

Hill v New York City Tr. Auth.

2008 NY Slip Op 33180(U)

November 17, 2008

Supreme Court, Queens County

Docket Number: 4054/08

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 22

BRADFORD HILL,

Petitioner,

-against-

NEW YORK CITY TRANSIT AUTHORITY,
Respondent.

Index No. 4054/08

Motion
Date September 9, 2008

Motion
Cal. No. 10

Motion
Sequence No. 2

PAPERS
NUMBERED

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Upon the foregoing papers it is ordered that the motion by petitioner, Bradford Hill for an order pursuant to CPLR 2221, granting petitioner leave to renew and reargue his motion against respondent, New York City Transit Authority (NYCTA) for leave to file his Notice of Claim, *nunc pro tunc*, and after renewal and reargument, for an Order granting him leave to file his Notice of Claim against respondent, *nunc pro tunc* is hereby decided as follows:

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (see, *Schneider v. Solowey*, 141 AD2d 813 [2d Dept 1988]; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410 [2d Dept 1985]).

A motion to renew must be based upon new facts that were not offered in the prior motion, and the party must set forth a reasonable justification for the failure to present such facts in the prior motion (see, CPLR 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, 271 AD2d 636, 638 [2d Dept 2000]; *McNeill v. Sandiford*, 270 AD2d 467 [2d Dept 2000]; *Shapiro*

v. State, 259 AD2d 753 [2d Dept 1999]); or the motion must demonstrate that there has been a change in the law that would change the prior determination (see, CPLR 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, 271 AD2d 636, 638).

Petitioner's underlying motion sought leave from this Court to file a Notice of Claim, *nunc pro tunc* against Respondent. In a Decision/Order dated April 24, 2008, this Court denied petitioner's application, holding that "the petitioner has failed to establish that the respondent had actual knowledge of the essential facts underlying the claim within the statutory 90-day period or a reasonable time thereafter, and has failed to establish that respondent would not be substantially prejudiced in defending the claim on the merits."

As petitioner has failed to present any new facts that were not offered in the prior motion, (see, CPLR 2221[e]; *Delvecchio, supra*; *McNeill, supra*; *Shapiro, supra*) nor has petitioner demonstrated that there has been a change in the law that would change the prior determination (see, CPLR 2221[e]; *Delvecchio, supra*) that branch of petitioner's motion to renew is denied. However, as petitioner has established that the Court may have overlooked or misapprehended the relevant facts (see, *Schneider, supra*; *Rodney, supra*), that branch of petitioner's motion for leave to reargue is granted. Upon reargument, petitioner's motion for leave to file his Notice of Claim against respondent, *nunc pro tunc*, is granted.

Petitioner maintains that he did establish that the respondent had actual knowledge of the essential facts underlying the claim contemporaneous with the accident, and actually investigated the physical condition of the sidewalk. Petitioner contends that the respondent's Incident Report recorded petitioner's sidewalk fall in that the bus driver's narrative states that petitioner "tripped on sidewalk," and that this sets forth the key facts that underlie petitioner's theory of liability, which is that petitioner was wrongfully discharged onto a defective sidewalk. Petitioner further maintains that the respondent conducted an inspection of the sidewalk area where the petitioner fell within minutes of the petitioner's fall, as indicated by the respondent's Supervisor's Report. Petitioner additionally maintains that the respondent's Incident Reports indicate that petitioner was discharged and fell to the sidewalk and states that the respondent's Supervisor's Report indicates that the Supervisor "inspected the rear of the bus and rear steps" and evaluated the physical condition of the sidewalk and adjacent roadway where petitioner fell. Petitioner alleges that the Supervisor's Accident/Crime Investigative Report contains multiple categories with physical characteristics of the sidewalk and roadway at the place of the incident, which categories

included such designations as "Stop Condition" and "Bus Stop Area;" and the category of "Stop Condition" indicated that it was blocked. Moreover, petitioner further asserts that the respondent's Supervisor's Report and the Operator's report state that a third employee of respondent was present at the scene.

Finally, petitioner maintains that there is no substantial prejudice since the Incident Report shows that the bus driver prepared a contemporaneous written report and was interviewed by a Supervisor within minutes of the accident; since the respondent could have interviewed the third employee who was at the scene; since witnesses are still available; since all of the facts about the claim are still available; and since the appearance of the bus stop is virtually identical to its appearance on the date of the accident.

After considering petitioner's and respondent's arguments, the Court issues the following decision:

Upon the foregoing papers it is ordered that petitioner's application for leave to serve a late Notice of Claim is granted (see, General Municipal Law § 50-e[1][a]). It is within the Court's discretion to extend the time to serve a Notice of Claim (*In the Matter of Nahema Canty v. City of New York*, 273 AD2d 467 [2d Dept 2000]). "The key factors to be considered in determining whether to grant an application to serve a late Notice of Claim are whether the [governmental unit or its attorneys or its insurance carrier] acquired actual knowledge of the essential facts of the claim within the statutory 90-day period, whether the petitioners had a reasonable excuse for the delay, and whether the delay would substantially prejudice the [governmental unit or its attorneys or its insurance carrier] in its defense on the merits." (*Matter of "Jane Doe" v. Hicksville Union Free School District*, 24 AD3d 666 [2d Dept 2005]; General Municipal Law § 50-e[5]; *Fox v. City of New York*, 91 AD2d 624 [2d Dept 1982]).

