

**Smarsch v New York State Urban Dev.
Corp.**

2009 NY Slip Op 31081(U)

April 27, 2009

Supreme Court, New York County

Docket Number: 105975/08

Judge: Emily Jane Goodman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: GOODMAN
Justice

PART 17

KARL SMARSCHE
- v -

NY STATE URBAN DEVELOPMENT
CORP

INDEX NO. 105975/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No Plaintiff's Motion

Upon the foregoing papers, it is ordered that this motion ~~is granted~~ is

decided per attached

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 141B).

Dated: 4/28/09

J.S.C.
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
KARL SMARSCH,

Plaintiff,

-against-

Index № 105975/08

NEW YORK STATE URBAN DEVELOPMENT
CORPORATION d/b/a EMPIRE STATE
DEVELOPMENT CORPORATION,

Defendant.

UNFILED JUDGMENT
The 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 1419).

-----X
EMILY JANE GOODMAN, J.:

Plaintiff Karl Smarsch (Smarsch) moves, by order to show cause, for an order granting him leave to serve and file a late notice of claim, the condition precedent to maintaining a tort action against the defendant municipality, New York State Urban Development Corporation d/b/a Empire State Development Corporation (Empire State).

Smarsch alleges that, on May 9, 2007, he sustained serious injury to his left knee when he was caused to fall from a ladder while performing construction work, as defined under the Labor Law, at premises owned by Empire State, located at 1111 6th Avenue, New York, New York. Smarsch has also commenced a companion action, under New York County index number 105955/08, against two other entities, PCA Tishman Speyer Inc., and The Durst Organization, Inc., based upon their alleged involvement as owners and contractors at the same construction project (Verified Complaint, index №. 105955/08, ¶¶ 12 - 15). Addressing the allegations contained in the instant action, it is plaintiff's contention that he was injured as a result of Empire State's negligent failure to provide him with adequate and proper equipment, sufficient to ensure his safety while working on a ladder at an elevated height, in violation of New York State's

Labor Law §§ 200, 240, 240 (1), 241, and 241 (6), and in violation of Rule 23 of the New York State Industrial Code, 12 NYCRR 23-1.21.

In order for Smarsch to recover damages from Empire State, he is required, under section 3567 (1) of New York's Public Authorities Law, to file a notice of claim. Public Authorities Law § 3567 (1) provides, in relevant part:

no action or special proceeding shall be prosecuted or maintained against the corporation, its members, officers or employees for personal injury . . . alleged to have been sustained by reason of the negligence, tort or wrongful act of the corporation . . . unless: (a) notice of claim shall have been made and served upon the corporation within the time limit set by and in compliance with section fifty-e of the general municipal law . . . [and] (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the even upon which the claim is based. . . .

New York's General Municipal Law (GML) § 50-e (1) requires a claimant to serve a notice of claim within 90 days after his or her claim arises. It is undisputed that Smarsch did not serve a notice of claim on or before August 9, 2007, that being the last day under which service of his notice of claim would have been timely, and that plaintiff did not seek an extension of time to serve the requisite notice until April 2008. However, under GML § 50-e (5), the courts are granted the discretion to extend a claimant's time to file a notice of claim when certain criteria are met (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535 [2006]). GML § 50-e (5) provides, in relevant part, that:

the court shall 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 in subdivision one 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, or died before the time limited for service of the notice of claim; . . . and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

Plaintiff seeks the benefit of this statute, GML § 50-e (5), and leave of court to file a late notice of claim, nunc pro tunc, in order to maintain an action against Empire State.

In deciding the motion, the court must evaluate whether Smarsch, as movant, has demonstrated: (1) a reasonable explanation for his delay; (2) that the municipality acquired actual knowledge of the essential facts underlying the claim within 90 days of the accrual of movant's claim or within a reasonable time thereafter; and (3) that the municipality was not substantially prejudiced in its ability to maintain a defense on the merits as a result of the delay (*Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept 2003]). The New York courts have consistently held that the presence or absence of any one of these factors is not determinative of the motion (*Matter of Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005]).

