

Whittier v City of New York

2010 NY Slip Op 30390(U)

March 1, 2010

Supreme Court, New York County

Docket Number: 100948/10

Judge: Cynthia S. Kern

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

PRESENT: Kern CYNTHIA S. KERN J.S.C.
Justice

PART 52

Brent Whitton

- v -

CITY OF NY

INDEX NO. 100948/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 is decided in accordance with the annexed decision.

FILED

MAR 02 2010

NEW YORK
CLERK'S OFFICE

Dated: 3/1/10 CK
CYNTHIA S. KERN 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: Part 52

-----X
BRENT WHITTIER,

Plaintiff,

Index No. 100948/10

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

Defendant.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained when he tripped and fell on debris on an interior stairwell in which he was participating in training exercises for his job as a firefighter on March 31, 2009. Plaintiff now seeks leave to serve a late Notice of Claim. For the reasons set forth below, his motion is granted.

The relevant facts are as follows. On March 31, 2009, plaintiff allegedly tripped and fell on debris on an interior stairwell within "Building No. 2" at the Fire Department of New York's ("FDNY's") training academy on Randall Island. Plaintiff also alleges that the lighting on the stairwell was inadequate. On April 2, 2009, FDNY Lieutenant Michael P. Cacciola completed a

“Member Injury Report” memorializing the incident. It is undisputed that plaintiff failed to serve defendant the City of New York (the “City”) with a timely notice of claim. On or about October January 22, 2009, plaintiff brought an Order to Show Cause seeking leave to serve a late Notice of Claim, together with a proposed Notice of Claim. In his Order to Show Cause, plaintiff states that he only learned of the 90-day deadline for serving a Notice of Claim “a short time ago” and that he had “recently” retained his current attorneys.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* General Municipal Law (“GML”) §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to GML §50-e(5). In determining whether to grant leave, the court must consider whether the petitioner had a reasonable excuse for his delay, whether the delay prejudiced the municipality’s defense and whether the municipality acquired “actual knowledge of the essential facts constituting the claim” within ninety days after the claim arose or within a reasonable time thereafter. *See* GML §50-(e)(5); *Strauss v New York City Transit Authority*, 195 AD2d 322 (1st Dept 1993). It is plaintiff’s burden to prove each of these elements, including lack of prejudice to the defendant. *See Delgado v City of New York*, 39 A.D.3d 387 (1st Dept 2007); *Ocasio v New York City Health and Hospitals Corporation*, 14 A.D.3d 361 (1st Dept 2005). Although no one factor is dispositive, the court must give particular consideration to whether the defendant acquired actual knowledge of the claim within the 90-day statutory period or shortly thereafter. *See Justiniano v New York City Housing Authority Police*, 191 A.D.2d 252 (1st Dept 1993). The lack of a reasonable excuse alone is not fatal. *See Velasquez v City of New York Health and Hospitals Corp.*, 69 A.D.3d 441 (1st Dept 2010).

Plaintiff fails to satisfy the first factor, the existence of a reasonable excuse. His only excuse is his claim that he did not know of the deadline for filing a Notice of Claim. However, ignorance of the law and, in particular, of the 90-day deadline for filing a Notice of Claim, does not constitute a reasonable excuse. *See Gaudio v City of New York*, 235 A.D.2d 228 (1st Dept 1997). Nonetheless, the lack of such an excuse is not fatal. *See Velasquez*, 69 A.D.3d 441.

The plaintiff does show that the City acquired actual knowledge of the claim by virtue of the FDNY's "Official Member Injury Report." Although accident reports are usually insufficient to prove that the City had actual knowledge of the claim, "where... a municipal employee is injured in the course of his employment, the filing of an accident report such as the Fire Department's Report of Injury to Member, *containing the essential facts constituting the claim*, will be held to impart actual knowledge to the City." *Zbryski v City of New York*, 147 A.D.2d 705 (2nd Dept 1989) (emphasis added); *see also Caselli v City of New York*, 105 A.D.2d 251, 256 (2nd Dept 1984); *Cicio v City of New York*, 98 A.D.2d 38 (2nd Dept 1983); *Lucas v City of New York*, 91 A.D.2d 637 (2nd Dept 1982). In the instant case, the injury report contains the essential facts of the claim, including the date and location of the accident, the cause of the accident (debris on the stairs) and the fact that plaintiff had injured his knees. The cases plaintiff cites for the proposition that an accident report is insufficient to give actual notice to the City are distinguishable, as none of them involved municipal employees. *See, e.g. Tarquinio v City of New York*, 84 A.D.2d 265 (1st Dept 1982).

Finally, plaintiff shows that the City did not suffer prejudice due to the delay in filing a Notice of Claim. Where the municipality had actual knowledge of the claim, as here, it is less likely that it could have suffered prejudice because of plaintiff's failure to file a formal Notice of

Claim. See *Williams v Nassau County Medical Center*, 6 N.Y.3d 531, 539 (2006); *Bertone Commissioning v City of New York*, 27 A.D.3d 222, 224 (1st Dept 2006).

Accordingly, plaintiff's motion to serve a late Notice of Claim is granted. This constitutes the decision and order of the court.

Dated: 3/1/10

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.

FILED
MAR 02 2010
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