In the underlying action, petitioner, Bradford Hill seeks to recover from respondent, The New York City Transit Authority ("NYCTA") for personal injuries suffered as a result of an accident occurring on January 19, 2007, when respondent allegedly tripped and fell and was caused to be injured as he stepped off respondent's Q48 Bus on Ditmars Boulevard, between 103rd and 104th Street, in East Elmhurst, County of Queens onto a defective sidewalk. Pursuant to General Municipal Law § 50-e, petitioner's time to file a Notice of Claim expired 90 days after January 19, 2007. Petitioner served its Order to Show Cause on February 25, 2008.

Actual Knowledge of Essential Facts Underlying Claim Within 90-Day Statutory Period

Petitioner maintains that the NYCTA had actual knowledge of the accident on the day of the accident. Petitioner maintains that the Transit Authority's Bus Operator wrote up the incident and the Transit Authority's supervisor interviewed the bus operator and plaintiff at the scene of petitioner's fall. Petitioner includes an incident report and an accident report as part of its moving papers. Petitioner asserts that the reports include such things as where the petitioner was on the bus, the direction the bus was facing, the condition of the pavement, the name of the hospital where plaintiff was taken etc. Also, petitioner claims that the respondent took 35 mm photographs on the date of the accident and includes the photographs as part of its moving papers. Furthermore, petitioner maintains that there are contemporaneous witness statements. Finally, petitioner claims that the respondent had notice of the facts surrounding the claim and fully investigated the incident and observed plaintiff's injuries and that the bus operator actually called "911" for an ambulance for petitioner.

NYCTA asserts that it did not acquire any knowledge about the potential claims until the instant Order to Show Cause which was served nearly ten (10) months after the ninety (90) day deadline. Respondent also maintains that accident reports are not sufficient notice because they would not apprise Respondent of any possible future claims against it and because they do not connect an accident with any negligence on the part of the public corporation. Respondent asserts that accident reports would not apprise the respondent of the nature of the claim or apprise the respondent of the plaintiff's injuries. Additionally, NYCTA argues that a No-Fault application does not take the place of a notice of claim.

This Court finds that the NYCTA did have actual knowledge of the essential facts underlying the claim within the 90-day statutory period or within a reasonable time thereafter. The Appellate Division, Second Department has held that this factor "should be accorded great weight." (See, *In the Matter of Nahema Canty v. City of New York, supra*). The Court finds that incident and accident reports taken by the NYCTA on the day of the accident provide adequate notice to the NYCTA of the essential facts constituting the claim. "[W]hat satisfies the statute is . . . knowledge of the nature of the claim." (*Matter of Shapiro v. Nassau*, 208 AD2d 545 [2d Dept 1994]). "In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that

underlie the legal theory or theories on which liability is predicated in the notice of claim; but the public corporation need not have specific notice of the theory or theories themselves." (*Matter of Felice v. Eastport/South Manor Central School District*, 50 AD3d 138 [2d Dept 2008]). In the instant action, the NYCTA had knowledge of the facts underlying the legal theories on which liability is predicated in the notice of claim. The theory of liability set forth in the notice of claim is negligent discharge of petitioner from a bus onto a defective sidewalk. The incident and accident reports relied upon by petitioner indicate that the NYCTA Supervisor evaluated the physical condition of the sidewalk and the adjacent roadway where the accident happened. The NYCTA Incident Report indicates that petitioner "tripped on sidewalk." Additionally, the NYCTA's Supervisor's Accident/Crime Investigative Report contains multiple categories with physical characteristics of the sidewalk and roadway at the place of the incident, including: "Environment," Street Condition, "Pavement Conditions," Grade," Street Type," Lighting," "Bus Stop Area," Stop Location," and Stop Condition." The last category "Stop Condition" lists "Good", "Blocked, Broken Curb," No Curb," Broken Sidewalk," Dirt," Mud," Pothole," Unpaved," Snow," and "Ice" as potential condition choices to be circled. The condition of "Blocked" was circled, and all of the other listed physical descriptions of the sidewalk relating to the curb and sidewalk at the stop were listed and could have been circled by the NYCTA Supervisor. Accordingly, petitioner has demonstrated that NYCTA had actual knowledge of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter.

Reasonable Excuse for the Delay

Petitioner and petitioner's counsel maintain that there is a reasonable excuse for the delay in that petitioner was diagnosed with two types of cancer and was physically incapacitated because of cancer treatment during the 90 day period following his fall, which treatment left him physically debilitated and unable to pursue his claim or consult with a lawyer. Petitioner attaches to the moving papers billing records from the hospital where he was treated and petitioner maintains that during the spring of 2007, petitioner was unable to leave the house except to go to the hospital. Additionally, petitioner's counsel states that he was retained on June 5, 2007, during petitioner's recovery from treatment, at which point petitioner's counsel began investigating the accident, which included a FOIL request to the NYCTA. Finally, Petitioner's counsel maintains that he did not

receive a response to the FOIL request until February 7, 2008.

