

Mintz v Town of Oyster Bay

2009 NY Slip Op 31701(U)

July 21, 2009

Supreme Court, Nassau County

Docket Number: 14284/08

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

ELLEN MINTZ, JOEL MINTZ, JANET
FLANAGAN, WILLIAM FLANAGAN and LISA
SILVER,

Plaintiff,

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 14284/08

- against -

Motion Sequence No. 001

THE TOWN OF OYSTER BAY,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiffs seek leave pursuant to General Municipal Law § 50-e (5) to serve a late notice of claim *nunc pro tunc*; directing the proposed additional respondent the County of Nassau to accept service of the notices of claim, as if made within the 90-day statutory period. The County of Nassau opposes the motion. The defendant town of Oyster Bay, in an affirmation dated April 21, 2009, by its counsel, takes no position with respect to the relief sought in this motion, but disputes and denies all of the plaintiffs' assertions in the moving papers alleging the street drains and catch basins on Melbourne Lane were clogged prior to July 17, 2007; the Town was negligent in maintaining any drainage system; and the Town was on notice of any problem with the drainage system and the potential for flooding on

Melbourne Lane. The defendant town of Oyster Bay also disputes the plaintiffs' claim there was no way for the plaintiffs to know the County of Nassau pipes may have been involved in the alleged occurrence, to wit Round Swamp Road, the main thoroughfare abutting Melbourne Lane because the plaintiffs could have easily discovered it by reasonable investigation.

The underlying action involves three separate but related claims for property damage on July 17, 2007, when the storm drain on Melbourne Lane, in the Town of Oyster Bay, County of Nassau, clogged, causing a flood. The plaintiffs claim a heavy rain storm occurred at approximately 8:00 a.m., and resulted in clogged street drains and catch basins, and the drain blockage caused the water to rise to the level of the existing homes where water entered causing real and personal property damage.

The plaintiffs' attorney points, in a supporting affirmation dated March 31, 2009, to the testimony of Janet Flanagan, at a General Municipal Law 50-h hearing, who testified observing a person arrive in a Town of Oyster Bay truck at the site following the cessation of the storm and the receding water. Janet Flanagan testified she saw that person clean the drains. Janet Flanagan also testified a Town of Oyster Bay employee returned to clean the drain in her yard and left a Town of Oyster Bay Department of Public Works card requesting the Town be contacted for an appointment to clean the drain, but when Flanagan was not home at that time. The plaintiffs' attorney adds the Town of Oyster Bay sent its residents a street cleaning schedule, specifically stating the Town is required to check the catch basins before, during and after each rain at 35 Melbourne Lane. The plaintiffs' attorney reports the

deposition of Town of Oyster Bay had not yet been conducted at the time of the filing of this instant motion, but was scheduled pursuant to a preliminary conference order.

The plaintiffs' attorney submits the plaintiffs set forth a reasonable excuse for failing to serve a timely notice of claim upon the County of Nassau. The plaintiffs' attorney indicates, based upon the circumstances of this matter and the drain location along with the response by the Town of Oyster Bay, was at fault, and while the plaintiffs immediately contacted the Town of Oyster Bay following the flood, the Town of Oyster Bay never informed the plaintiffs the County of Nassau was responsible for the drainage system. The plaintiffs' attorney states rather the Town of Oyster Bay Department of Public Works responded to Melbourne Lane; worked to unclog the drain and catch basins; and left information to contact the Town of Oyster to perform further unclogging of the storm drains. The plaintiffs' attorney opines there is no possible way the plaintiffs could be expected to know some of the pipes underneath the road surface may be owned by the County of Nassau especially when the Town of Oyster Bay acted affirmatively to clean and respond to the flooding. The plaintiffs' attorney maintains it was only at the preliminary conference on this matter that the plaintiffs found out about the involvement of the County of Nassau.

The plaintiffs' attorney avers notices of claim were served upon the Town of Oyster Bay immediately after the plaintiffs consulted the affirmant's law firm. The plaintiffs' attorney contends an investigation was performed into the drainage system, and it was allegedly determined the County of Nassau partially or entirely owns the subject clogged drainage pipes. The plaintiffs' attorney asserts the source of that information is recently

disclosed information by a Town of Oyster Bay attorney. The plaintiffs' attorney maintains, according to the attorney for the Town of Oyster Bay, the County of Nassau was on actual notice of the flood because it worked on the same day of the flooding to clear the pipes and drains located on Round Swamp Road. The plaintiffs' attorney opines, although beyond the 90-day statutory period, the County of Nassau received actual notice of the facts and circumstances of the July 17, 2007 flooding, so the County of Nassau will not be prejudiced by the late filing of notice because it actually investigated the flooding within the 90-day statutory period.

The Deputy County Attorney for the County of Nassau states, in an affirmation dated April 13, 2009, the plaintiffs admittedly failed to comply with General Municipal Law § 50-e, and now it is too late to seek leave to serve a late notice of claim under General Municipal Law § 50-I (1) (c) because of expiration of the one year and 90 days statute of limitations to bring an application for a late notice of claim. The Deputy County Attorney for the County of Nassau points out the plaintiffs' cause of action accrued on July 17, 2007, and the plaintiffs time to seek a late notice of claim upon the County of Nassau expired in October 2008. The Deputy County Attorney for the County of Nassau notes appellate authority holds a motion Court lacks power to authorize a late filing or to order a late filed notice be deemed *nunc pro tunc*. The Deputy County Attorney for the County of Nassau states a complaint against the County of Nassau would be inherently defective here because the plaintiffs cannot plead compliance with the prerequisites of General Municipal Law § 50-I. The Deputy County Attorney for the County of Nassau adds, even if the County of Nassau had actual

notice of the facts and circumstances of the July 17, 2007 flooding, actual notice is not a substitute for a notice of claim which would detail the plaintiffs' basis for a liability claim against the County of Nassau which has long since expired.

This Court has carefully reviewed and considered all of the parties' papers submitted with respect to these motions, and all of the factors enumerated in General Municipal Law 50-e (5).

General Municipal Law 50-e (3) (a) provides:

The notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation.

General Municipal Law 50-i (1) (c) provides:

No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen of any such city, county, town, village, fire district or school district or any volunteer fireman whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death.

The Court of Appeals of the State of New York holds:

The 1976 amendments to section 50-e of the General Municipal Law permit a court to grant an application to file a late notice of claim after the commencement of the action but preclude the court from granting an extension which would exceed "the time limited for the commencement of an action by the claimant against the public corporation" (L 1976, ch 745, § 2 [now General Municipal Law, § 50-e, subd 5]). That means that the application for the extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled (General Municipal Law, § 50- i, subd 1; *Cohen v Pearl Riv. Union Free School Dist.*, 51 NY2d 256, 262-263). This result is compelled by precedent, by sound principles of statutory interpretation, and by common sense. To permit a court to grant an extension after the Statute of Limitations has run would, in practical effect, allow the court to grant an extension which exceeds the Statute of Limitations, thus rendering meaningless that portion of section 50-e which expressly prohibits the court from doing so. In our view, it was the intention of the Legislature, manifested in the amended statute, to relax the objectionably restrictive features of the old statute, but to fix the period of the Statute of Limitations as the period within which any relief must be sought. With the expiration of the period of limitations comes the bar to any claim

Pierson v. City of New York, 56 N.Y.2d 950, 954-955, 453 N.Y.S.2d 615 [1982].

Accordingly, the motion is denied.

So ordered.

Dated: July 21, 2009

ENTER:

J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

JUL 23 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**