

Matter of Admiral Indem. Co. v City of New York

2010 NY Slip Op 30466(U)

March 5, 2010

Supreme Court, New York County

Docket Number: 101615/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice

PART 5

ADMIRAL INSURANCE COMPANY
- v -
CITY OF NY

INDEX NO. 101615/10
MOTION DATE 3/9/10
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion to/for leave to file late ^{serve} the City _{N/C}

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

PAPERS NUMBERED
<u>1</u>
<u>2</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that

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 1618) motion.

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 3/5/10

BJ
BARBARA JAFFE J.S.C.

MAR 05 2010

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 5

-----X

In the Matter of the Application of

Index No. 101615/10

ADMIRAL INDEMNITY COMPANY A/S/O THE
SOHO GREENE CONDOMINIUM,

Motion Date: 3/9/10

DECISION & JUDGMENT

Petitioner,

-against-

CITY OF NEW YORK,

Respondent

-----X

UNFILED JUDGMENT
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BARBARA JAFFE, JSC:

By order to show cause dated February 8, 2010, petitioner moves for an order granting it leave to serve a late notice of claim upon respondent and deeming the notice timely served *nunc pro tunc*. Respondent opposes the petition. For the following reasons, the petition is granted.

I. CONTENTIONS

Petitioner alleges that one year ago, on February 11, 2009, an employee of the New York City Police Department (NYPD) drove a motor vehicle into its subrogor's building. (Affirmation of Alan Wenig, Esq., dated Feb. 4, 2010 [Wenig Aff.]). Although the vehicle is described in the Police Accident Report (report) as a taxi, it also clearly reflects that the taxi was an NYPD vehicle and that the driver was an NYPD employee. (*Id.*, Exh. A). The report contains a detailed description, apparently relayed by the driver to the reporting officer, of how the accident occurred:

Driver of veh. #1 states that she was travelling n/b on Greene St. When vehicle started to pull left. When she tried to compensate and correct the vehicle, she lost control of vehicle striking a Jersey barrier and steps of a building. Pavement at accident location is cobble stone and had slight mist on them during time of accident.

The accident occurred at 3 a.m. (*Id.*).

Petitioner explains its failure to file a timely notice of claim with respondent as resulting from having failed to notice on the report that the taxi was driven by an NYPD employee.

(Wenig Aff., Exhs. B, C). Petitioner also claims that the report afforded respondent with actual notice of the essential facts constituting its claim, that such actual notice precludes any contention that respondent is prejudiced by the late notice, and that as the claim is for property damage only, the available estimates, appraisals, and photographs eliminate any prejudice. (*Id.*).

Respondent opposes the application, asserting that given the clear indication in the report of the NYPD's direct involvement in the accident, there is no reasonable excuse for failing to serve the notice timely. (Affirmation of Jessica Wisniewski, Esq., dated Feb. 26, 2010).

Respondent denies having received actual notice of the claim, arguing that the mere happening of an occurrence with a City agency does not constitute actual notice of the facts from which negligence may be inferred, observing that "there are many instances in which NYPD vehicles are involved in accidents where another driver or pedestrian is entirely at fault." It also contends that the report was insufficiently detailed and that petitioner failed to demonstrate an absence of prejudice resulting from the delay. (*Id.*).

II. ANALYSIS

Pursuant to General Municipal Law (GML) § 50-a, a tort action against a municipality must be commenced by service of a notice of claim upon the municipality within 90 days of the

date on which the claim arose. The court may extend the time to file the notice, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the municipality acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the municipality in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (GML § 50-e; *Grant v Nassau County Indus. Dev. Agency*, 60 AD3d 946, 947 [2d Dept 2009]).

A. Actual knowledge

A municipality receives actual knowledge of the essential facts constituting a claim when it acquires actual knowledge of the facts underlying the theory on which liability is predicated (*Grande v City of New York*, 48 AD3d 565 [2d Dept 2008]), not merely knowledge of the facts underlying the incident (*Chattergoon v New York City Hous. Auth.*, 161 AD2d 141 [1st Dept 1990], *lv denied* 76 NY2d 875).

An accident report may provide a municipality with actual knowledge of a claim, if the report has been filed with the appropriate official, shows ownership or control over the location where the accident occurred, and indicates the defect causing the injury and the negligence or fault of the location's owner. (62A NY Jur 2d, *Government Tort Liability* § 416 [2010]). It must be readily inferred from the report that a potentially actionable wrong had been committed. (*Devivo v Town of Carmel*, 68 AD3d 991 [2d Dept 2009]).

There is no dispute that the accident was investigated and reported by an NYPD employee who provided details from which it may be reasonably inferred that the accident was caused by the negligence of an NYPD employee. Consequently, the report furnishes actual

knowledge of the essential facts constituting the claim. (*See Matter of Schiffman v City of New York*, 19 AD3d 206, 207 [1st Dept 2005] [City acquired notice of essential facts based on facts that police were called to scene and were directly involved in all aspects of claims emanating from death of plaintiff's decedent]). As there is no indication that anyone other than the driver was at fault here, respondent's argument to the contrary borders on the frivolous.

B. Prejudice

Given the detailed report and absence of any witnesses other than the driver, there can be no articulable prejudice arising from the delay. (*See In re Caridi v New York Convention Center Operating Corp.*, 47 AD3d 526 [1st Dept 2008] [prejudice undermined by presence at scene of State Police at time of accident and immediate investigation which including interviewing witnesses and taking photographs of location as it existed at time of accident, which culminated in report readily available to respondent]).

C. Reasonable excuse

As the involvement of an NYPD driver and vehicle is clearly set forth in the report, petitioner has not offered a reasonable excuse for its delay in seeking to sue respondent.

IV. CONCLUSION

As petitioner's failure to offer a reasonable excuse for its delay "is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondents]" (*LaMay v County of Oswego*, 49 AD3d 1341 [4th Dept 2008]), it is hereby

ORDERED, that petitioner's application for leave to serve a late notice of claim is granted; and it is further

ORDERED, that petitioner file and serve a notice of claim upon respondent within 20

days of the date of this order.

This constitutes the decision and judgment of the court.



 Barbara Jaffe, JSC
BARBARA JAFFE
 J.S.C.

DATED: March 5, 2010
 New York, New York

MAR 05 2010

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