New York City Health and Hospitals Corporation s/h/a Bellevue Hospital Center is granted, and the Clerk is directed to sever and dismiss all claims against those defendants; and it is further

ORDERED that the remainder of the action shall continue and counsel for the plaintiff and St. Luke's are directed to appear in Room 222 to complete a preliminary conference order on September 3, 2008 at 11:00 a.m.

This constitutes the decision and order of this Court.

Dated: July 25, 2008

JUL 25 2008


J.S.C.
ALICE SCHLESINGER

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