

Outlaw-Constance v City of New York

2009 NY Slip Op 31103(U)

May 15, 2009

Supreme Court, New York County

Docket Number: 101737/2009

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla
Justice

PART 52

Vanessa Outlaw - Customer

INDEX NO. 101737/09

MOTION DATE _____

MOTION SEQ. NO. 021

MOTION CAL. NO. _____

- v -

City of Ny

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

Upon the foregoing papers, it is ordered that this motion order to show cause is
decided in accordance with the accompanying
memorandum decision.

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: 5/15/09

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST DEFERRED

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM; PART 52

----- X
VANESSA OUTLAW-CONSTANCE,

Petitioner,

Index No.: 101737/2009

- against-

Submission Date: 4/1/09

THE CITY OF NEW YORK,

Respondent.

Decision and Order

----- X

For Petitioner:
Raphaelson & Levine Law Firm, P.C.
14 Penn Plaza, Suite 407
New Rochelle, NY 10122

For Respondent City of New York:
Michael A. Cardozo, Corporation Counsel
100 Church Street, 4th Floor
New York, NY 10007

Papers considered in review of this order to show cause for leave to file a late notice of claim:

- Order to Show Cause 1
- Aff. in Opp 2

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 1419).

HON. SALIANN SCARPULLA, J.:

Petitioner Vanessa Outlaw-Constance ("Outlaw-Constance") moves by order to show cause for leave of court to file a late notice of claim.

On June 7, 2008, Outlaw-Constance allegedly tripped and fell on the sidewalk adjacent to 124-130 West 125th Street. She retained Raphaelson & Levine Law Firm, P.C. ("law firm") in June 2008. The law firm investigated the circumstances surrounding Outlaw-Constance's accident and determined that CMF Cohen Realty ("CMF") was the owner and Burger King Corporation ("Burger King") was the tenant of the property adjacent to the sidewalk where the fall occurred. The law firm notified CMF and Burger King of Outlaw-Constance's accident and advised them to contact their insurance companies.

Outlaw-Constance now moves for leave to file a late notice of claim. In support, her attorney affirms that after the law firm notified CMF and Burger King of Outlaw-Constance's accident, CMF informed the law firm that respondent The City of New York (the "City") had affirmatively taken control of the subject sidewalk, extended it out further into the street, and performed reconstruction. CMF allegedly further informed the law firm that the City knew of the sidewalk defect upon which Outlaw-Constance had tripped because CMF had made requests of the City to correct the defect.

Outlaw-Constance claims that by the time she and the law firm became aware that the City was in control of the subject sidewalk, the time to file a Notice of Claim had expired. She also claims that the City would suffer no prejudice from a late filing of a notice of claim.

In opposition, the City argues that Outlaw-Constance fails to provide a reasonable excuse for her delay in filing a timely notice of claim, fails to prove that the City acquired actual knowledge of the essential facts surrounding the claim within the statutorily prescribed time, and fails to prove that the City has not been prejudiced by her substantial delay. The City further argues that in any event, Outlaw-Constance's claim is patently meritless because liability for defective sidewalk conditions rests with the abutting property owner and not the City.

Discussion

Pursuant to General Municipal Law §50-e, a party is required to serve a notice of claim on the City within ninety days of the accrual of a claim. When considering a motion to file a late notice of claim, key factors considered by the court include: (1) whether the

petitioner demonstrated a reasonable excuse for failing to file a timely notice of claim; (2) whether the respondent acquired actual notice of the essential facts constituting the claim within ninety days after the claim arose or within a reasonable time thereafter; and (3) whether the respondent was prejudiced by the delay. *See Nieves v. New York Health and Hospitals Corp.*, 34 A.D.3d 336 (1st Dept. 2006).

Here, Outlaw-Constance's application must be denied because she fails to satisfy the relevant factors. *See generally Alexander v. City of New York*, 2 A.D.3d 332 (1st Dept. 2003). First, Outlaw-Constance maintains that she failed to file a timely notice of claim because she was only notified that the City was in control of the subject sidewalk after the ninety day period for filing a notice of claim had passed. However, she fails to explain why she or the law firm could not have investigated and determined who maintained control of the subject sidewalk prior to the expiration of the ninety day period.

Further, Outlaw-Constance offers no proof, other than her attorney's affirmation, that the City did in fact maintain control of the subject sidewalk at the time of her accident. Her attorney avers only that he was told that the City had affirmatively taken control of the sidewalk, but fails to state who told him, when he allegedly learned this information, when the City purportedly took control of the sidewalk, and fails to offer any competent evidence to support the theory that the City maintained control of the subject sidewalk. Outlaw-Constance's mistaken belief as to who maintained control of the sidewalk and her failure to conduct due diligence and a thorough investigation into that issue does not constitute a

reasonable excuse for the delay. *See Arias v. New York City Hous. Auth.*, 40 A.D.3d 298 (1st Dept. 2007).

Second, it is well settled that the municipality must have notice or knowledge of the essential facts constituting the claim within ninety days after the claim arose or within a reasonable time thereafter, and not general knowledge that a wrong has been committed. *See Liberty Group Holdings, Inc. v. City of New York*, 5 A.D.3d 148 (1st Dept. 2004); *Cotten v. County of Nassau*, 307 A.D.2d 965 (2nd Dept. 2003). Here, Outlaw-Constance fails to submit any evidence proving that the City had knowledge of the facts surrounding her claim or even general knowledge that a wrong has been committed within ninety days of her accident or within a reasonable time thereafter.

Finally, Outlaw-Constance only makes conclusory statements that the City would not be prejudiced by her delay. She fails to demonstrate that the approximately five month delay would not prejudice the City's ability to investigate the alleged sidewalk defect and other circumstances surrounding the accident. *See Gomez v. City of New York*, 250 A.D.2d 443 (1st Dept. 1998).

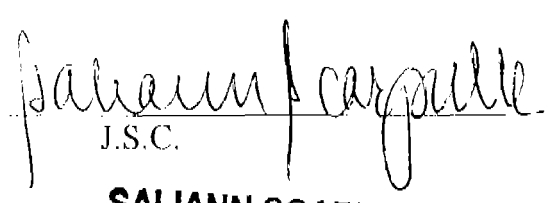
In accordance with the foregoing, it is

ORDERED that petitioner Vanessa Outlaw-Constance's order to show cause for leave to file a late notice of claim is denied.

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

Dated: New York, New York
May 15, 2009

ENTER:

Handwritten signature of Saliann Scarpulla in cursive script.

J.S.C.

SALIANN SCARPULLA

J.S.C.