

**Property Clerk, N.Y. City Police Dept. v
McBrien**

2009 NY Slip Op 32496(U)

October 19, 2009

Supreme Court, New York County

Docket Number: 403039/08

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: _____ J.S.C. _____

PART 1

Index Number : 403039/2008

PROPERTY CLERK, NYCPD

VS.

MCBRIEN, NOEL

SEQUENCE NUMBER : 001

OTHER RELIEFS

INDEX NO. 403039/08

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A-B

Answering Affidavits — Exhibits 1-8

Replying Affidavits encls. A-C


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 attached decision and order.

FILED
 OCT 27 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: OCT 19 2009



 MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
PROPERTY CLERK, NEW YORK CITY
POLICE DEPARTMENT,

Plaintiff,

-against-

NOEL McBRIEN,

Defendant.
-----X

Index No. 403039/08

DECISION/ORDER

HON. MARTIN SHULMAN, J.S.C.:

In this civil forfeiture proceeding, plaintiff seeks forfeiture of the subject vehicle, a 2001 Chrysler, bearing Vehicle Identification Number 1C8GP44361B273244 (the "subject vehicle"), which was seized from defendant Noel McBrien ("defendant" or "McBrien") and vouchered under Property Clerk Invoice Number B191026V as a result of defendant's March 24, 2008 arrest on charges of driving while intoxicated in violation of Vehicle and Traffic Law ("VTL") §1192(3). McBrien moves pursuant to General Municipal Law ("GML") § 50-e(6) to correct, supply or disregard any good faith mistake, omission or irregularity contained in the purported notice of claim he previously served, or in the alternative, for leave to serve and file a late notice of claim under GML § 50-e(5). Plaintiff Property Clerk, New York City Police Department ("plaintiff" or "Property Clerk") opposes the motion.

Defendant seeks to assert a counterclaim against plaintiff for conversion of the subject vehicle. McBrien claims to have sent notice of claim in the form of two letters dated December 5, 2008 and February 17, 2009 (the "letters") and addressed to the New York City Police Department Legal Bureau. See Exh. A to motion. Plaintiff

commenced this action on December 16, 2008 and defendant interposed his answer and counterclaim on or about April 6, 2009. The answer lacks any allegation that notice of claim was served as required by GML §50-i(1).

Discussion

A timely notice of claim is a condition precedent to bringing a tort claim against a municipality. GML §50-e; *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 358 (1981). Here, defendant's counsel's December 5, 2008 letter to plaintiff's counsel advises that McBrien made a demand for the subject vehicle's return on November 6, 2008 and requests that plaintiff advise when the vehicle will be returned. The February 17, 2009 letter, also from defendant's counsel, reiterates the dates of McBrien's demands made at the College Point Auto Pound and subsequent steps taken to secure possession of the subject vehicle, again requesting written notice that the subject vehicle will be returned forthwith.

GML §50-e(6) provides in relevant part:

Mistake, omission, irregularity or defect. At any time after the service of a notice of claim . . . a mistake, omission, irregularity or defect made in good faith in the notice of claim . . . not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

The Property Clerk argues that the letters should not be construed as notices of claim because they do not comply with GML §50-e(2)'s requirements. Specifically, plaintiff contends the letters: 1) fail to set forth the nature of the claim or indicate that McBrien's unmet demands would lead to litigation; 2) were not sworn to by plaintiff; 3) do not specify plaintiff's name and address; 4) do not set forth "the time when, the place

where and the manner in which the claim arose” (see GML §50-e[2]); and 5) lack the “items of damage or injuries claimed to have been sustained” (*Id.*).

Plaintiff further claims the letters were not served pursuant to GML §50-e(3), which requires a notice of claim to be served upon “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.” Citing *Herrera v. Duncan*, 13 A.D.3d 485, 485-486 (2d Dept. 2004), plaintiff claims that service was invalid since the letters were not served upon the Corporation Counsel or the Comptroller of the City of New York. The Property Clerk contends that its Legal Bureau has limited authority to initiate forfeiture actions but not to represent the City of New York in connection with tort claims such as that which defendant seeks to assert. Finally, the letters were not served personally or by registered or certified mail as GML §50-e(3) mandates.