Respondent asserts that the petitioner has failed to provide a satisfactory explanation for the delay in filing his Notice of Claim timely. Respondent maintains that someone could have filed the notice of claim on behalf of the claimant, and it did not have to be done through a legal representative of the petitioner. Also, petitioner's counsel should have immediately petitioned for leave to file a late notice of claim since when he was retained, it was only about a month past the ninety-day deadline, and respondent maintains that it is inexcusable that petitioner's counsel waited more than 10-months past the 90-day deadline to petition the Court to file a late Notice of Claim. Respondent feels petitioner's counsel's excuse that he did not receive a response to the FOIL request is without merit. Finally, respondent questions the proof of the extent and duration of petitioner's physical incapacitation.

This Court finds that petitioner has sufficiently explained the delay in filing the application for leave to serve a late Notice of Claim. Petitioner proffers the excuse of medical incapacitation due to a diagnosis of cancer shortly after the accident and petitioner's attorney awaiting a response to his FOIL request. This Court finds that petitioner has provided sufficient documentation, including, *inter alia*, the medical billing records from the hospital where petitioner was receiving cancer treatment to substantiate the delay (*see, Haeg v. County of Suffolk*, 30 AD3d 519 [2d Dept 2006]). Accordingly, petitioner has provided a reasonable excuse for the delay.

Substantial Prejudice as a Result of the Delay

Petitioner asserts that there is a lack of prejudice to the defendant as a result of the delay. Petitioner maintains that there will be no prejudice to respondent because it conducted a full investigation on the day of the accident. Petitioner maintains that since photographs were taken of the site, respondent had visual documentation of the site as it existed on the date of the accident as well as contemporaneous witness statements and accident reports prepared by the Transit Authority, and so it had notice of the facts surrounding the claim and fully investigated the incident and observed plaintiff's injuries and so there will be no prejudice in filing the late Notice of Claim.

Respondent contends that it will be prejudiced if the petitioner is allowed to file a notice of claim 13 months after

the accident. Respondent maintains that even if an employee of the Authority filed an accident report, it would not apprise the authority of any future claims against it. The NYCTA asserts that it was deprived of an opportunity "to locate and interview witnesses, conduct statutory hearings and interview its own employees for knowledge while memories [were] still fresh." Respondent further asserts that with timely notice it could have made every effort to retrieve, review, and verify all accident reports, medical records, lost earning claims, and reports related to the accident, before such records were discarded and destroyed. Additionally, the NYCTA asserts that it was not given an opportunity to investigate promptly and adequately with an eye towards future litigation. Also, respondent also cites to case law which states that where a petitioner fails to show countervailing circumstances, lack of prejudice cannot be asserted on a motion to file a late Notice of Claim, *citing Phillips v. New York*, 415 NYS2d 249 (Sup. Ct. Kings Co. 1979). Finally, respondent contends that the mere passage of time which has prevented a prompt investigation has been held sufficient to constitute prejudice, *citing, Phillips v. New York*, 415 NYS2d 349, Sup Ct. Kings Co., (1979).

This Court finds that the delay would not substantially prejudice the NYCTA in maintaining its defense on the merits. Under the circumstances, it cannot be said that the NYCTA was not given a sufficient opportunity to "timely and efficiently" investigate the merits of the claim (*Matter of Light v. County of Nassau*, 187 AD2d 720 [2d Dept 1992]) as the Incident and Accident Reports indicate that the area of the sidewalk where petitioner claims to have tripped was actually investigated at the time of the accident. Additionally, the bus driver prepared a written report at the time of the accident. "As the [respondent] had actual knowledge of the essential facts underlying the claim, there is no substantial prejudice to the [respondent] as a result of the delay." (*In the Matter of Nahema Canty v. City of New York*, 273 AD2d 467 [2d Dept 2000]). The respondent could have conducted an investigation while the facts regarding the incident were still fresh (*see, In the Matter of Mariya Gofman v. City of New York*, 268 AD2d 588 [2d Dept 2000]). Accordingly, this Court finds that the delay would not substantially prejudice the NYCTA in maintaining its defense on the merits.

Conclusion

In conclusion, the petitioner has established that the respondent had actual knowledge of the essential facts underlying

the claim within the statutory 90-day period or a reasonable time thereafter, that there is a reasonable excuse for the delay, and that respondent would not be substantially prejudiced in defending the claim on the merits. Accordingly, under the circumstances, petitioner's application is granted.

Accordingly, it is hereby

ORDERED, that the proposed Notice of Claim annexed to petition as Exhibit C, is hereby deemed served upon the respondent, New York City Transit Authority as required under General Municipal Law § 50-e, effective of the date of this order.

This constitutes the decision and order of this Court.

Dated: November 17, 2008

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Howard G. Lane, J.S.C.