Plaintiff served his motion by order to show cause, attaching as exhibits a proposed notice of claim (Exhibit 1), Smarsch's sworn affidavit (Exhibit 2), and a copy of Smarsch's proposed summons and complaint naming Empire State as a defendant (Exhibit 3). Empire State opposes the motion based on the deficiency of plaintiff's moving papers and on the merits of the motion itself. Plaintiff submitted a Reply Affirmation attaching as exhibits a printout from the Durst organization web site (Exhibit 1), results of plaintiff's title search (Exhibit 2), a copy of plaintiff's Workers' Compensation Board C-2 Form (C-2 Form) dated May 11, 2006, a copy of an orthopedic report dated May 11, 2007 (Exhibit 3), and a copy of plaintiff's radiology report, dated May 23, 2007¹ (Exhibit 4).

In his initial moving papers, plaintiff asserted that defendant had been advised of the

¹Neither the orthopedic report nor the radiology report is properly sworn to, or affirmed by the respective physician. As a result, neither report constitutes competent evidence and cannot be admitted into evidence (CPLR 2106).

claim within a reasonable time, and that any prejudice to defendant due to the delay, is relatively minor in light of the liability imposed upon it under the Labor Law. His notice/knowledge argument is based on the treatment he received after his accident by on-site doctors, and is also based upon the prompt filing of the C-2 Form, only two days after the accident. Finally, with respect to the delay in commencing the action against Empire State, plaintiff and/or his attorney of record asserts that “[a] cause of action was not initially started based upon the claimant’s continued medical treatment to see the extend [sic] of his injuries” (Attorney’s Affirmation, ¶ 13), and furthermore, that there was confusion regarding the fee owner of the subject property.

With respect to plaintiff’s explanation for failing to timely file a notice of claim, he argues that not only was his delay due to the unexpected confusion and difficulties he encountered while researching title to the location property, but that his injuries prevented him from visiting the site to obtain the necessary information until Spring 2008. This is not a persuasive argument. Not only is title to the subject property a matter of public record and readily ascertainable², but plaintiff’s failure to provide competent medical evidence supporting his claimed limitation, is not remedied by plaintiff and his attorney’s conclusory statements of physical incapacity (*Matter of Dubowy v City of New York*, 305 AD2d at 321). The orthopedic and radiologic reports attached as exhibits to plaintiff’s Reply Affirmation, vary between them as to a diagnosis of plaintiff’s left knee (orthopedic: torn meniscus, radiologic: torn medial collateral ligament), and neither is submitted in admissible form (CPLR 2106). More problematic is that neither report contains language to the effect that Smarsch was in any way

²To the extent that plaintiff’s excuse amounts to law office failure, it does not constitute an acceptable excuse for failing to timely file the notice of claim (*Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990], *affd* 78 NY2d 958 [1991]).

incapacitated and/or unable to ambulate as a result of the injury (*see Matter of Gomez v City of New York*, 250 AD2d 443 [1st Dept], *lv denied* 92 NY2d 809 [1998]; *see also Gaudio v City of New York*, 235 AD2d 228 [1st Dept 1997]). However, plaintiff's lack of a satisfactory excuse for failing to serve a timely notice of claim is not, standing alone, fatal to his motion (*see Bialer v City of New York*, 23 AD3d 304 [1st Dept 2005]; *Matter of Porcaro v City of New York*, 20 AD3d at 358).