The court agrees that the letters should not be treated as notices of claim which merely contain a mistake, omission, irregularity or defect made in good faith. As such, defendant’s request to correct them is denied. Indeed, the motion fails to expressly delineate what “mistake, omission, irregularity or defect” in the letters should be disregarded. McBrien’s counsel’s supporting affirmation only summarily asserts that the letters made plaintiff aware of his conversion claim and satisfied the purpose of the notice of claim requirement, *viz.*, to afford the public corporation adequate opportunity to investigate the circumstances surrounding the claim and its merits while information

is still readily available. *Brown v. New York City Transit Auth.*, 172 A.D.2d 178, 180 (1st Dept. 1991).

It appears that defendant inadvertently failed to serve a timely notice of claim and upon realizing the mistake, seeks as an afterthought to use his attorney's demand letters seeking the return of the subject vehicle as de facto notices of claim. This would be improper given the letters' complete failure to reference any actual claim or that litigation might potentially be brought should defendant's demand for the return of the subject vehicle not be met. It does not appear that the letters were intended as notices of claim and they admittedly do not satisfy the statutory requirements for such notices. See *Pretino v. Wolbern*, 84 A.D.2d 830, 831 (2d Dept. 1981)(in replevin action, attorney's letter to District Attorney demanding return of property was not considered a sufficient notice of claim).

Turning to McBrien's request for alternative relief, a notice of claim against a municipality must be served within 90 days after the claim arises. GML § 50-e(1)(a). However, a court has discretion to extend the time to serve a late notice of claim after a consideration of all relevant facts and circumstances. GML § 50-e; *Washington v. City of New York*, 72 N.Y.2d 881, 883 (1988). In determining whether to extend such time a court must strike an "equitable balance . . . between a public corporation's reasonable need for prompt notification of claims against it and an injured party's interest in just compensation [internal citations omitted]." *Gerzel v. City of New York*, 117 A.D.2d 549, 550 (1st Dept. 1986).

Among the factors a court should consider are: (1) whether the municipality acquired actual knowledge of the essential facts of the claim within the statutory 90-day period or within a reasonable time thereafter; (2) has the petitioner demonstrated a reasonable excuse for the delay; and (3) has the delay in notice substantially prejudiced the municipality's ability to defend the action. *Perrault v. New York City Transit Auth.*, 234 A.D.2d 464, 465 (2d Dept. 1996). However, the presence or absence of any one factor is not necessarily determinative; rather, all facts and circumstances should be considered. *Gerzel v. City of New York, supra*, at 551.

Here, taking into consideration the three above-cited factors, this court concludes that defendant's alternative request to file a late notice of claim should be granted. Defendant gives no reason for the delay in serving a notice of claim. However, the court can discern no significant prejudice to plaintiff in its ability to defend against the counterclaim. Importantly, this type of claim, unlike a personal injury cause of action, does not require extensive investigation. Indeed, the relevant facts are set forth in the motion papers regarding the alleged dates of defendant's demands and when his right, if any, to the return of his vehicle accrued. Weighing the parties' respective interests leads to the conclusion that late service of the notice of claim in the form annexed to the moving papers at Exhibit B should be granted. Accordingly, it is hereby

ORDERED that defendant's motion is granted to the extent that defendant is granted leave to serve and file a late notice of claim (Exh. B to motion) as a condition precedent to the commencement of his counterclaim against plaintiff, and the motion is otherwise denied; and it is further

[* 7]

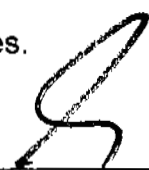
ORDERED that defendant shall serve said notice of claim upon the proper entity within twenty (20) days of service of a copy of this decision and order with notice of entry, with a courtesy copy sent to plaintiff's counsel; and it is further

ORDERED that defendant is granted leave to amend his answer to include the predicate notice of claim language, and such amended answer shall be served and filed within ten (10) days of service of the notice of claim as directed above; and it is further

Counsel for the parties are directed to appear for a preliminary conference on December 1, 2009 at 9:30 a.m. at 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: October 19, 2009



Hon. Martin Shulman, J.S.C.

FILED
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COUNTY CLERK'S OFFICE
NEW YORK