

Williams-Smith v New York City Tr.

2009 NY Slip Op 33074(U)

December 23, 2009

Supreme Court, New York County

Docket Number: 402906/2008

Judge: Harold B. Beeler

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

PRESENT: HAROLD BEELEN
J.S.C.
Justice

PART 21

Index Number : 402906/2008
WILLIAMS-SMITH, PEARL
VS.
MTA NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 402906/08
MOTION DATE 02/
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *to dismiss is granted,*
as per annexed decision and order.
The clerk shall enter judgment in favor of
defendant.

FILED
DEC 24 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/23/09

HAROLD BEELEN J.S.C.
J.S.C.

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: IAS PART 21

-----X

PEARL WILLIAMS-SMITH
Plaintiff,

-against-

NEW YORK CITY TRANSIT
Defendants

-----X

Index No. 402906/2008
SEQUENCE MS001
DECISION & ORDER

FILED
DEC 24 2009
NEW YORK
COUNTY CLERK'S OFFICE

HAROLD B. BEELER, J.S.C.:

Defendant New York City Transit Authority moves for dismissal of plaintiff's claim, on the grounds that plaintiff's notice of claim was served past the 90-day deadline, and the one year and 90 day statute of limitations has expired. Plaintiff opposes the motion, arguing that her notice of claim was timely served. For the reasons that follow, defendant's motion is granted.

Plaintiff alleges that on October 26, 2007, she fell down the subway stairs on the southeast corner of 14th Street and First Avenue. It is undisputed that a notice of claim, as required by General Municipal Law §50-e and Public Authorities Law § 1212, was served on defendant. It is also undisputed that, under §50-e, the deadline to serve a notice of claim was January 24, 2008.

Plaintiff alleges that an employee of the law firm deposited the notice of claim in a sealed envelope, by certified mail, at 6 pm in a mailbox outside a United States Postal Service location in New Jersey. Plaintiff annexes an affidavit from the employee, dated July 16, 2009, averring that

I served a true copy of the annexed Notice of Claim on January 24, 2008 after the close of business at 6:pm by mailing the same in a sealed envelope, with postage paid thereon, in an outside official

depository of the U.S. Postal Service within the State of New Jersey, addressed to the last known address of the addressee...

According to plaintiff, the post office's closing time is 5:00 pm.

An affirmation submitted by plaintiff's counsel states that the office uses only postage stamps. Defendant annexes a copy of the envelope which contained the Notice of Claim, with the return address label from plaintiff's law firm and the defendant's handwritten address. A Certified Mail seal, dated January 25, 2008, is affixed to the top of the envelope. The seal reflects that the postage cost \$5.38, and the envelope was sent from Norwood, New Jersey. Plaintiff does not deny that this copy is a copy of that envelope that was sent to defendant.

Following receipt of the notice of claim, a hearing pursuant to § 50-h was held on March 18, 2008. On July 21, 2008, plaintiff served a summons and complaint on defendant.

Discussion

Public Authorities Law § 1212(2) requires that, prior to the commencement of an action against Transit Authority, a party must serve a requisite notice of claim on Transit Authority within ninety days of the accident. This requirement is a condition precedent to commencement of an action against Transit Authority. *Barchet v. New York City. Trans. Auth.*, 20 N.Y.2d 1 (1967). Although the court may grant a party leave to serve a late notice of claim after weighing equitable factors, it has no authority to do so if the one year and ninety day statute of limitations has expired. *Pierson v. City of New York*, 56 N.Y.2d 950 (1982). Defendant argues that because plaintiff sent the notice of claim on the 91st day following the accident, and the statute of limitations has since expired, the claim must be dismissed.

Plaintiff does not dispute that the notice of claim must be served within the 90 day period.

Plaintiff's counsel argues that his firm served the notice of claim by depositing it into a mailbox at 6 pm on the 90th day, after the post office was closed. The envelope was then mailed the next business day. Because the 90-day deadline expires at the end of a full day, and not at the end of business hours, plaintiff argues that the notice of claim was timely served.

As a purely legal matter, this argument is correct. General Municipal Law § 50-e provides service by certified mail is complete upon deposit of the notice of claim, enclosed in a postpaid properly addressed wrapper, in a post office or official depository of the post office. Therefore, if the notice of claim was dropped in a mailbox after business hours on the 90th day, she has complied with the statute's requirements and the notice of claim is timely. *See Gonzalez v. Board of Educ. or City of Yonkers*, 298 A.D.2d 358 (2d Dept 2002).

However, the documentary evidence establishes the notice of claim was not sent on the 90th day, but rather on the 91st day. Affixed to the envelope is a "Certified Mail" seal with the cost and the January 25, 2008 date. This seal was generated in Norwood, New Jersey, the location of the post office where the notice of claim was sent. In order for it have been affixed with the seal, plaintiff's counsel must have either utilized its own meter, or had the seal generated at the post office. Plaintiff's counsel has averred that the law firm does not use a meter to generate stamps, but rather uses postage stamps. However, the copy of the envelope contains only the post office generated seal, and no postage stamps. At oral argument, plaintiff's counsel stated that he contacted the post office in response to defendant's motion and was told that the postage stamps were removed. This questionable statement is not supported by an affidavit from a representative at the post office, and is therefore inadmissible. In any event, there is no indication from the envelope that stamps were removed, and the assertion otherwise defies

credibility. The only explanation is that plaintiff's firm's version of events is incorrect, and that the envelope was sent via certified mail on the 91st day following the accident. Accordingly, the notice of claim is timely and it is

ORDERED that defendant's motion to dismiss is granted, and the clerk shall enter judgment in favor of defendant.

This constitutes the decision and order of the court.

Dated: New York, New York

December 23, 2009

ENTER:



Harold B. Beeler, JSC

FILED
DEC 24 2009
NEW YORK
COUNTY CLERK'S OFFICE