

Matter of Rocco v Battery Park City Auth.

2008 NY Slip Op 32999(U)

October 31, 2008

Supreme Court, New York County

Docket Number: 113060/08

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

Rocco, WILBERT

INDEX NO.

113060/08

MOTION DATE:

10/14/08

MOTION SEQ. NO.

01

MOTION CAL. NO.

BATTERY PARK CITY AUTHORITY

The following papers, numbered 1 to 10 were read on this motion to ~~for~~ petition ~~file~~ file late notice of claim

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

PAPERS NUMBERED

1-8

Answering Affidavits — Exhibits

9

Repeating Affidavits

10

Cross-Motion: Yes No

UNFILED JUDGMENT

Upon the foregoing papers, it is ordered

This judgment has not been entered by the Clerk of Court and notice of entry cannot be served because the party has not obtain entry, counsel or authorized representative to appear in person at the Judgment Clerk's Office (Section 141B).

**MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER**

Dated: 10/31/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

-----X
In the Matter of the Claim of WILBERT ROCCO,

Petitioner,

Index No. 113060/08

-against-

Decision, Order, and Judgment

BATTERY PARK CITY AUTHORITY,

Respondent.

JOAN B. LOBIS, J.S.C.:

Petitioner, Wilbert Rocco, moves

UNFILED JUDGMENT
This judgment has not been entered and notice of entry c. not be obtained. Entry, counsel or self must appear in person at the Municipal Law Office, pursuant to General Municipal Law § 50-e(5), granting him leave to file his notice of claim *nunc pro tunc*.

§ 50-e(5), granting him leave to file his notice of claim *nunc pro tunc*.

This matter arises out of an accident that occurred on December 14, 2007, in lower Manhattan at the Goldman Sachs construction site. Petitioner was delivering seventeen tons of steel studs, which he transported from South Plainfield, New Jersey, on the back of a flatbed trailer. As the steel studs were being hoisted from the truck to the thirty-second floor, one of the straps broke and the studs fell on the bed of petitioner’s truck. Petitioner was inside the truck at the time, and alleges that he was injured when he was “violently toss[ed]” around the inside of the cab of the truck.

Records from Concerta Medical Center in South Plainfield, New Jersey, indicate that petitioner initially was diagnosed with cervical, shoulder/upper arm, and thoracic strain. By December 28, 2007, the records indicate that he was still unable to drive his company vehicle. A December 28 MRI of his cervical spine revealed small disc herniations at the C3-4 and C4-5 levels. Initially, he was treated conservatively, but his pain increased over the following months. Records from Morristown Memorial Hospital in New Jersey note that petitioner continued to be out of work

through May 27, 2008. He did not have surgery for the disc herniations until May 30, 2008, when he underwent a microdiscectomy. Petitioner experienced complications from this first surgery due to infection and diabetes and underwent a second surgery in August 2008 to remove an abscess. He underwent a third surgery in September 2008 to fuse his spine; as of the date of petitioner's affirmation, he was receiving inpatient care at Kessler Institute in New Jersey. Petitioner claims that as a result of the injuries he sustained, he was disabled for several months following the accident, and that only in the beginning of August 2008, was petitioner able to investigate the circumstances of the accident and consult with an attorney. Petitioner's attorney sets forth that petitioner has been unable to work since the date of the accident.

Goldman Sachs leased the premises where the accident occurred from the Battery Park City Authority (the "BPCA"). Petitioner's attorney sets forth that petitioner has a cause of action for vicarious liability against the BCPA under Labor Law § 241(6). However, under Public Authorities Law § 1984, a notice of claim pursuant to the provisions of General Municipal Law ("Gen. Mun. Law") § 50-e must be filed as a condition precedent to the filing of a tort action against the BPCA. A timely notice of claim would have had to be filed by March 13, 2008. Petitioner never filed a notice of claim, but brought this application for leave to file a late notice of claim on September 25, 2008, over six months after the end of the 90-day period.

Section 50-e sets forth that the "notice of claim shall . . . be served in accordance with the provisions of this section within ninety days after the claim arises." Upon application to the court, the time to serve a notice of claim may be extended up to the time limited for the

commencement of an action or, in this case, one year and ninety days. See Gen. Mun. Law §§ 50-e(5), 50-i(1). In determining whether to grant an extension, § 50-e(5) directs the court to consider

in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated . . . ; whether claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations . . . ; 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; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

The First Department has held that the most important factors the court must consider are whether: (1) the movant demonstrated “reasonable excuse”; (2) 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) the municipality would be “substantially prejudice[ed]” in its defense. Porcaro v. City of New York, 20 A.D.3d 357, 358 (1st Dep’t 2005). The “presence or absence of any one of the foregoing factors is not determinative . . . , and the absence of a reasonable excuse is not, standing alone, fatal to the application.” Id. (internal citations omitted).

