

Lee v City of New York
2009 NY Slip Op 31287(U)
June 11, 2009
Supreme Court, New York County
Docket Number: 102465/2009
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Salviann Scarpulla
Justice

PART 50

Jenny Lee

- v -

City of NY

INDEX NO. 102465709
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for leave to file late notice of claim

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

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the accompanying decision, order and judgment.

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: June 11, 2009

Salviann Scarpulla
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

UNFILED JUDGMENT

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 141B

JENNY LEE,

Petitioner,

Index No.: 102465/2009

- against-

Submission Date: 4/29/09

THE CITY OF NEW YORK and
NEW YORK CITY POLICE DEPARTMENT,

Respondents.

Decision, Order and Judgment

For Petitioner:
Steven Landy & Assocs., PLLC
270 Madison Ave., Suite 1400
New York, NY 10016

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
- Reply Aff. 3

HON. SALIANN SCARPULLA, J.:

Petitioner Jenny Lee ("Lee") moves by order to show cause for leave of court to file a late notice of claim.

On November 10, 2008, Lee was hit by a bicyclist at the intersection of Central Park South and Avenue of the Americas (the "intersection"). Police and emergency services arrived at the intersection, and Lee was taken by ambulance to New York Presbyterian Hospital. Before leaving the intersection, Lee states that she spoke with New York City Police officer Thomas Jusza ("Officer Jusza"), and that Officer Jusza told Lee he would get the name and address of the bicyclist for her.

On November 28, 2008, Lee requested and obtained a copy of the New York City Police Department Aided Report (the "Aided Report"), which she noted did not include the name of the bicyclist who struck her. Lee states that from November 25, 2008 through January 2009 she visited Officer Jusza's Police Precinct on numerous occasions and spoke with various police officers in hopes of getting the bicyclist's contact information. Lee hired counsel in late February 2009, who then filed this petition.

Lee seeks leave to file a late notice of claim against the City of New York and New York City Police Department (collectively the "City"). Lee claims that she believed that Officer Jusza had a duty to gather the bicyclist's name and contact information for her, and that Officer Jusza's breach of this duty has prevented her from pursuing her claims against the bicyclist. In support, Lee affirms that she was unable to consult with or hire an attorney sooner due to her severe medical condition as a result of the accident. Lee suffered multiple breaks and fractures to her left (dominant) arm, and multiple deep cuts to her tongue, which interfered with her ability to eat, drink, and talk. This resulted in hospitalization, multiple surgeries, outpatient treatment and physical therapy.

Lee further claims that by the time she was able to hire counsel, 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 Lee 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, Lee's claim is patently meritless because Lee fails to establish a special duty by which to hold the defendants liable.

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). In addition, while courts generally should not delve into the merits of an action in determining an application for leave to file a late notice of claim, in cases where petitioner's claim is "patently meritless . . . it makes little sense to grant the right to file a late notice of claim." *Katz v. Town of Bedford*, 192 A.D.2d 707, 708 (2d Dep't 1993) (citation omitted). *See also Catherine G. v. County of Essex*, 3 N.Y.3d 175, 179 (2004) (leave to file a late notice of claim "is not appropriate for a patently meritless claim").

Here, Lee'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,

Lee maintains that she failed to file a timely notice of claim because she was physically

unable to do so. However, she states that between the time of her accident through January 2009 she made multiple visits to the Police Precinct in an attempt to discover the name and contact information for the bicyclist. Lee fails to explain how she was able to make these efforts, but was not able to consult with counsel or file a notice of claim until late February 2009, after the expiration of the ninety day period.

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, Lee fails to submit any evidence proving that the City had knowledge of the facts surrounding her claim, (*i.e.* that Officer Jusza promised, but failed, to obtain the name of the negligent bicyclist) or even had general knowledge that a wrong had been committed within ninety days of Lee's accident or within a reasonable time thereafter.

In addition, Lee only makes conclusory statements that the City would not be prejudiced by her delay. She fails to demonstrate that the delay would not prejudice the City's ability to investigate Officer Jusza's conduct and the circumstances surrounding the accident. *See Gomez v. City of New York*, 250 A.D.2d 443 (1st Dept. 1998).

Finally, Lee's claim against the City is not supportable. Lee argues that this action falls into the limited category of cases where there is a right to recover from a municipality for its negligent failure to provide protection by virtue of a "special relationship" between

the municipality and the claimant. The elements of a special relationship are: “(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality’s agent that inaction could lead to harm; (3) some form of direct contact between the municipality’s agent and the injured party; and (4) that party’s justifiable reliance on the municipality’s affirmative undertaking.” *Laratro v. City of New York*, 8 N.Y.3d 79, 83 (2006) (citing *Cuffy v. City of New York*, 69N.Y.2d 255, 260 (1987)).

Lee fails to establish the second prong of the special relationship test, which “requires knowledge on the part of the municipality’s agents that inaction could lead to harm.” *Kovitz v. Hallums*, 4 N.Y.3d 499, 507 (2005) (citing *Pelaez v. Seide*, 2 N.Y.3d 186, 202 (2004)). Here, Lee fails to allege how Officer Jusza’s failure to secure the bicyclist’s name led to her injuries, or how Officer Jusza had knowledge that his inaction could lead to harm.

There is absolutely no allegation here that either Officer Jusza’s or the City of New York’s negligence was the cause of Lee’s injuries. It is not disputed that Lee’s injuries were caused by the bicyclist hitting her, which occurred prior to Officer Jusza ever arriving at the scene. Lee is now seeking to recover from the City for the alleged negligence of the bicyclist, but Lee fails to allege facts to show that Officer Jusza had actual or constructive knowledge that his failure to include the bicyclist’s name or contact information in the Aided Report would cause Lee to suffer the harm caused by the bicyclist. *Kovitz*, 4 N.Y.3d at 507-508; *Kadymir v. NYCTA*, 55 A.D.3d 549, 553 (2d Dep’t 2008). The circumstances in this case do not create a special relationship which would create a duty for Officer Jusza to use

a heightened lever of care for Lee's benefit. *See Falco v. City of New York*, 34 A.D.2d 673, 674 (2d Dep't 1970), *order aff'd* 29 N.Y.2d 918 (1972) (finding no special relationship between police officer and plaintiff motorcyclist who had been struck by motor vehicle, where police officer allegedly assured motorcyclist he would get the name of the driver of the motor vehicle and failed to do so).

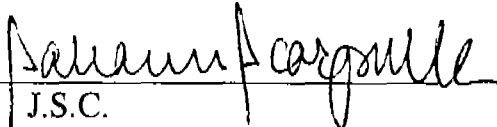
In accordance with the foregoing, it is

ORDERED that petitioner Jenny Lee's order to show cause for leave to file a late notice of claim against the City of New York and the New York City Police Department is denied.

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

Dated: New York, New York
June 11, 2009

ENTER:



J.S.C.
HON. SALIANN SCARPULLA

UNFILED JUDGMENT
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