As to the second prong of the statute, the competent evidence does not support a finding that Empire State acquired knowledge of the essential facts underlying the claim within 90 days of his accident or within a reasonable time thereafter. It is well settled that "knowledge of the facts underlying an occurrence does not constitute knowledge of the claim" (*Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990], *aff'd* 78 NY2d 958 [1991]). In opposition to the motion, defendant submits the affirmation of Joseph C. Petrillo (Petrillo), a New York attorney and senior counsel/special projects for Empire State, in which he states, among other things, that a search of the relevant file maintained by defendant's legal department failed to reveal either notification or reports relating to plaintiff's accident. Additionally, Petrillo states that the municipality "had no notice or knowledge of the incident involving the plaintiff on May 9, 2007 or the facts and circumstances underlying this claim at any time until the service of the instant application" (Petrillo Aff., ¶ 5).

Contrary to plaintiff's assertions, actual notice to Empire State was not established by his claim to have received medical treatment on-site following his fall,³ or by the C-2 Form which

³Plaintiff does not submit either a medical report, notes, or an affidavit prepared by the doctor or individual(s) who supposedly treated him at the scene, nor does he submit a witness statement.

was prepared within two days of the incident.⁴ Plaintiff has submitted no evidence that Empire State was present on the day of his accident or was in the vicinity of accident such that it would be in the position to observe any treatment. There is also evidence before the Court indicating that Empire State received a copy of, or notice of, the C-2 Form (*compare Schifano v City of New York*, 6 AD3d 259 [1st Dept 2004] [City was allegedly privy to a worker's compensation report by reason of its being an additional insured on the liability policy issued by the workers' compensation carrier; however, the argument that the City had actual knowledge of the of the claim was rejected because the extent of plaintiff's injuries and the dangerous condition were not apparent from the report]).⁵

Finally, with respect to the third prong of GML § 50-e (5), Smarsch has failed to establish that Empire State would not be substantially prejudiced in maintaining its defense on the merits if the Court granted him leave to serve a late notice of claim. Plaintiff argues that because his proposed action against Empire State is "a strict liability claim against the owner of the property" and the owner may be held liable for injury absent supervision or control under the Labor Law, Empire State is not prejudiced.

⁴The C-2 Form, which lists Cornell & Company, Inc. of Westville, New Jersey as plaintiff's employer, provides, in relevant part:

21. WHAT WAS EMPLOYEE DOING WHEN INJURED? Employee was climbing a ladder
22. HOW DID THE ACCIDENT OR EXPOSURE OCCUR? Employee states that he was climbing a ladder, he got caught on an unknown object, causing him to twist his left knee and fall approximately 5 feet.
23. OBJECT OR SUBSTANCE THAT DIRECTLY INJURED EMPLOYEE unknown

⁵Plaintiff argues that because his employer, Cornell, received notice of his accident via the C-2 Form, and because Cornell was hired by The Durst Organization, Inc., which had "stepped into the shoes of [Empire State]," that Empire State had the requisite knowledge. However, even assuming that The Durst Organization, Inc. had actual knowledge of the accident, that is not a basis for claiming that Empire State also had such knowledge.

Although it is true that, in the First Department, a plaintiff's prima facie case under 240 (1) is relatively simple to prove where that plaintiff falls from a ladder, a plaintiff will not prevail where the evidence reveals that a plaintiff's own actions are the sole proximate cause of his or her injuries (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Accordingly, the opportunity to conduct an investigation into the circumstances surrounding plaintiff's accident, including interviewing witnesses, if any, to determine if plaintiff's version of the accident occurred as stated by plaintiff, is not rendered irrelevant by plaintiff's Labor Law claims. In light of the lengthy delay and the absence of actual notice, the Court cannot find that plaintiff demonstrated a lack of prejudice (*compare Weiss v City of New York*, 237 AD2d 212 [1st Dept 1997] [where plaintiff was injured by fall from a ladder, City was not substantially prejudiced by service of a notice of claim one week outside of the 90 day time limitation]).

Accordingly, it is

ORDERED that plaintiff's motion by order to show cause for leave to serve a late notice of claim is denied.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: April 27, 2009

ENTER:



J.S.C.

EMILY JANE GOODMAN

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 Room (Room 141B).