Petitioner first contends that his failure to timely file a notice of claim was due to his physical incapacitation and unawareness of the law regarding notices of claims to municipalities. He maintains that since the accident, he has undergone multiple surgeries, suffered infections and complications as a result of these surgeries, taken part in physical therapy, and been unable to work.

Also, he claims that at first he was unaware of the BCPA's potential liability for his injuries, because he was working at a "large-scale construction project overseen by private contractors constructing the future headquarters of a well-known private company [Goldman Sachs]." Petitioner asserts that the culpable municipal authority was less apparent in this case than in, for example, an accident in a subway terminal or a construction accident at City Hall, which would "naturally point to liability against the city."

In opposition, respondent argues that petitioner's excuse is not reasonable. The BCPA argues that ignorance of the statute requiring notice of claim within ninety (90) days of the incident leading to the claim is not an excuse. With respect to physical incapacity, the BCPA argues that the documents annexed to the petition indicate that petitioner was cleared to go back to work on December 20, 2007 and his admission for surgery was not until May 2008. Petitioner replies that respondent has misconstrued his reasonable excuse. He clarifies that he does not plead ignorance to the 90-day statute nor to the potential liability of the BCPA. Rather, he argues that his lack of awareness of the extent of his injuries and his subsequent physical incapacity led to the delay in filing a notice of claim. Petitioner notes that by the time he realized the extent and seriousness of his injuries, he was physically incapacitated. That incapacitation prevented him from promptly seeking to serve a late notice of claim after he realized the extent of his injuries.

"While the reasonableness of the excuse proffered by the petitioner in this case may be open to question," (Alvarenga v. Finlay, 225 A.D.2d 617 [2d Dep't 1996]), as stated before, "the absence of a reasonable excuse is not, standing alone, fatal to the application." Porcaro, supra, 20

A.D.3d at 358. The incident during which petitioner was injured was known to the BCPA. Not only was the incident observed by workers at the construction site and passersby, as well as covered in local newspapers, but an architect, Robert Woo, who was working in a trailer at the construction site was severely injured by the falling load of steel. Mr. Woo filed a timely notice of claim against the BCPA on February 4, 2008, for the injuries he sustained on December 14, 2007. Mr. Woo's injuries arose from the same accident which allegedly caused petitioner's injuries. Thus, the BCPA "acquired actual notice of the essential facts of the claim within 90 days" after petitioner's claim arose. Porcaro, supra, 20 A.D.3d at 358; see also, Heredia v. City of New York, 141 A.D.2d 473 (1st Dep't 1988) (trial court providently granted leave to file late notice of claim on behalf of shooting victim because timely notice of claim on behalf of another shooting victim in the same incident served purpose of § 50-e[5]); Alvarenga, supra, 225 A.D.2d at 617 (trial court providently granted leave to file late notice of claim when another victim of the same automobile accident timely filed notice of claim). Respondent's argument that there is no way that the BCPA would have independent knowledge as to claimant being on the site because he was making a delivery and was not regularly on site is unavailing if petitioner's claim against the BCPA is predicated on vicarious liability.

Equally unavailing are respondent's complaints of substantial prejudice. The BCPA had the opportunity to promptly investigate the scene of the accident, if not on the very first day the accident occurred—which seems likely given the scope of the accident—then at least in February 2008, when Mr. Woo filed his notice of claim. There are medical records available documenting petitioner's injury and the progress of that injury. The "only legitimate purpose served by section

50-c is the opportunity for prompt investigation and preservation of evidence of the facts and circumstances of claims asserted against public corporations. . . . That purpose was adequately served by the information contained” in Mr. Woo’s notice of claim. Heredia, supra, 141 A.D.2d at 474 (internal citations omitted).

Accordingly, it is hereby

ORDERED that petitioner’s request for leave to file a late notice of claim against the Battery Park City Authority is granted; and it is further

ORDERED that petitioner is to serve and file a notice of claim within thirty (30) days of this judgment.

This constitutes the decision, order and judgment of the court.

Dated: October 31, 2008



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).